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THE

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All the Cases Argued and Determined

IN

PARLIAMENT,
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THE PRIVY COUNCIL,
THE COURT OF APPEAL IN CHANCERY,
THE ROLLS COURT,
V.C. STUART'S COURT,
V.C. MALINS' COURT,
V.C. JAMES'S COURT,
THE COURT OF QUEEN'S BENCH,
THE COURT OF COMMON PLEAS,
THE COURT OF EXCHEQUER,
THE BAIL COURT,
THE EXCHEQUER CHAMBER,
THE COURT OF CRIMINAL APPEAL,
THE PROBATE COURT,
THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES,
THE ADMIRALTY COURT,
THE BANKRUPTCY COURTS,
AT NISI PRIUS,
MARITIME LAW CASES,

AND

ELECTION PETITIONS.

TOGETHER WITH A SELECTION OF CASES OF UNIVERSAL APPLICATION DECIDED IN THE SUPERIOR COURTS IN IRELAND AND IN SCOTLAND.

VOLUME XXI.

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THE

LAW TIMES REPORTS:

COMPRISING

All the Cases Argued and Decided

IN ALL THE

COURTS OF LAW AND EQUITY, IN BANKRUPTCY, IN THE DIVORCE AND PROBATE COURTS, IN THE ADMIRALTY COURT, AT NISI PRIUS, IN THE CRIMINAL COURTS, IN IRELAND, &c.

FROM SEPTEMBER 1869, TO FEBRUARY 1870.

In Parliament.

Reported by FREDERICK CLIFFORD and PEMBROKE S. STEPHENS, Esqrs., Barristers-at-Law.

THE COURT OF REFEREES ON PRIVATE BILLS.

Monday, April 12.

(Before Mr. DODSON, Chairman; Mr. RICKARDS, and Mr. WYNNE, Referees.)

MILFORD IMPROVEMENT BILL.

Objection to *locus standi* of the GREAT WESTERN RAILWAY COMPANY.

Railway—Scale of rating by improvement commissioners, and under the Local Government Act 1858—*Incomplete transfer of line from former railway company.*

An improvement Bill promoted by the commissioners of M. for the extension of their borrowing powers, but without increase of rates, was petitioned against by the G. W. Railway Company, by whom the M. Railway, within the commissioners' limits, was worked under agreement, but of which they had not yet become statutory lessees, though a Bill for that purpose was before Parliament. The Act authorising the M. Railway was prior in point of date to the commissioners' original Act of 1857, *and under those Acts the railway was liable to rating on its full value. The G. W. Co., who became the workers of the line since* 1857, *and paid the rates, now contended that the rating should be reduced to the usual scale of one-fourth:*

Held, that the petitioners had no locus standi.

The main object of the Bill was to enable the Milford Improvement Commissioners to borrow a further sum of 3000*l.* without, however, extending the rating powers already possessed by them. The petitioners, the Great Western Railway Company, opposed the Bill on the ground that they worked and occupied the Milford Railway under an agreement for a lease, and that railway being rated by the commissioners, the granting to them of additional borrowing powers, would be injurious to the petitioners. Their petition set forth that the additional sum of 3000*l.*, by the intended Act authorised to be raised on mortgage, was to be applied, first, in payment of the costs of the intended Act; secondly, in discharging the liability of the commissioners in respect of waterworks; and, thirdly, in payment of any other liability of the commissioners. And it went on to say:—

The Milford Railway extends from your petitioners' South Wales Railway, at Johnston, to the town of Milford, and your petitioners work, manage, and maintain the said railway under an agreement with the Milford Railway Company for a lease in perpetuity of the undertaking of the Milford Railway Company, which includes the said railway.

Your petitioners, as occupiers of the Milford Railway are rated in large sums by the said commissioners, and if the Bill promoted by the commissioners, and at present pending in your honourable House, receives the sanction of Parliament, as it now stands, the rates leviable on your petitioners will be very much increased, and your petitioners object thereto.

Your petitioners will derive and have derived no benefit from the objects to which the money proposed to be raised under the authority of the intended Act is to be applied as aforesaid, but, on the contrary, the provisions of the intended Act which authorise the raising of the said sum of 3000*l.* will be injurious to them, and your petitioners, therefore, object to so much of the Bill as increases the debt of the commissioners by the said sum of 3000*l.*

The interests of your petitioners differ from those of other ratepayers in the town of Milford, inasmuch as those ratepayers have derived, it is presumed, some benefit from the waterworks towards which a part of the said sum of 3000*l.* is to be applied, but your petitioners have derived no benefit or advantage from them; and some of the improvements that have been made in the town of Milford may be of advantage to the owners and occupiers of houses and property in the said town and to the inhabitants generally, while they have not been of any advantage to your petitioners.

By sect. 55 of the Local Government Act 1858 (which is a public Act), and which is to be construed together with, and be deemed to form part of, the Public Health Act 1848, and which makes further provision for the local government of towns and populous districts, it is enacted that "The owner of any tithes, or of any tithe commutation rent-charge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

The said Local Government Act 1858 contains no such exemption in favour of the ratepayers generally, except the owners of the special properties mentioned above, so that under the provisions of the said Act, which, as before stated, is a public Act, your petitioners' interest are recognised as being different from those of the general body of ratepayers.

No such provision, however, as that contained in the Local Government Act 1858, and above specified, is contained in the Milford Improvement Act 1857, nor in the said

Bill, and your petitioners submit that should your honourable House think it right to sanction the passing of the said Bill, it is only just and reasonable that the said provision should be extended to Milford, and that clauses and provisions should be inserted in the Bill to that effect, so as to give your petitioners the benefit thereof, and that other clauses and other provisions should also be inserted in the Bill for their protection, and for regulating the manner in which the valuation for assessments should be made at Milford.

The objections to the *locus standi* of the petitioners were:

1. The petitioners are not entitled to be heard against the said Bill as occupiers of the Milford Railway, or as ratepayers within the Milford Improvement District.

2. No right of the said petitioners is proposed to be altered by the said Bill.

3. No property of the said petitioners is proposed to be taken or used under the powers of the said Bill.

4. That no agreement for a lease of the Milford Railway to the petitioners has been sanctioned by Parliament, and that the petitioners are not entitled to be heard as lessees or occupiers of the Milford railway.

5. That the Milford Railway Act was passed in 1856, and the petitioners have become occupiers of the Milford railway since the Milford Improvement Act of 1857 was passed, and that they have undertaken such occupancy subject to the burthen (if any) imposed on the Milford Railway Company by the Milford Improvement Act 1857.

6. No additional rating power is sought by the Bill, and the petitioners are seeking to be relieved from liabilities to rates they or the Milford Railway Company are now liable to.

Saunders for petitioners.—We object to the proposal to raise the borrowing powers of the commissioners from 7000*l.* to 10,000*l.* By the Act of 1856 the Milford Railway, three miles in length, forming a drop line from the South Wales Railway, was authorised; it now forms, but was not then, a portion of the Great Western system.

Mr. DODSON.—One of the objections is that you do not represent the Milford Railway. If so, the whole thing is at an end.

Saunders.—The court will be the judges of that. In 1863 an agreement was entered into between the Great Western and the Milford Railway Companies. The first clause of that agreement provides for a lease in perpetuity of the Milford Railway to be sanctioned by Parliament; the ninth clause of the agreement provides that on the completion of the railway and works, if the lease do not sooner come into effect, the Great Western will (subject to approval as therein mentioned) work the railways until the intended lease shall commence.

Mr. RICKARDS.—Technically, then, no sanction has been given by Parliament?

Saunders.—That is so; but in a Bill of this session there is a clause sanctioning that agreement; and the Milford Company's Act of 1863 gives power to the Great Western and South Wales Railway Companies, or either of them, to enter into agreements with regard to working the Milford Railway. Under that power we are now working the railway; and that is our answer to the further objection that we are not entitled to be heard as occupiers.

Mr. RICKARDS.—Which company pays the rates?

Saunders.—I hold in my hand the last demand for rates made by the Milford Improvement Commissioners. The notice is for rates made the 9th Dec. 1868, and is directed to the Great Western Company.

Mr. RICKARDS.—Have the Great Western, in fact, paid the rates?

Saunders.—Ever since the working agreement was entered into, the rates have always been paid by the Great Western Company. It is out of the question to suppose that a three mile line could want, or be worked with, a separate rolling stock of its own. The commissioners recognise and treat us as occupiers in drawing their rates from us.

Mr. RICKARDS.—How does the name appear in the rate-book; are the Great Western entered as occupiers?

Saunders.—That would not be evidence for or against us; but notice served by the commissioners upon us would be evidence against them; no doubt the notice is taken from the rate-book. As to the second and third objections, they are merely general in their charracte; but as to the fourth, which seeks to ignore our right, both as lessees and occupiers, to uphold this objection would be to ignore the practice of Parliament altogether. An occupier even for a year, has as good a *locus* as a lessee, and in this case we are an occupier working the line under an Act of Parliament. Then as to the fifth objection, that we became occupiers since the passing of the Improvement Act of 1857—

Mr. DODSON.—Is this railway in any way represented on the local board at Milford?

Saunders.—I am told not.

T. Marriott (Parliamentary agent), for promoters.—They are entitled to vote in the election of commissioners.

Saunders.—I don't think anything turns on the question when we became owners of the Milford Railway. If we were owners before the passing of the Improvement Act, it might be contended that then was our time to have come forward and been heard. This is the first Bill brought into Parliament to affect the management of the town of Milford since the Great Western had any interest in the town.

Mr. RICKARDS.—Can you mention any case in which a ratepayer has been allowed a *locus standi* against the Board of Health, or governing body of the town, or community to which he is a contributor?

Saunders.—I don't think I can, but, as far as I know, the case has not arisen in the present shape. The petitioners have an interest quite distinct from that of the other ratepayers.

Mr. RICKARDS.—That is not so. At present their rating is not distinct; they want it to be distinct.

Saunders.—We say, not that we should be distinctly rated, but that our interests are distinct. Parliament has recognised the principle that railway and canal companies who do not get the benefit of an improvement Act in the same way as inhabitants of a town do, should be only rated at one fourth. Our interests are distinct; the only thing is that in this case, by a private Bill brought in before we had anything to do with the Milford Railway, this principle was lost sight of, and the distinction was not made. What is apparent equality, therefore, is real inequality; we are paying four times as much as the public.

Mr. DODSON.—But you voluntarily acquired the railway subject to this condition.

Saunders.—It was not in our power to bring in a Bill to change the law; but here they are bringing in a Bill themselves, and the Chancery doctrine applies—"let him that seeks equity do equity." In answer to the question put by the court, I would say that while I can quote no case that establishes our

right to be heard, I know of no case that negatives our strong claim to a hearing.

Mr. RICKARDS.—There are a good many cases the other way; for instance—

Mersey Docks and Harbour Bill 1858, Smethurst, p. 86;

Whitechapel and Holborn Improvement Bill 1865, 12 L. T. Rep. N. S. 31.

Saunders.—In none of those cases were the interests proved to be as distinct as they are in this case. True, we stand at present on the same footing as other ratepayers: but look at the hardship that inflicts. We pay the same rates as others, but we do not derive the same benefit from the works done by the Improvement Commissioners. To contend, therefore, that, because we pay now we must go on paying, is to beg the whole question.

Mr. DODSON.—This privilege of being rated at only one-fourth is conferred by Parliament in some cases but not in others. In the Milford Improvement Act 1857 Parliament did not think fit to insert it, but treated the Milford Railway, previously sanctioned, on the footing of an ordinary ratepayer. You, the Great Western Company, became the workers and occupiers of the Milford Railway with a knowledge of that fact, and you are in the shoes of the Milford Company. But I do not see how you can allege that you are damnified by the provisions of this Bill?

Saunders.—At the time the Railway Act was passed the practice was not uniform, but it has since become so.

Mr. RICKARDS.—If that be so, the Milford Railway Company might have applied for a clause protecting them, in the Improvement Act of 1857.

Saunders.—We are not the Milford Company.

Mr. RICKARDS.—Yes, you are, for the purposes of this discussion.

Saunders.—Well, if so, we are shut out from relief from all time. In the nature of things we cannot derive the same benefit as other ratepayers from the powers as to cemetery, watering, paving, lighting, &c., already vested in the hands of the commissioners, or conferred upon them by this Bill; and therefore our interests are distinct. This is the only opportunity of redressing an injustice affecting my clients, and of putting them on the same footing as other railways, and I therefore contend that they ought to be heard. Let the committee afterwards decide on the merits of their application. Had the Local Government Act 1858 preceded the Milford Improvement Act 1857, the 55th section of the Local Government Act, making railway companies liable in the proportion of one fourth only, would have been incorporated in the Improvement Act.

Mr. RICKARDS.—When the Milford Improvement Bill was before Parliament, the Milford Company might have applied for a clause containing provisions like those in sect. 55 of the Local Government Act.

Saunders.—The laches of the Milford Company ought not to be visited upon us.

Mr. RICKARDS.—How are the rating powers of the Milford Improvement Commissioners governed?

Marriott, for promoters.—By the Towns Improvement Act 1847, incorporated in the Improvement Act 1857. No special mention of railways is made in that Act, but the word "person" is interpreted to mean corporations, and therefore railway companies. Under that Act accordingly railways are not dealt with differently from other property.

Saunders.—But all railway companies are rated, according to modern practice, at one-fourth; and it is a common thing, when improvement commissioners who have been working under old Acts come before Parliament, for railway companies who have not the benefit of this lower rating, to appear upon petition and claim to have the modern system applied to them. I can recall no case in which such an application was refused. The rule as to shareholders not being allowed a *locus standi* against a company of which they are constituent members, will not apply in this case for two reasons, first, because our interests are distinct; and secondly, because there is here no machinery analogous to the Wharncliffe meeting, at which shareholders would have an opportunity of objecting.

Marriott.—The Milford Improvement Commissioners must be taken to represent the ratepayers, including the railway company. In borrowing 7000*l.* and mortgaging the rates, under the Act of 1857, the commissioners relied upon the rating powers given by that Act, including the power to rate railway property equally with the rest. The argument as to little benefit derived from outlay upon paving, &c., is fallacious, for the heavy waggons of a railway company do more damage to the streets than any other traffic.

Mr. DODSON.—Do the Great Western Company oppose the Bill as a whole, including the confirmation of the mortgages?

Saunders.—No; we should be satisfied with a *locus standi* against the rating clauses.

Marriott.—The petitioners have no *locus standi* at all. They are neither owners, lessees, nor occupiers within the meaning of the Standing Orders, or under the practice of Parliament. No lease respecting the railway has been entered into and sanctioned by Parliament in manner contemplated by the agreement which has been referred to. The Great Western Company, by the Bill which they have introduced this session, show that they do not consider the transfer of the Milford line to them complete. If such were the case, there would be no necessity for the Bill. As to the question of rating, that was determined when the line was originally sanctioned in 1856; the same question was again considered and dealt with by Parliament in 1857, when the Improvement Commissioners were constituted with power to levy rates, and no change affecting the railway was then made. Even supposing that the Great Western Company now stand for all purposes in the shoes of the Milford Company, they are represented for fiscal purposes upon the board of commissioners elected by the ratepayers. And by the Bill which these commissioners are now promoting, and against which the company seek to be heard, no change whatever is made in the rating powers. Accordingly, the petitioners fail to show any ground, first, why their interests are in any way distinct from those of the ratepayers generally; and, secondly, why they should be heard to claim exemption from liabilities which Parliament, on two occasions, declared that the Milford Company, in whose shoes they stand, should be liable to. Moreover, though the Great Western Company may in point of fact pay the rates, it does not follow that they are entitled to be heard as ratepayers.

Mr. RICKARDS.—The promoters have treated the petitioners as ratepayers, and it is as ratepayers they desire to be heard.

In accordance with a request by Mr. Rickards, the *Gazette* notice was then handed in for the purpose of seeing whether it would cover any alteration in the rating.

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The REFEREES took time to consider their decision. At their next sitting on the 14th April they announced that the *locus standi* of the petitioners was disallowed.

Locus standi disallowed.

In a case subsequently heard before the Court of Referees (*Aberdare and Aberaman Gas Bill*), Mr. RICKARDS took occasion to observe that in the decision at which the court arrived in this case, they were largely influenced by the fact that there appeared to be nothing in the Bill which affected the Great Western Company.

Agents for the Bill, *Marriott, Jordan*, and *Cooper*.

Solicitors for the petitioners, *Young, Maples*, and *Co.*

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

March 4 and 15.

(Present: the Right Hon. Sir JAMES W. COLVILE, Sir ROBERT J. PHILLIMORE, Lord Justice SELWYN, and Lord Justice GIFFARD.)

EMILIE MALVINA EVANTUREL and EDWARD RÉMILLARD (apps.), *v.* FRANÇOIS EVANTUREL (resp.)

Lower Canada—Will—Coutume de Paris, Art. 289—*Dicté et nommé.*

By the Coutume de Paris, Art. 289, "*pour réputer un testament solennel,*" *it is necessary that it be* "*dicté et nommé*" *by the testator to two notaries, and then that it be re-read to the testator in the presence of the notaries.*

A testatrix stated to a notary the dispositions that she wished her will to contain. The notary made a memorandum, in which the dispositions were concisely stated, and the testatrix directed him to prepare a will in conformity therewith, and to send it to her in order to have it examined by counsel. This was done. A few days later the testatrix took the draft will to the notary, who then, in the presence of a second notary, asked the testatrix what dispositions she wished to make. The testatrix repeated in brief, and as if she knew them by heart, the dispositions which the will contained. The notary read over the will to the testatrix, and some alterations were suggested by the latter. The will, with the suggested alterations, was then re-read, and the testatrix being unable to write, the formula in such cases required was appended.

On an objection to the validity of the above will,

Held (affirming the judgment of the Court of Queen's Bench of Lower Canada), that the will so executed was valid.

For the Coutume de Paris (1) *does not require in express terms that the will should be written by a notary at the time of dictation, though it does require that the will be read over in the presence of the notaries and testator;* (2) *contains no declaration, like that in the Code Napoléon, that the formalities enjoined shall be observed on pain of nullity; and* (3) *does not require, by the expression dicté et nommé, that the notary should write at the dictation of the testator word for word, nor forbids the testator to dictate from a written and previously prepared instrument.*

The mode in which the present will was executed was not obnoxious to the mischief which the Coutume intended to guard against, the will being the expression of the undoubted wishes of the testatrix, and further the force of contemporaneous exposition, embodied and continued in the practice of notaries down to the present time, and the principle of recent decisions in the Canadian Courts, are in favour of the validity of such an execution of a will as that described.

The words dicté et nommé must be considered as conveying one idea, the latter word being only used to strengthen the former.

This was an appeal from the judgments of the Court of Queen's Bench for Lower Canada (appeal side), the one, dated June 20, 1865, reversing a judgment of the Superior Court for the Province of Canada, district of Quebec; and the other, dated March 18, 1867, affirming a judgment of the Superior Court, in an action *en pétition d'hérédité*, instituted by the appellants (as husband and wife) against the respondent. The respondent and the female appellant were brother and sister and children of the late Marie Anne Bédard, or Evanturel, the validity of whose will was the question in dispute.

The petition alleged in substance that Madame Evanturel died on Nov. 10, 1863, leaving five children surviving her; that such five children constituted the sole heirs of Madame Evanturel, and that consequently each of them was entitled to one-fifth share of her property; that nevertheless the respondent had unlawfully possessed himself of the whole of the property to the exclusion of his sisters; and the petition concluded with a prayer that the respondent should be ordered to deliver up to the appellants one-fifth share of such property, with all profits accrued thereon.

To this petition the respondent replied by a peremptory and perpetual exception in law (*exception péremptoire en droit perpétuelle*) in which he pleaded a will made by his mother dated May 18, 1861, being that of which the validity was in question in this suit.

The will in question, after ordering payment of debts, and giving directions as to her funeral, comprised a donation by instrument *inter vivos*, which she had previously executed, of a piece of land in favour of her only son, the respondent. It then bequeathed her piano and some articles of furniture to her youngest daughter, Elmire Aglaé, and gave all the residue of her property, real and personal, to the respondent, with remainder to his children by his wife Louise, absolutely charged, however, with annuities of 15*l.* a piece to three of the sisters of the testatrix, and of 25*l.* a piece to her four daughters, with a provision that any one of these latter legacies should be at once annulled in the case of any daughter who should attempt to dispute the validity of the will; and she discharged her son from all accounts and claims against him as her agent or attorney during her lifetime, and appointed him sole executor of her will.

The appellants, having replied to the respondent's exceptions by general and special answers, which it is unnecessary to specify because not insisted on in the appeal, subsequently moved the Superior Court of Lower Canada that they might be permitted *de s'inscrire en faux* against the will pleaded by the respondent, to show that it was not duly executed as a testamentary instrument. This leave was granted, and the appellants filed the *moyens de faux, i. e.*, a statement of their objections to the due execution of the will. These were as follows:—

First, that the pretended will of the said late Marie Anne Bédard (Evanturel), under date May 18, 1861, was not *dicté et nommé* by the said lady to M. Jh. Petitclerc and his colleague, notaries public, as falsely alleged in the pretended will.

Secondly, that the said pretended will was not *dicté et nommé* by the said late lady to M. Jh. Petitclerc and his colleague, notaries public, on May 18, 1861, as falsely alleged by the said pretended will.

Thirdly, that important parts of the said pretended will (other than the preamble), appeared to be manuscript written or altered in a strange hand,

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other than that of either of the said two notaries, who passed the said will.

On the objections so pleaded issue was joined.

The testatrix could read imperfectly, but was unable to write.

The law which governed the execution of wills at the time when Madame Evanturel's will was made, consisted of Article 289 of the Coutume de Paris, and of the Statute 14 Geo. 4, c. 83, which extended to the people of Canada the power of making wills in the English form.

The provisions of the Coutume de Paris, the manner in which the will was executed, and the evidence in support of the objections made by the appellants, are sufficiently stated in the judgment of the Judicial Committee (*post*). The appellants, at the trial below, contended that on the evidence of the two notaries (Petitclerc and Huot) who prepared the will, it was clear that the will was not *dicté et nommé* by the testatrix, as required by the Coutume de Paris, because it was not dictated to the two notaries and then and there written by one of them in the presence of the other, and read and re-read to the testatrix, but was prepared by one notary (Petitclerc) alone, at his office, from notes taken down by him on a previous day, in the absence of the second notary; and that the other notary (Huot) was not present when the will was dictated, nor when it was written, and had never even seen it or the testatrix until his attendance at the office of Petitclerc, where he found the will already prepared for execution; that, in fact, Huot, instead of being present with Petitclerc at the dictation, writing, reading, and re-reading of the will as required by the Coutume, was present only when it was read and re-read and repeated in epitome, and acknowledged by Madame Evanturel; and that her repetition, "as if she had known them by heart," of the provisions of the will, bearing in mind that she could neither write nor read writing, must have been a mere parrot-like repetition of a lesson in which she had been beforehand instructed. And further, that the will was only read once, and not read and re-read after the alterations were made, and also that one of the most material clauses was not the spontaneous suggestion of, nor dictated by, Madame Evanturel, but was first suggested to her by her legal adviser, M. Casault.

The respondent called some notaries of Montreal and Quebec in order to prove a custom of the notaries of Lower Canada to pass testaments in the manner, above described, that had been adopted in this case. On the other hand, the appellants called eleven notaries from Quebec and Montreal and country districts in order to disprove any such custom.

The cause came on for hearing on June 10, 1864, in the Superior Court of Lower Canada, before Taschereau, J., who on Sept. 5 following pronounced judgment, which, so far as material, was as follows:—"Considering that it is established by the proof given in this cause on the objection to validity . . . that the will was not dictated and expressed (*dicté et nommé*) by Madame Evanturel to the notaries, according to the law. Considering that the fact of having in advance and upon notes given to a single notary, and taken by him in the absence of his brother notary, prepared during the next day the said will out of the presence of the testatrix, and of having submitted it to her all prepared on a following day in the presence of the second notary, in whose presence the will was read and re-read after the testatrix had repeated her dispositions to the notaries, is not equivalent to the formality required by the law as to dictating and expressing the will, and does not meet the exigencies of the law. Considering that in the execution of a solemn notarial will, the formalities prescribed by the law ought to be strictly observed under the penalty of nullity, and that equivalents ought not to be admitted in their execution, in order to avoid mistakes, errors, and frauds. The court maintains the objection to validity (*inscription en faux*) made against the will of Madame Evanturel, bearing date May 18, 1861, as being illegally executed; that is to say, as not having been dictated and expressed by the testatrix to the notaries public, who drew the will . . . and declares such will null for all legal purposes."

Against this decision the present respondent appealed to the Court of Queen's Bench of Lower Canada, and that court, on June 20, 1865, by a majority of one (Duval, C. J., Aylwin and Meredith, JJ., against Drummond and Mondelet, dissenting), reversed the judgment of the court below, dismissing the appellant's *inscription en faux*, with costs in both courts, and remitting the cause to the court below. The *considérant* for the decision, as stated in the preamble of the judgment, was as follows: "Considering that it is established by the evidence given in this cause on the *inscription en faux* against the testament of the late Madame Evanturel, passed before M. Petitclerc and his fellow notary, at Quebec, on May 18, 1861, that the said testament was *dicté et nommé* by the said testatrix to the said notaries, following and conformably to the law, and ought to be executed according to its form and tenor; and that in the judgment pronounced by the Superior Court at Quebec, on Sept. 5, 1864, which maintains the said *inscription*, there is error." This is the first of the two judgments appealed against.

The Court of Queen's Bench afterwards ordered that the appellants should be at liberty to prove their allegations as to the incapacity of the testatrix, and the fraud and undue influence alleged by them to have been practised by the respondent, but without recurring to the *moyens de faux* already decided upon by the court. The suit accordingly proceeded on these issues, and came on for hearing before the Superior Court. The cause was heard on the merits, and on May 16, 1866, Taschereau, J. gave judgment, dismissing the appellants' action with costs, on the grounds that they had failed to prove the allegations of their *réponses spéciales* to the respondents' *exception péremptoire en droit perpétuelle*, relative to the charges of *suggestion et captation*, and the mental condition of Madame Evanturel, and her capacity to make such testament. The Court of Queen's Bench of Lower Canada, on appeal, affirmed the judgment of the court below with costs. This is the second of the two judgments appealed against.

Bowring, for the appellants, and *Wickens* for the respondent, referred to the following authorities:

Ferrière, Coutume de Paris (edit. 1714), vol. 4, pp. 18, 105, 106, 107, 133;
Dalloz, Répertoire de Législation, vol. 16, p. 829 (edit. 1856), "De l'écriture par le Notaire," Artt. 2866-2904;
Routier v. *Robitaille*, 4 Stuart's Lower Canada Rep. 440, K. B.;
Toullier Droit Civil (edit. 1830), vol. 5, p. 330, "De la Dictée des Testaments;"
Code Napoléon, Art. 972, 1001;
Troplong Donations Entre-vifs et des Testaments (2nd edit.), vol. 3. p. 69, *et seq.*;
Burge Colonial and Foreign Laws, vol. 4, pp. 420, 425-426.

March 15th.—Judgment was delivered by Sir R. J. PHILLIMORE.—This is an appeal against two judgments of the Court of Queen's Bench of Lower Canada—one of the 20th June 1865, which reversed the judgment of the Superior Court of the 5th Sept. 1864, and the other of the 18th March 1867, which

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affirmed the judgment of the Superior Court of the 16th May 1866. The subject of these judgments and of the present appeal is the validity of the testament of the late Marie Anne Evanturel, widow, of Quebec. She died on the 10th Nov. 1863, leaving five children surviving her, among whom were the appellant, Emilie Malvina, wife of Edouard Rémillard; and the respondent, the Hon. François Evanturel. These five children, if she had died intestate, would have been entitled in equal shares to her property. The suit was begun by a claim to the succession of Madame Evanturel, entitled *pétition d'hérédité*, filed by the present appellants in the Superior Court of Lower Canada on the 7th Dec. 1863. In answer to this petition the present respondent, on the 5th Jan. 1864, replied by a peremptory and perpetual exception in law (*exception péremtoire en droit perpétuelle*), by which he pleaded a testament made by his late mother, dated the 18th May 1861. To this exception the appellant replied by a general answer, and by a special replication in which they impugned the validity of the testament on the ground of incapacity or undue influence (*fraude, suggestion, captation, ménaces, employés par le défendeur*). It may be convenient here to state that this allegation was disproved in the opinion of all the judges in the Canadian courts, and has not been insisted upon before their Lordships. The appellants in their special replication also relied on the invalidity of the execution of the testament. The mode of raising this latter issue is, according to the law of France and Lower Canada, to enter, by permission of the court, a process which is called *inscription en faux*. The appellants having duly obtained this leave, filed their *moyens de faux*, which were as follows:—"1. That the pretended testament of the 18th May 1861, was not *dicté et nommé* by the deceased to two public notaries, as falsely asserted in the pretended testament. 2. That it was not *dicté et nommé* by her to two public notaries on the 18th May 1861, as falsely asserted in the pretended testament. 3. That an important part of the alleged testament, other than the preamble, was written and altered by some stranger's hand, other than that of the two notaries who passed the testament." It appears from the evidence that M. Petitclerc, a notary, went to the testatrix, in obedience to a summons, on the 16th May 1861; he found her alone; she told him that she desired to make her testament; she then and there expressed the dispositions and bequests which it was to contain. M. Petitclerc drew up a memorandum in which they were concisely stated; the testatrix then told him to prepare her testament in conformity therewith, and to send it to her in order to its being examined by her counsel; he drew up the testament on the same or on the following day. Madame Evanturel, on the 17th, had an interview with her counsel, M. Casault, whom it appears that she had consulted on the subject of her will on the 15th and 16th May; he wrote in the margin of the will an alteration, subsequently cancelled and re-written by the notary; and on the afternoon of the 18th May Madame Evanturel went to the office of M. Petitclerc, bringing with her the draft testament, which he opened, and on perceiving M. Casault's alterations drew his pen through them; he then sent for a brother notary, M. Huot, who arrived; there was also present M. Casault. M. Petitclerc then asked the testatrix what were the dispositions which she desired to make, and she repeated in brief (*en raccourcis*), as M. Huot says, "as if she had known them by heart," all the dispositions which are contained in the testament, though not exactly, it would appear, in the same terms and in the same order. M. Petitclerc then read the testament—she suggested certain corrections, and the addition of the following correction attendant on the bequests to her daughters: "Et que quant à celle ou celles qui voudront contester mon dit testament, le legs à elles fait de la dite rente soit non avenu et caduc." It appears that M. Petitclerc then re-read the testament with the corrections and addition which have been mentioned; the testatrix then declared that she could not write, and what Taschereau, J. calls the *énonce sacramentel*, the essential formula, was put in the following words:

Ce fut ainsi fait, dicté et nommé par la dite dame veuve François Evanturel, testatrice, aux dits notaires soussignés, et son présent testament lui ayant été lu et relu par Maître Joseph Petitclerc, l'un des dits notaires, en presence de Maître Philippe Huot, son confrère, pour ce mandé, la dite dame Evanturel a dit le bien entendre et comprendre, et y a persisté, à Quebec, en l'étude de Maître Joseph Petitclerc, l'un des notaires, l'an 1861, le 18me jour du mois de Mai, après-midi, sous le numéro 11,686. Et la dite dame veuve François Evanturel a déclaré ne savoir ni écrire ni signer de ce requise, lecture faite et refaite.

Signé sur la minute, demeurée en la dite étude.

PHI. HUOT, N.P.
JH. PETITCLERC, N.P.

It may be convenient here to dispose of the two *moyens de faux* which relate respectively to the date of the testament and to the alterations in a strange hand. It has scarcely been contended before this court that the testament was *dicté et nommé* on the 16th May; and such a contention, in their Lordship's opinion, cannot be sustained. The question of the execution of the testament must be confined to the date of the 18th May. With respect to the alterations in a strange hand, they are fully accounted for by the testimony of the witnesses, and can in no way affect the decision in this case. In the evidence given by the witnesses, MM. Petitclerc, Casault, and Huot, some discrepancies occur, and also in the two depositions of M. Petitclerc made at different times; but their Lordships entirely concur with the remarks of M. Taschereau, J. upon this subject, and are of opinion with him that their discrepancies are insignificant, and do not affect the real and only question in this case, viz., the true construction of the law which governs the execution of this testament. There is no controversy as to what that law is. It is the 289th Article of the "Coutume de Paris," as declared by the Parliament of Paris in 1580, and it is in these words:

Art. 289.—Pour réputer un testament solennel, il est nécessaire qu'il soit écrit et signé du testateur: ou qu'il soit passé pardevant deux notaires, ou pardevant le Curé de la paroisse du testateur, ou son vicaire-général, et un notaire; ou du dit curé ou vicaire et trois témoins; ou d'un notaire et deux témoins: iceux témoins, idoines, suffisants mâles et âgés de vingt ans accomplis, et non légataires, et qu'il ait été dicté et nommé par le testateur aux dits notaires, curé ou vicaire-général, et depuis à lui relu en présence d'iceux notaires, curé ou vicaire-général, et témoins, et qu'il soit fait mention au dit testament qu'il a été ainsi dicté, nommé et relu; et qu'il soit signé par le dit testateur et par les témoins: ou que mention soit faite de la cause pour laquelle ils n'ont pu signer.

It is contended by the appellants that the provisions of this regulation have not been complied with, and that the testament is therefore invalid. They maintain that, according to the true construction of that regulation, and especially of the words "dicté et nommé par le testateur aux dits notaires," the testator must declare the dispositions which he desires to make, and that one notary at least, if not the two, must then and there write down these dispositions, and that unless this requisition of the law be obeyed, the testament is null. This construction of the Coutume was adopted by M. Taschereau, J., in the Superior Court of Lower Canada; and, accordingly, he sustained the *inscription en faux*, and pronounced against the validity of the testament. From this sentence an appeal was prosecuted to the Court of Queen's Bench of Lower Canada. That court reversed this decision, holding that the testament was duly executed. The

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court was composed of five judges; of these three, Duval, C.J., Aylwin and Meredith, JJ. delivered their judgments in favour of the validity of the testament; while two, Drummond and Mondelet, JJ. dissented, and agreed with Taschereau, J. From this sentence the present appeal has been prosecuted. The case has been fully argued before their Lordships, and we have now to deliver our opinion upon the true construction of the 289th Article of the Coutume de Paris in its application to the testament which is the subject of this litigation. Some preliminary observations occur which it will be well to mention in this place. First, that the language of this Coutume does not require in express terms that the will should be written by a notary at the time of dictation; though it does require that the will should be read over in the presence of the notaries and of the testator; and, secondly, that there is no declaration, like that which is to be found in the Code Napoléon, that the formalities enjoined shall be observed on pain of nullity. In respect to these particular words *dicté et nommé*, it appears to their Lordships that they must be considered as conveying one idea, the latter word being only used to strengthen the former; and in this opinion their Lordships are justified by the opinion of the learned editor of *Ferrière*, and of the decision to which he refers:—"La première chose à observer est qu'il faut que le testament soit dicté et nommé par le testateur, sur quoy on a demandé autrefois, si des mots équivalants suffisoient, comme *proferez de sa propre bouche*, il a été décidé qu'ils ne suffisoient pas, la Coutume disant dicté et nommé; mais que si un notaire ne mettoit que l'un des deux, ou dicté ou nommé, comme ils sont synonimes, qu'il n'y auroit point de nullité:" (Vol. 4, p. 133.) It was admitted by the counsel for the appellants that it was not necessary that the notary should write *mót à mót* the dispositions of the testament as dictated by the testatrix, that he might put them in proper language and in proper order, and with whatever amplifications were necessary to give them due legal force and effect, and that the testatrix might dictate from a written and previously prepared instrument. And their Lordships are clear that this view is correct, having regard both to the reason of the thing, and to the decisions which have been given upon the particular Coutume, as well as those which have been delivered upon the far more rigorous language of the article in the Code Napoléon, which are collected in Dalloz, vol. xvi., tit. 4, c. 2, sect. 4, article 2, sect. 2. (De l'écriture par le notaire.) In forming our judgment upon the general construction of the Coutume, one of the primary considerations has necessarily been to ascertain what was the mischief which this law was framed to remedy, and upon this point there is really no room for doubt. The authority of the commentator Claude de Ferrière has been much relied upon by both parties, and it is entitled to considerable weight in the explication of this law. After mentioning the various ways in which a *testament solennel* may be made under this Coutume, he adds: "Notre Coutume outre cela requiert dans les testamens plusieurs solemnitez, pour empêcher les fraudes et les suggestions. La première formalité ést, qu'il ait eté dicté et nommé par le testateur à celuy qui l'a reçû. La deuxième, qu'il soit relû au testateur, et qu'il soit fait mention qu'il a été *dictè, et nommé, et relû*. La troisième, qu'il soit signé par le testateur et par les témoins." (Ferrière, "Coutume de Paris," vol. iv, p. 18, edit. 1714.) And again, the same author, speaking of a will made *ad interrogationem alterius*, "La validité d'un testament ainsi fait, dépend beaucoup des circonstances, car les formalitez ne sont pas requises dans les testamens pour empêcher de tester, mais pour empêcher qu'ils ne fassent contre la volonté et l'intention des hommes, ainsi il paroît par les circonstances, que la disposition faite *ad interrogationem alterius* a été l'esprit de celuy qui l'a faite, elle doit être confirmée ainsi cela dépend de la prudence des Juges." (Pp. 105, 106.) This mischief of a fraudulent, or false, or extorted, or even suggested disposition, instead of the genuine expression of the testator's wishes, is certainly not incurred where, as in this instance, the testator is asked what his wishes are, where he deliberately expresses them, and where the instrument which contains them, though previously written, is read over to and approved by him. Their lordships agree with the opinion of Taschereau, J. on this point: "Il y a peu de doute que dans le cas présent, le testament argué de faux en cette cause présenterait à mon esprit une idée très forte de l'expression vraie et complète des volontés de Madame Evanturel." The execution of this testament not having sinned against the mischief which the law was intended to prevent, the consideration next in order appears to be, what interpretation did this law receive from contemporaneous exposition? This exposition is derived from the *arrêts*, or judicial decisions on the question, and is evidenced by the usage and practice of notaries public. 1. In considering the various *arrêts* cited both in the courts below and at the bar before us, we must distinguish those in which the testament was merely acknowledged in the presence of two notaries, though twice read in their presence and approved by the testator, from the present case, in which there was an actual dictation by the testatrix of the whole of her testamentary dispositions, though the writing did not follow that dictation. Even with respect to *arrêts* of the former description, there are three reported by Ferrière: that of Machéco, in 1597; that of Pisany, in 1602; and that of Claude Pollaët, in 1616, which latter *arrêt* was also confirmed by the Appellate Court, in which the testaments, acknowledged indeed and in the last case also signed by the testator in the presence of two notaries, but not dictated, were pronounced to be valid. It will be borne in mind that the date of the declaration of the Coutume is 1580; these *arrêts*, therefore, so far as their authority extends, have the force of a contemporaneous exposition. There are, it is true, on the other hand, various *arrêts* to be found in the books, in which testaments acknowledged and approved by the testator in the presence of two notaries, and twice read over, have been pronounced null, on the ground of their not having been *dictés et nommés*, according to the Coutume: but there does not appear to be one in which a testament, *dicté* as this testament was, has been set aside on the ground, either that the dictation was insufficient, or that the writing ought to have followed the dictation. And lastly, upon this point it is to be observed, that in the cases of *Robitaille* v. *Bonneville* and *Routier* v. *Robitaille* (Stuart's Rep. in K. B. of Lower Canada, 440), decided by the Court of Queen's Bench for the district of Quebec by Sewell, C. J. and Kerr, J. in the year 1829, in which cases the testament was *inscrit en faux* on the ground that it was not legally executed as a *testament solennel*, that is, not *dicté et nommé* according to the law and as certified by the notary, Meredith, J. says, and no doubt with perfect accuracy, "The evidence adduced in that case has been placed before us, and from the depositions of the two notaries and other evidence, it appears that the second notary was not present when the will was written. And yet the will was held to be a good will. The case went to appeal and was disposed of, as the gentlemen of the bar are aware, upon a different ground, and all that is said in the report respecting the point now under consideration is:—the court below, however, considered that the will had been

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regularly made, and rejected the *inscription en faux.*" There is no doubt that jurists, both in Canada and in France, have differed upon the construction of this article of the Coutume. Their discordant opinions are more or less reflected by the conflicting decisions above referred to, and also by the difference in the practice of notaries in Canada. The interpretation put by the usage of these officers, who perform a public duty in the preparation of wills, is by no means unimportant; and the result of the evidence upon this head is, that the practice of the leading notaries in the principal Canadian towns of Montreal and Quebec greatly preponderates in favour of the mode of executing a testament adopted in the case before us. It appears, therefore, to their Lordships that even, if the French authority were admitted to be in favour of the stricter construction of the Article in question, the latter interpretation has, both by decision and by long usage, acquired the force of law in Lower Canada. The 23rd Article of the Ordonnance des Testaments of 1735 and the 972nd Article of the Code Napoléon have been referred to, and the decisions with respect to them were considered by the judges of the court below, whose opinions were adverse to the validity of this testament. Their Lordships do not think it necessary or expedient to enter into an examination of these decisions. There is, however, an observation arising from the consideration of these two latter Acts of French legislation which is, perhaps, not irrelevant to the question before us. The Ordonnance requires that the notaries, or one of them, *écriront les dernières volontés du testateur telles qu'il les dictera*, and the Article of the Code Napoléon, that the testament *doit être écrit par l'un des notaires tel qu'il est dicté;* and a subsequent article (1001) provides that the prescribed formalities shall be observed under pain of nullity. The inference from the insertion of these additional formalities, and of the penalty by which they are guarded in this later legislation, is certainly not unfavourable to the liberal construction of the Coutume declared in 1580, under the authority of which the testament before us was made. After a careful consideration of the law, and of the authorities applicable to this case, inasmuch as it appears to their Lordships, that the mode in which this testament has been executed is not obnoxious to the mischief which the Coutume intended to guard against, the testament being the expression of the undoubted wishes of the testatrix, and inasmuch as the force of contemporaneous exposition embodied and continued in the practice of notaries down to the present time is in favour of the validity of such an execution—an exposition in itself reasonable and sound—and having regard to the principle of the comparatively recent decisions of the Canadian Courts in *Robitaille* v. *Bonneville*, their Lordships will humbly advise Her Majesty that the judgments appealed from ought to be affirmed, the validity of this testament pronounced for, and the costs of this appeal paid by the appellant.

Judgments affirmed.

Solicitors for the appellants, *Clarke, Son,* and *Rawlins.*

Solicitors for the respondent, *Bischoff, Cox,* and *Bompas.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Saturday, May 8.

(Before the LORDS JUSTICES.)

Re THE LONDON PERMANENT BENEFIT BUILDING SOCIETY.

Winding-up — Petition — Benefit society — Resolution ultra vires—Priority of rights—Acquiescence of petitioner.

F. in 1853 *paid up the full amount payable upon ten shares in the above-named society, and thereupon became a member of it. The rules provided that, any member not having received an advance might withdraw the balance to his credit on notice, but such withdrawal would be subject to his proportion of expenses and other deductions. In* 1854 *F., being entitled to do so, gave the notice, but the money was not repaid to him, and three years later a resolution was passed by the society which, in effect, left the losses to be exclusively borne by persons who were members antecedently to the resolution. The resolution was admitted to be bad, as being ultra vires of the society, but money was borrowed on the faith of it, and the claims of the lenders obtained, of course, a priority against the members. These claims were shown to exceed the value of the whole assets of the society. At the time F. was absent from England, but was aware of its position and proceedings, and twelve years after presented a winding-up petition:*

Held (affirming the decision of Malins, V.C.), that the petition must be dismissed, as F. had no such substantial interest in the society's assets as would entitle him to support it, and had acquiesced in the resolution complained of.

This was an appeal by Col. French, who had presented a petition for the winding-up by the court of the above-mentioned society, against an order of Malins, V.C. dismissing his petition with costs. The hearing before his Honour is reported 20 L. T. Rep. N. S. 388. That report contains a statement of all the necessary facts.

During the argument their Lordships offered to the petitioner a reference to chambers to inquire whether the sums advanced in consequence of the resolution were applied in satisfying debts, &c., of the society which were entitled to priority over the petitioner, but this offer was declined, and the arguments were continued.

Cole, Q. C. and *Miller* supported the appeal, and as to resolutions *ultra vires* referred to

Hutton v. *The Scarborough Cliff Hotel Company*, 2 Dr & Sm. 514; 12 L. T. Rep. N. S. 228; and on appeal *ib.* 289.

Cotton, Q. C. and *Hemings* for the society.

Glasse, Q. C. and *Macnaghten* for the creditors.

Lord Justice SELWYN said:—I think, Mr. Cotton, we ought not to call upon you in this case, as the reference which has been offered by the court to the petitioner has been declined, and I have no doubt very prudently declined, by his counsel.

It is clear upon the evidence, and it has been in truth admitted at the bar on the part of the petitioner, that, if the sums which were paid upon the faith of the resolution of 1857 are entitled to priority over the claim of the petitioner, the petitioner has no longer any substantial interest in the funds, estate, or property of the company. But on behalf

of the petitioner the validity of that resolution is disputed, and he contends that the resolution is entirely void; and this in truth is the substantial question existing between the petitioner and the respondent. Now, under these circumstances, although we have, as we have shown upon a very recent occasion, been willing to give full effect to the provisions of the Winding-up Act, and not to require the filing of a bill when the purposes of justice can be obtained by a less expensive proceeding under the powers of that Act: yet on the other other hand the court is bound to be cautious, and not allow the provisions of the Winding-up Act to be used for purposes other than those for which they were intended, nor to allow the extensive machinery of that Act to be put in motion, when other and more appropriate means of trying any particular question have been pointed out, and have been for a long time neglected by the petitioner for winding-up.

In the present case the position of the affairs of the company at the time when the present petitioner gave notice of withdrawal is very clearly stated in the affidavit of the secretary of the company. To that statement, I may observe, no substantial contradiction has been given in any affidavit filed on the part of the petitioner. But, considering the *primâ facie* right originally which the petitioner who paid this sum of 400*l.* had to the repayment of that money, and upon the statements made on this application to have a winding-up order, we thought it right to make an offer of reference; but that offer having been declined, we must, in the absence of any substantial contradiction, take the statements in the affidavit of the secretary of the company to be conclusively established.

The short result of that statement is this—this society had been started with very insufficient funds. They had incurred very considerable expense and debts, as anyone engaged in building speculations must do. Having been obliged to borrow considerable sums of money, those sums of money so borrowed were charges antecedent to the claims of any shareholder of the company, and, of course, the petitioner could not, by merely giving notice of withdrawal, obtain any priority as against those charges.

The affidavit further proves that, if at that time the company had been wound-up and the whole of the property disposed of, it would have been insufficient to discharge those prior claims; and consequently the petitioner, even assuming that he would be entitled to make this harsh claim because he gave the first notice, and that thereupon the company would be wound-up, and that he would be entitled to be paid in full his claim in priority to that of any other shareholder, would have obtained nothing. Assuming that he could have established the harsh claim, it would have no avail against the rights of the creditors; and consequently, upon the facts stated in the secretary's affidavit, he would have received nothing. He, therefore, very prudently abstained from taking any proceedings to enforce his claim, which would have resulted in his obtaining nothing.

Shortly afterwards he goes to India, but it appears that, although in India, his brother, who was trustee according to one of the letters, seems to have assumed the position of a director of the company; but whether he was or was not a director, he certainly was a trustee. In addition to that, he appears to have acted through another gentleman who was a stockbroker, and who appears to have been in constant communication with the officers of the company, and to have received certain letters and communications from them, none of which have been produced.

Under these circumstances, although of course due allowance ought to be made for a gentleman absent from this country engaged in the service of the country in a military capacity, still I think we cannot treat him as being altogether ignorant of the proceedings of the company.

That being the state of things, and it being obvious that if the affairs of the company had been wound-up no one would have received anything, as the amount would have been insufficient to pay the creditors, the reasonable course was taken of obtaining an advance of money, which could only be obtained on the condition of allowing the persons who advanced the money the right to stand in the shoes and on the footing of the creditors whose claims were paid off.

The substantial claim on the part of the present petitioner is that he is to have a winding-up order, the sole purpose and object of which is to have it decided that he is to be entitled to a priority over those persons who have advanced the money to pay off the creditors. In my judgment he has no right whatever to any priority. I think he must be taken to have lain by with some knowledge or means of knowledge of what was going on, and that he wisely and purposely abstained from insisting on his strict right, viz., the realisation within a short time after the making of his claim of all the property and effects of the company, that he lay by and acquiesced in matters being carried on in the only way in which they could be carried on, viz., by means of money obtained by the resolution, such money being applied in discharge of claims entitled to priority over those of the members or shareholders. If he had wished to run the risk of raising the question, he should have availed himself of an opportunity of raising it before. As Mr. Cole says, there are considerable difficulties, notwithstanding the rule now established, in the way of a person coming to ask for the dissolution of a partnership consisting of a great number of members. On the other hand the practice is well established that where, in pursuance of an invalid resolution, the directors or governing body of a partnership or society are making payments which are proved to be illegal and only justifiable by that void resolution, it is competent for any shareholder, either on his own behalf or on behalf of others who are prejudiced, to bring the company and the managing body before the court, and to ask for an injunction to restrain them from making any such payments.

That course was open to the petitioner during the whole time this was going on, but he did not avail himself of it. It appears to me that this is an attempt to put the court in motion by means of the extensive machinery of the Winding-up Act, without the risk to which he would be exposed if he came himself in person to try the question. Of course all the observations made with respect to acquiescence and laches would be applicable against him in addition to the risk he would have to run in raising the question at law. I think, therefore, this is an attempt to obtain a winding-up order at the instance of a person who has no substantial interest in a winding-up order being made at all. The matter is now before us for the purpose of trying the question, and, as far as we are now competent to decide it, we decide it against him. As far as the facts are concerned, he has had an opportunity of answering them by means of affidavit, of which he has not availed himself. And he has had a further opportunity of an inquiry which his counsel have prudently declined. Under these circumstances I think the only course will be to affirm the order of the Vice-Chancellor, and to dismiss this appeal petition with costs.

Lord Justice GIFFARD said:—The order on this petition will contain this recital, and be to this

effect, viz., that "The court having offered the petitioner an inquiry to ascertain whether the sums referred to in the affidavit of the secretary as having been advanced on the faith of the resolution of 1857 were applied to any, and if to any to what, extent in discharge of the debts or liabilities having priority to the petitioner's claim, and that offer having been refused, the appeal be dismissed with costs."

That having been refused, the secretary's affidavit must be taken as accurate, and that being so the case stands in this way. The plaintiff some years ago gave notice to withdraw, and thereupon he was entitled to claim 400*l.* from this company; but it was a claim which was subject to the then external debts of the company. In that state of things in the year 1857 a committee is appointed. The committee make a report, and that report is confirmed and converted into a resolution of the company. One paragraph of that report is this: "Your committee most decidedly feel that all subscriptions on unadvanced shares subsequent to the third annual meeting being subscribed for the special purpose of rescuing the society from a position of total insolvency, should be exempted from participation in any losses which may ultimately arise in the realisation of the assets then held by the society, leaving such losses to fall solely upon the balances due to the shareholders on June 30th 1856, in rateable proportion to the amounts thereof."

Well that was acted upon, and we must now take it that, as the offer we made has been refused, the money so advanced was actually applied in payment of debts, which debts had priority, and have priority to the plaintiff's claim.

Well, then, throwing aside technicalities, I do not think it at all necessary to look at what the effect of not registering a resolution may be, or whether the resolution is or is not *ultra vires*. What the transaction was is a very simple one. Here you have a society, no one member of which can be compelled to advance or to pay a single sixpence; here you have the society in an insolvent state; you have debts which have priority over the payments, and you have the members and the society agreeing together, and saying, "We will voluntarily advance moneys for the purpose of paying the debts which have priority over the plaintiff's claim, provided we can stand in the shoes of those creditors who have that priority." They acted upon the faith of that, and, although I do not think it the least material whether the petitioner had or had not knowledge, I certainly must say that I have on the statement before us the clearest possible opinion that he had knowledge, and I do not hesitate to say that, if we either gave him priority, or put him on the same footing as those that had advanced the money, we should be doing a gross injustice, and I am happy to say there is no rule of law which at all compels us to do anything of the kind.

I am of opinion, therefore, that the petitioner really and truly has no *locus standi*, because it was admitted, that if those persons have priority there can be nothing coming to the petitioner by any possibility. That being so, the petition was improperly presented, and the appeal must be dismissed with costs in the usual way.

Solicitors: *Lanfear* and *Stewart; Shaw* and *Fraser.*

Friday, May 28.

(Before the LORDS JUSTICES.)

Re CHARLES LAFFITTE AND CO. (LIMITED); DE ROSAZ'S CASE.

Contributory—Notice of allotment—Authority to agent—Ratification of acts done.

De R. having applied for shares in the above named company, wrote to the company requesting that the letter of allotment might be handed to H., who was one of the promoters of the company. Shortly after the shares were allotted to De R., and on H.'s applying for the allotment, a bundle which contained numerous letters of allotment was handed to him. It was disputed whether the allotment to De R. was amongst these, but it was proved that when H. received the bundle, De R.'s letter to the company had not been posted, but it was afterwards sent by De R. to H., and by him produced to the company. De R. never paid anything in respect of the shares, but his name having been inserted by the liquidator in the list of contributories, it was removed by the Master of the Rolls.

Held, that the letter, though not in H.'s hands when he received the allotment, was a ratification of what he did, and the evidence showing that the allotment letter of De R.'s shares was in the bundle handed to H., De R. had notice of the allotment, and must be settled on the list.

This was an appeal by the official liquidator of the above-named company, which is now being wound-up in the chambers of the Master of the Rolls, against a decision of his Lordship removing from the list of contributories the name of the respondent, the Chevalier De Rosaz, as the holder of 500 shares.

The hearing at the Rolls is reported in 20 L. T. Rep. N. S. 348, where all the circumstances are sufficiently stated. It should, however, be mentioned that, whereas Mr. Hillel received the letter of allotment of the shares on the 23rd Dec. 1865, the letter of Mr. De Rosaz authorising him to do so, which was dated on the 20th, was not posted until the 8th Jan. 1866.

Jessel, Q. C., and *Waller* supported the appeal.

Swanston, Q. C., and *Higgins* argued the case for the respondent.

The authorities cited were:

Gunn's Case, Re The Universal Banking Corporation, L. Rep. 3 Ch. App. 40; 17 L.T. Rep. N. S. 365;
Levita's Case, L. Rep. 3 Ch. App. 36; 17 L. T. Rep. N. S. 337;
Cookney's Case, 3 De G. and J. 170;
Re The Anglo-Danish, &c., Steam Navigation Company, Sahlgreen and Carrall's Case, L. Rep. 3 Ch. App. 323;
Fletcher's Case, 17 L. T. Rep. N. S. 136.

Lord Justice SELWYN said: Mr. Jessel, I think we ought not to call upon you to reply in this case. In the first place the application for shares on the part of Mr. De Rosaz is proved, and it is, in fact, admitted by himself in his own affidavit that he applied for the shares. I think the allotment of shares is also conclusively proved. The allotment appears in the allotment book of the company; but what goes much further than that is, that the transaction relating to the allotment of these shares, which form part of the total of 10,000 shares, distinctly appears not only from the document which has been produced from the books of the company and referred to in Mr. De Rosaz's affidavit, but from the whole series of transactions. It was certainly a singular, and to some extent an irregular transaction but I think the present respondent cannot be heard to complain of it when he was a party to the trans-

action, when he allows his name to be made use of by Hillel, and was held out to the world as being one of the shareholders in the company; and without paying any sum of money, he was to have the advantage of the chance of a rise in the price of the shares and to receive some compensation from the promoter. A person who does so cannot be heard to complain of the irregularity of the transaction. The transaction is a very simple one. He applies for the shares; the shares are allotted to him, and at or about the same time—I think nine days after the application, which was on the 11th Dec., on the 20th Dec.—he writes a letter in which he says: "I have applied for 500 shares in your company, I have to request you to hand the letter of allotment of same to Mr. Jules Hillel." That he signs. It is true that is not posted until the 8th Jan., but, provided it is received by Mr. Hillel, it is, of course, an authority to him to do what is expressed in that letter. The allotment takes place on the 22nd, and on the 23rd Mr. Hillel, who, no doubt, had suggested this letter and many other letters, comes, and being the agent who was to pay for getting subscriptions to the amount of 10,000 shares, asks for the letters of allotment, and he is, of course, met with the very patent objection that he has not got the authority of the allottees to receive their letters of allotment; but he says "I have the authority of a great many of them, and the others I will produce at a subsequent time;" and upon the faith of the letters of allotment which he then produced, and upon his promise, which was subsequently performed, to produce the rest, he receives a bundle of letters. I think if, after he receives from this very person a letter, and does, in pursuance of that promise, deliver that letter to the secretary of the company, it is perfectly inmaterial whether that letter was posted on the 8th Jan. But so far as the person who wrote the letter put himself in Mr. Hillel's hands, he is in the same position, having ratified what was done, as if it had been posted on the day on which it was written, and been received in London on the same day. Then if that be so, there is due communication of this allotment to the person authorised to receive it, provided only that the letter of allotment was included in that bundle which is the only question that remains. After that the whole transaction goes on entirely in accordance with the arrangement entered into between the parties. It is true, as Mr. Swanston said, that Mr. De Rosaz was not in the position which is ordinarily filled by a person who has applied for shares, and who has received an allotment of these shares; but he was not in that position because he himself had omitted the very essential part of the duty of a person applying for shares, namely, payment on the same day in respect of the deposit and allotment, amounting to 5*l.* a share. He would have been bound to pay, if he had been an ordinary shareholder, 2500*l.*; but the arrangement was that another person was to pay that for him. He is a creditor for that 2500*l.* in the books of the company, as if it had been paid by himself; and on the other hand, in the account with the company Mr. Lafflitte is debited and the company is credited with the sum of 2500*l.*, that being in exact accordance with the original arrangement. The question, therefore, is narrowed to the simple question of fact, whether this letter of allotment was included in the bundle, which was delivered on the 23rd Dec. to Mr. Hillel, who was authorised to receive the letter.

In the first place we have the affidavit of Mr. Read, who states positively that it was included and that it was delivered, and this is entirely in accordance with all the probabilities of the case, seeing that the transaction was in every other respect acted upon and carried into execution exactly in accordance with the arrangement, as to which there is no dispute; and it would be a very singular thing if by any accident this particular letter had been omitted from that bundle. Mr. Read positively swears that it was included, although it is true that Mr. Hillel has made a subsequent affidavit in which he has denied that it was there. Then we have next in order of date the deposition of Mr. Bate, which is not contradicted at all. It has been argued before us that that deposition of Mr. Bate does not state positively the delivery of the letter. What he says is this, "I remember Mr. Hillel coming to the office of the company and asking Mr. Read for some letters of allotment. They were letters of allotment of 10,000 shares to gentlemen whose names Mr. Hillel had previously handed in as applicants for shares." Now there were not two such sets of 10,000 shares, and this is a distinct allegation that there was an application for the letters of allotment for 10,000 shares, which, according to the uncontradicted evidence, included the shares of De Rosaz. Then Mr. Bate goes on to say, "This happened shortly after the allotment of shares had been made. Mr. Hillel handed to Mr. Read, or undertook to procure, letters in a certain form signed by all the applicants, requesting that the letters of allotment should be handed to Mr. Hillel for them. I saw Mr. Read hand the letters of allotment to Mr. Hillel." In the absence of all suggestion that there were other letters of allotment to which that evidence could apply, and when it is joined with the established fact that Mr. De Rosaz's shares constituted a portion of the 10,000 shares which are referred to in the previous part of the deposition, in my judgment it is a clear statement that Mr. De Rosaz's letter of allotment was included in the letters of allotment which Mr. Bate says he saw Read hand over to Mr. Hillel. I think, therefore, that we have all the probabilities of the case, we have the acts of the parties, and we have, supposing there to be a conflict of evidence, the evidence of two disinterested witnesses as against the evidence of Mr. Hillel, with this additional observation that one of the witnesses makes his depositions after the date of Mr. Hillel's depositions, and he is not met, as I have already said, with any subsequent denial. Therefore I think that Mr. De Rosaz, who has applied for the shares under the circumstances I have mentioned, and given the authority which I hold in my hand to Mr. Hillel, cannot now be heard to dispute the necessary consequences of his own act, and I think, therefore, that he ought to have been included in the list of contributories; and as it appears by the order that the application made at the Rolls was an application made by him, and it was, I presume, an application to remove his name from the list of contributories, that application ought to have been refused with costs. I think there should be no costs of the appeal, excepting that the official liquidator will have his costs out of the estate.

Lord Justice GIFFARD said:—This appears to me to be a very plain case. Hillel was the promoter of this company. and Mr. Charles Lafflitte was to receive from the company a very large sum of money—I believe 150,000*l.* In the course of the formation of the company 10,000 shares were to be allotted, in respect of which Charles Lafflitte arranged to pay 5*l.* per share, and Mr. Hillel was employed for the purpose of obtaining applications for allotment, and the letters of allotment were, in fact, to be held until the parties who made the applications themselves paid the 5*l.* a share, which 5*l.* a share was, in the first instance, to be paid by Mr. Hillel. The letters of application were, beyond all question, sent in to the company, and amongst others was a letter of application from Mr. De Rosaz. Upon that there is no dispute whatever. It is plain upon the

evidence that there was as a matter of fact an allotment. There is the allotment book, and, no doubt, there was an allotment upon the footing of those applications. But then it is said that there was no notice to Mr. De Rosaz of the allotment having been made. Whether there was notice given to him, or to his agent, comes to the same thing. The Master of the Rolls, at the hearing before him, does not at all appear to have disbelieved either Mr. Bate or Mr. Read, nor is there any ground for his doing so. Taking their evidence, what the matter amounts to is this—there having been this allotment which must be taken to have been known beyond all question to Mr. Hillel, Mr. Hillel goes and asks for the letters of allotment, and there is handed to Mr. Hillel a bundle which, he is told, contains the letters of allotment, and they are handed back in a box to which he has access. Whether the letter was there or not, I do not think material—upon the evidence I infer beyond all doubt that it was; but whether it was there or not would not be in the slightest degree material, because that very transaction told Mr. Hillel in plain terms that the allotment had been made, and it was represented to him that the bundle delivered to him was the letters of allotment. I think also that this amounts to quite a sufficient delivery of the letters of allotment, and again I say that it is not material whether the letter of allotment was there or not. Then we go beyond that, because Charles Laffitte having this interest in the matter, the company owing him 150,000*l.*, he is debited with 5*l.* a share upon the 10,000 shares, and the company is credited with that amount.

The only other point urged was this—that Mr. De Rosaz's letter, giving the authority, was not posted till the 8th Jan. Whether it was posted before or after the transaction is not in the slightest degree material, and I have no doubt that there was plenty of authority as appears by the letter, but whether there was or not that letter was written to Mr. Hillel after the transaction; of course it ratified everything that had taken place before, and Mr. De Rosaz must be bound by it.

I am clearly of opinion that he contracted to take these shares, and therefore his application to have his name taken from the list should have been refused, and refused with costs. His name will now be inserted on the list of contributories for 500 shares.

Solicitors: *Stevens* and *Rawlinson*; *Abrahams* and *De Roffey*.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-L

June 1, 3, *and* 7.

Re BLAKELY ORDNANCE COMPANY; *Ex parte* THE METROPOLITAN AND PROVINCIAL BANK.

Company—Winding-up—Debentures payable to bearer—Claim by creditor to prove on collateral security.

A company gave to a bank, as a collateral security for a debt, certain debentures containing a covenant to pay to C., his executors, administrators, or assigns, or to the bearer thereof, the sums therein mentioned. The debentures had been made out in the name of C. with the view to a transaction between him and the company, which went off. These debentures were then handed over to the bank, but were not formally assigned:

Held, first, that the bank, being merely holders and not assignees of the debentures, took them irrespective of any equities existing between C. and the company.

Secondly, that the bank were not entitled to prove on the debentures, as they had already proved for the full amount of the debt owing to them.

Re Barned's Banking Company—Kellock's case, 18 *L. T. Rep. N. S.* 671; *L. Rep.* 3 *Ch. App.* 769, *distinguished.*

This was an application by the Metropolitan and Provincial Bank for liberty to prove under the winding-up of the above company upon thirty-two debentures of 250*l.* each. issued to them by the company, as well as upon the acceptances of the company for 4000*l.*, which was the entire amount due to the bank.

The company being in the early part of the year 1866 indebted to the bank in the sum of 9000*l.*, an arrangement was made by which all but 4000*l.* was paid off, and it was agreed that bills for the 4000*l.* should be renewed, and that thirty-two debentures of the company for 250*l.* each should be given to the bank as a collateral security for the debt.

These debentures were part of a number which had been made out in the name of a Mr. Challis, the manager of the Albion Bank, for the purpose of carrying out an arrangement between the company and the Albion Bank, which arrangement had gone off.

By each of these debentures the company covenanted to pay to Challis, his executors, administrators, or assigns, or to the bearer thereof, the sum of 250*l.*; and also to pay to the bearer of every coupon thereto annexed the sum of money in such coupon mentioned. And it was thereby provided that the bearer of the debenture, and every bearer of any of the coupons thereto annexed, should have power to give receipts for the money which was intended to be secured by the instrument of which he should so be the bearer, although he might not be the owner, or the sole or absolute owner thereof, and that the company or persons paying the same should not be bound to inquire into the title of the bearer, or be bound to take any notice of any trust affecting such money, or be affected by express notice of any equity which might then be subsisting in relation to the title of such bearer, or to such instrument as aforesaid, or to the money intended to be thereby secured.

The transaction with the Albion Bank having gone off, these debentures were handed over to the Metropolitan and Provincial Bank as a collateral security for the amount due to them, on the occasion of their renewing the bills for 4000*l.* The bank had been admitted to prove upon the bills for 4000*l.*, and they then carried in their claim to prove upon the debentures; their claim was disallowed by the chief clerk, who adjourned the case into court at the request of the bank.

Southgate, Q. C. and *R. E. Turner*, for the bank, submitted that they were entitled to prove on the debentures in their own name without being subject to any equities existing between Challis and the company. They cited—

Re Blakely Ordnance Company, ex parte New Zealand Banking Corporation, 18 L. T. Rep. N. S. 132; L. Rep. 3 Ch. App. 154;
Dickson v. *Swansea Vale Railway Company*, 19 L. T. Rep. N. S. 346; L. Rep. 4 Q. B, 44.

Sir *Richard Baggallay*, Q. C. and *J. Napier Higgins*, for the official liquidator, contended that the bank could only prove once for the amount of their debt, and not on the debentures as well as on the bills; and that even assuming that they could prove on the debentures they could only do so subject to the equities between Challis and the company. They cited—

Re Natal Investment Company; Claim of the Financial Corporation, 18 L. T. Rep. N. S. 171; L. Rep. 3 Ch. App. 355.

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June 7.—Lord ROMILLY.—I think in this case that the bank was only entitled to prove for 4000*l.*, the amount due to them. Upon the first opening I thought this was a case where the question arose, whether the bank took the debentures, subject to any equities, which might exist between the company and Mr. Challis, in whose name the debentures were issued; but, on further investigation of the facts, I am of opinion that no question arises here upon that part of the case. In my opinion they are not assignees of the debentures at all. I will assume, for the purpose of this argument, that any assignees of the debentures from Challis would take subject to the equities of the bank. In my opinion, in this case they are not assignees of any *chose in action* at all; they are the holders of a *chose in action*, but they are not the assignees of it. I mean the original holders; that is of course, as between the man who gives the right and the person who holds the *chose in action*, whether it is a debenture or whether it is a bill of exchange. There is no question that that is subject to all the equities between the person who gave it and the person who holds it. Then the question arises when he is not the person to whom the *chose in action* is originally given, but the person to whom it is assigned, whether he does not take the *chose in action* subject to the equities between the first two persons. The thing is very obvious and clear; in the one case there are three persons, and in the other only two. If A. gives a bill of exchange to B., of course that is subject to all the equities between A. and B.; but if A. gives a bill of exchange to B., who assigns it for value, without notice, to C., then C. holds it subject to all equities, not between him and A., which would otherwise be so, but between A. and B. That case does not arise here. I thought at first that was a question which would have to be determined in this instance; but it is not so at all. Then the next question is this, whether the bank can prove for anything more than 4000*l.*? Now I understand the facts of the case to be these: [His Lordship stated the facts of the case, and continned.] Having stated my opinion that there is no equity between them, the next question is whether this was a *bonâ fide* issue of these debentures? I have no doubt it was a perfectly *bonâ fide* issue of debentures. They were issued by Captain Blakely, and they were given to Captain Blakely by the company for the purpose of being issued to Mr. Challis upon a transaction which went off. That transaction having gone off, he issued these debentnres as perfectly good and *bonâ fide* debentures to the Metropolitan and Provincial Bank. That is a perfectly good and perfectly proper transaction; and it does not lie in the mouth of the Bank to say that Captain Blakely had no authority to deliver them over to the Metropolitan and Provincial Bank. On the contrary it is quite clear that, as he did not commit a fraud, as he did not issue them for any benefit of his own, but issued them only as a consideration for having the 4000*l.* bills renewed, the transaction was a perfectly good and valid one. Now certainly up to that point all the observations I have made are in favour of the Metropolitan and Provincial Bank, but after that the case, I think, entirely fails as to them. Then the question comes to this—does this case come within, what I may for shortness call, *Kellock's* case (*sup.*)? I am of opinion that it does not. I will give two or three instances to show what my meaning is. For instance, the company owes the bank 4000*l.*, for which they give a bill and they execute a mortgage upon Whiteacre. There *Kellock's* case applies. The bank may enforce the mortgage upon Whiteacre and prove for the whole amount of the debt. Again, if the company owe 4000*l* and pledge 100 bales of cotton, then *Kellock's* case applies; the bank may sell the cotton for what it is worth and prove for the whole debt. I will go a step further. I will assume that they have got thirty two debentures of 250*l* each in Company X., and that they pledge those. Then *Kellock's* case applies again. The bank may realise those debentures against Company X., and prove for the whole of their debt. But the present case is quite different. Suppose that, in addition to the promissory notes for 4000*l.* they give two other promissory notes for a similar amount, then *Kellock's* case does not apply at all. Supposing that, in addition to that, they give a covenant that they will pay the debt, then *Kellock's* case has no application whatever. Supposing they issue debentures, if there was in addition to that, a covenant to secure the debt, then *Kellock's* case has no application at all. It is only one debt secured in various modes against themselves, and that distinction is perfectly plain as it appears to me. In every one of the cases which I have last put, you must prove against the company itself; whether it is on the bill, or on the debenture, or on the covenant, you must prove, and you can only prove, for the amount that is due; but in the other cases where there is a mortgage, where there is a pledge of cotton, or a pledge of debentures belonging to another society, they have nothing to do with the proof against the company which you are seeking to establish. Those things are to be realised, you may get the full amount for them, and there you may prove for the full amount of the debt. In the present case you can only prove for the amount of the debt. Then it was very ingeniously suggested by Mr. Higgins in his argument, that they might sell the debentures; but the person to whom the debentures are sold and transferred, stands in no better position than the person who transfers them in respect of that particular debt. You cannot by selling or transferring these debentures to ten persons multiply the proof ten times over. You can only prove once for the debt. Therefore, in my opinion, *Kellock's* case does not apply to this case. In other respects I think they are in the right, but that they can only prove for the 4000*l.* Accordingly I will answer the summons in that form. I will not make the bank pay any costs, but I do not think I can give them any costs; the official liquidator will have his costs out of the estate.

Solicitors for the bank, *Davidson, Carr*, and *Bannister*.

Solicitors for the official liquidator, *Lewis, Munns, Nunn*, and *Longden*.

Feb. 18 *and* 19.

THE MADRID BANK (LIMITED) *v.* PELLY.

Company—Directors—Promoters—Promotion money—Payment by promoters to directors—Costs.

A limited company was incorporated in 1868 *for the purpose of establishing an international bank under a concession to be obtained from a foreign Government. The nominal capital of the company was* 1,200,000*l.* *in* 60,000 *shares, of which the first issue was to be* 30,000*l.* *It was provided by the articles of association that as soon as the allotment of shares under the first issue should take place, the directors should pay* 10,000*l.* *to the promoters. Before the concession was obtained so as to place the company in a position to begin business, and when only about* 5000 *shares had been subscribed for, the directors allotted the shares, and paid* 5000*l.* *to the promoters, who on the same day paid* 500*l.* *apiece to four of the directors. This payment to the promoters almost exhausted the funds of the company, and it was soon afterwards ordered to be wound-up.*

On a bill by the company and its official liquidato

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against the directors to render them liable for a breach of trust in thus misapplying the moneys of the company and to compel repayment thereof:

Held, that no decree could be made as to the 5000l., as the persons who had received the money had not been made parties to the suit, but that each of the directors must refund to the company the 500l. received by him from the promoters:

Held also, that, when costs are given against a company in the process of winding-up, they are to be paid by the liquidator out of the assets, and are not to be proved for.

This was a suit instituted with the sanction of the court by the Madrid Bank and its official liquidator against all the former directors of the bank, praying that it might be declared that a certain payment of 7000l. to the promoters was a breach of trust on the part of the defendants and a misapplication of the moneys of the bank, and that the defendants were liable to make good the same; and also that in any event it might be declared that the receipt of 500l. apiece by Pelly, Chapman, Daniell, and Turck, four of the directors, from the promoters, was a breach of trust on the part of the four directors and a misapplication of the moneys of the bank, and that they might be ordered to repay the same.

The Madrid Bank, Limited, was on the 13th May 1863, incorporated as a company limited by shares under the provisions of the Companies Act 1862. The nominal capital of the bank was 1,200,000l. divided into 60,000 shares of 20l. each, with power to increase. According to the prospectus, the first issue was to be 30,000 shares; 1l. per share was to be paid on application, and 1l. per share on allotment. The first call was to be 3l. per share, and it was not proposed to call up more than 10l. per share.

By the memorandum of association the objects for which the bank was established were stated to be the transacting of every kind of banking business in London, and by means of banks, branch banks or agencies, at other places in the United Kingdom and in Spain and its colonies and dependencies, and elsewhere.

By the articles of association, it was provided that Messrs. Daniell, Chapman, Turck, Dumas, Pelly, and Venning should be the first directors of the company; that George Williams, of Madrid, one of the promoters of the company, should be the first director general of the company at Madrid; that the directors should be at liberty to commence the business of the company as soon as they should see fit, notwithstanding the whole capital might not have been then subscribed for or taken; and that in consideration of the great labour, expenses, and risk which the promoters had incurred and been put to in and relating to the promotion and formation of the company, and in registering the memorandum and articles of association, and otherwise in forming and bringing the company into operation in Spain as well as in England, the directors should, when and as soon as the allotment of shares under the first issue should take place, pay to the promoters the sum of 10,000l. in full of all charges of whatever description incurred by the promoters, either on their own behalf or on behalf of the company prior to the day on which such allotment of shares should be made.

At a meeting of the board of directors, held on the 29th June 1863, it was resolved that an allotment of shares should be immediately made. The total number of shares which had at that time been subscribed for in England did not exceed 5000l. of which 1000l. were subscribed for by the directors, each of whom, except Dumas, subscribed for 200 shares, and only 5876l. stood to the credit of the company at their bankers. The directors had been informed that about 15,000 shares had been subscribed for in Spain, and that 12,600l. must be deposited as caution money, to obtain a concession from the Spanish Government to carry on the bank at Madrid, for which concession they had applied.

At a meeting of the board of directors, held on the 6th July 1863, at which all the directors, except Dumas, were present, it was resolved that the sum of 5000l. should be paid to the promoters of the bank on account of the promotion money; and the payment was accordingly made on that day. On the same day the promoters paid 500l. a piece to Pelly, Chapman, Daniel, and Turck, without the knowledge of the two other directors, Venning and Dumas.

On the 20th June 1864, a resolution was passed at a meeting of the board of directors, at which all the directors, except Dumas, were present, that a further sum of 2000l. should be paid to the promoters on account of the promotion money, and the same was accordingly paid.

No shares had in fact been subscribed for in Spain, and the total number of shares allotted at any time did not exceed 5319. A concession was obtained from the Spanish Government in April 1864, but the bank transacted little or no business, and, on the 18th March 1865, an order was made for its compulsory winding-up.

In the course of the winding-up the promoters sent in their claim against the bank for the sum of 3000l., being the balance remaining unpaid of the 10,000l. promotion money mentioned in the articles of association, but this claim was disallowed by the Master of the Rolls: (See *Re Madrid Bank, ex parte Williams*, 14 L. T. Rep. N. S. 456; L. Rep. 2 Eq. 216.) In support of that claim J. E. Williams, one of the promoters, deposed that the sum of 500l. was paid to the directors under an agreement previously entered into between the promoters and the four directors; that the money paid by these directors in respect of the shares which they should apply for should be returned to them. This was made evidence in the present suit.

Pelly, Chapman, and Turck, in their answers, stated that after the allotment of shares the promoters presented each of them with a sum of 500l. as a spontaneous gift, but not in pursuance of any previous arrangement or agreement.

The defendant Daniell, being out of the jurisdiction of the court, had not been served.

Roxburgh, Q.C., and *Edmund James*, for the plaintiffs, submitted that the directors, being trustees for the shareholders, were liable to refund the moneys of their *cestuis que trust*, which they had improperly paid to the promoters. They cited

Turquand v. *Marshall*, 18 L. T. Rep. N. S. 385; L. Rep. 6 Eq. 112; on appeal, 20 L. T. Rep. N. S. 766; L. Rep. 4 Ch. App. 376.

They submitted that it was at any rate clear that the directors must refund the money which they had received from the promoters. It was settled that when a director shares with a stranger the benefit of a bargain made between the stranger and the company, the director's share of the benefit belongs to the company. They cited

Re The Brighton Brewery Company, Hunt's case, 37 L. J. 278 Ch.

Sir *Richard Baggallay*, Q.C., and *Eddis*, for Pelly and Chapman, contended that the whole transaction had been *bonâ fide*; that there was no evidence that the money had been paid in pursuance of any previous arrangement; and that the company had no right to what had been given gratuitously to the directors by the promoters.

Southgate, Q.C., and *Renshaw*, appeared for Venning.

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J. Napier Higgins, for Dumas.

Turck did not appear.

Lord ROMILLY intimated that he would not make any decree as to the 5000*l* and 2000*l* in the present suit, as the promoters who received these sums were not parties to the suit; that he thought the bill must be dismissed with costs against Venning and Dumas; and as to the other defendants he would read the evidence and dispose of the case on the following day.

Feb. 19.—Lord ROMILLY.—I shall not trouble you in this case, Mr. Roxburgh, because what I said on the former occasion, when this matter was before me, applies entirely to the present case. The case is as distinct, in my opinion, as it can possibly be. The facts of the case, which are not denied, are these;—that there was 10,000*l.* to be paid to the promoters; it was well known that this 10,000*l.* was to be paid to the promoters as soon as the allotment of shares was made, and the allotment of shares was to be made when they were in a situation to carry on the business. Therefore, three things were necessary. It was necessary that they should be in a situation to open the bank and carry on the business; that they should also thereupon allot shares; and thereupon that they should pay the promotion money, or the money to the promoters. Well, what takes place is this; they do not get the concession from Spain. It is essential to observe that the very essence of the company was to make it a bank having connection with Spain—a bank which should be a Spanish and English bank, carrying on business at Madrid and London. Their object was not to form another mere joint-stock bank in London, and they did not get the Spanish concession until, I think, the month of April 1864. In the month of July 1863, nine months before that, as soon as they get a little money, they determine to allot shares when they have only got in round numbers 5000 shares taken; when they have got 5000 shares and very little more, they give 5000*l.* to the promoters at once. Well, that seems to be a very strange proceeding, and one that requires to be looked into, that they should begin business before they had got the concession from Spain, and before, in point of fact, they had got capital enough to carry on the business. It is true that they could acquire fresh capital by making fresh calls, but it is exceedingly unpopular to do so in the case of a bank; it does not answer with a bank. The object is to carry it on with as small an expense as possible. They make this payment to the promoters. Well, what takes place is this; out of the sum so paid, the promoters pay 500*l.* to each of the four directors, who ordered the payment to be made. That takes place forthwith. Well, it is very properly admitted by Sir Richard Baggallay and Mr. Eddis that if the promotion money was paid for the purpose or with the knowledge, or under an express agreement that this payment should be made to the directors, it is a transaction which cannot be supported. They cannot properly pay money to the directors in order that they may have 500*l.* a piece. They state in their answers that this was, in fact, mere bounty, unexpected bounty, on the part of the promoters, who out of pure gratitude and good-will gave them this large sum of 500*l.* a piece. Well, really the thing is disposed of by the deposition of Mr. Williams, who expressly states that it was expressly agreed to. (His Lordship here read Mr. Williams' deposition.) That is expressly stated by him. He says that he made the arrangement, and accordingly it was actually done. Well, the real fact is that the combination, and the simultaneousness of the transaction, is evidence that the whole matter was one transaction between them. If it were perfectly true that no arrangement was made at all, but that it was out of mere bounty and goodwill that the promoters thought fit to do this, then the answer of the directors should have been, "Why, the mere fact that we are directors, and that you could not have obtained the money except by our order, makes it impossible for us to receive anything, or for you to give anything." No absence of agreement or the like will justify such a transaction as that, where there is that particular species of relation between the parties. In point of fact it is impossible to suppose that the promoters would involuntarily and willingly have paid out of their own money 500*l.* a piece to four gentlemen whom they knew very little about, except that they were directors of this company, and with whom they had no particular reason to be friendly, except for the advantage they had done them in making this payment to them. Then we find that this payment is made to them at a time when the company was not in a situation to carry on business, when it really was not in a situation to do more than just to pay the preliminary expenses for the purpose of carrying the matter into operation. Then this money is paid, and they receive this 500*l.* apiece without any knowledge of it being imparted to the rest of the shareholders of the company. I am of opinion that the present case is governed by what I stated, in fact, on the former occasion with respect to the resisting the claim of the promoters to get the 3000*l.* This case is also governed by what I did in the case of the *Brighton Brewery Company* (*sup.*), which is exactly similar to this. This is, in point of fact, dividing money which was properly the money of the shareholders and not the money of the promoters at all. If the promoters thought fit to take 3000*l.* instead of 5000*l.*, or, in fact, to take 7000*l* instead of 10,000*l.*, or 8000*l.* instead of 10,000*l.*, that was a matter of which the shareholders must have the advantage, and the advantage cannot go to those directors who thought fit to take it, and in respect to whom it is obvious that nobody can doubt but that the leading motive for the rapid allotment of shares and payment of the promotion money was the repayment of this sum to them. Now, I fully admit the argument that they did not enter into the transaction with the bank for the purpose of obtaining this 500*l.*; that they did not take 200 shares each and incur this liability for the purpose of getting 500*l.* No doubt they entered into the transaction with the belief that it would succeed, but before they could ascertain whether it would succeed, before they could ascertain that it was on such a footing as to justify the payment, in order to obtain this 500*l.*, they pay the promotion money and they get 500*l.* apiece in return. If they had inquired a little more accurately into it, they would have found that all the communications from Madrid were perfectly fallacious; that there was not a single share taken at Madrid; that there was no likelihood of a single share being taken at Madrid, and that the whole idea and attempt to form a bank at Madrid would entirely fail. I am of opinion, therefore, that an order must be made that these three gentlemen pay 500*l.* apiece. I observe that you have not made the fourth a party, which is unfortunate. If you had made him a party you would have been entitled to have taken the bill *pro confesso*, and obtained it from him. As he is not a party, you cannot obtain any decree against him. The other three must pay 500*l.* apiece, and they must pay the costs of the suit. I am of opinion that the bill must be dismissed with costs against Mr. Dumas, Mr. Higgins's client, respecting whom I find nothing at all to affect him. He appears to me to have come out of the matter not only without any receipt of money, but without any taint of any description. I do not think there is anything to

affect his character in the slightest degree. The same observation applies to Mr. Venning, and the plaintiffs must pay his costs also; and I cannot allow them to add those costs to their own—they are separate and distinct. The other defendants must pay the costs of the suit, except so far as they have been augmented by making a case against Dumas and Venning.

J. Napier Higgins.—As to the payment of our costs, there is some question sometimes before the registrar as to whether costs given against a company in winding-up are to be paid by the liquidator out of the assets.

Lord ROMILLY.—He must pay the costs out of the assets. You have not to prove for the costs.

Solicitors for the plaintiffs, *Treherne* and *Wolferston.*

Solicitors for the defendants, Pelly, Chapman and Venning, *Flux*, *Argles*, and *Rawlins* for *J. J.* and *E. Venning*, Devonport.

Solicitors for the other defendants, *G. S.* and *H. Brandon*; *W.* and *H. P. Sharp.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Tuesday, May 4.

THE MID-WALES RAILWAY COMPANY *v.* THE CAMBRIAN RAILWAYS COMPANY.

Practice—Demurrer—Ouster of jurisdiction—Necessity for answer.

Three railway companies, under an Act of Parliament, being entitled to the joint use of a station, one of them, as it was alleged by one of the others, unfairly used the station to the detriment of such other company, who filed a bill to restrain the use of the station by the defendant company, except in accordance with the Act. A general demurrer was put in to this bill on the ground chiefly that a committee of the three companies was, under the Act, the proper tribunal.

Demurrer overruled.

This was a general demurrer for want of equity to a bill filed by the Mid-Wales Railway Company against the Cambrian Railway Company, for a declaration that the plaintiffs were entitled to equal traffic rights over the joint station at Llanidloes. The bill also prayed for an injunction to restrain the defendants, their agents and servants, from showing a preference in the enjoyment of the joint station and works to the traffic of the defendants over the traffic of the plaintiffs, so as to subject the plaintiffs or persons receiving or bringing goods over the plaintiff's line of railway, to any unnecessary delay, impediment, or disadvantage in that respect; or delay in the wharfage, certain matters excepted. And to restrain the defendants from making any arrangement or issuing such orders with reference to the management and enjoyment of the joint station or works as would subject the plaintiffs to prejudice or disadvantage, or create undue preference in favour of the defendants. The bill referred to an act giving the plaintiff and defendant companies, and the Milford Haven Company the joint use of the Llanidloes station, and the alleged unfair use by the defendants. The short ground of the demurrer was that the plaintiffs asked the court to undertake a duty when a machinery was pointed out by the legislature which appeared on the face of the bill, and which the bill did not state there had been any attempt to put in force.

W. W. Mackeson, Q.C. and *Fry* appeared in support of the demurrer, and insisted that it appeared upon the bill itself, that the proper tribunal to settle the disputed question was a committee jointly appointed by the three companies; and there was no statement that such a committee had ever been appointed. The same question would arise upon the motion, and the demurrer was the shorter and least expensive form:

The Shrewsbury and Birmingham Railway Company v. *The Stour Valley Railway Company*, 2 D. G. M. & G. 866.

The Shrewsbury and Chester Railway Company v. *The Chester and Holyhead Railway Company*, 14 L. T. N. S. 217 and 433.

In that case a joint committee had been appointed, but the ground of the bill was *ultra vires*, and the Lord Chancellor assumed that if the committee had had power, *cadet questio.*

Foss v. *Harbottle*, 2 Hare, 496.

Ernest v. *Weiss*, 11 W. R. 206,

where Vice-Chancellor Kindersley dismissed the bill without costs. There was no allegation that the other companies had been applied to to make bye-laws and refused; if there had been, the court would have had jurisdiction. A plaintiff was bound to show that he had done everything possible before he came into this court. If the act put in motion the Milford company, they should have been parties.

Osborne, Q.C., and *Dryden* for the plaintiffs were not called upon.

The VICE-CHANCELLOR.—The principles upon which injunctions are granted are well settled. I agree, if the case before the court is one in which no relief can possibly be obtained, the defendant is bound to demur, and if he omits to do so, as was the case in the *Barnsley case* (*sup.*) and *Ernest* v. *Weiss* (*sup.*), which, I suppose, was a clear one, the court refused the costs to those who ought to have demurred, but evidence was gone into. Apply that principle here: I must be satisfied that the the plaintiffs are clearly not entitled to any relief; if they are, the demurrer must be overruled. It has, however, been argued by the demurring parties that there is another tribunal with all the advantages and speed of a remedy by bill in this court, by which the plaintiffs can obtain relief. This is a case of one railway company against another, three companies being entitled to the use of a joint station by Act of Parliament, which gives them equal rights—such rights not to be taken advantage of by one to the disadvantage or prejudice of the other or others, but what has taken place is this. In consequence of the plaintiff's company (who have just as much right as the defendants) having of late ceased to bring coals over the defendant's line as they had hitherto done, instead of giving them the full advantage of the use of the station, the defendants have thrown upon them a very inconvenient mode of using it, and this the bill alleges, and therefore the demurrer admits. The defendants, instead of allowing the use of the upper side, which would be convenient while the lower would clearly be inconvenient, took the latter course, it being their duty to allow the plaintiffs the most convenient mode, and they did this, as the bill alleges, from improper motives. If I allow the demurrer, I put the plaintiffs out of court, and it is impossible to say to what extent the consequences of doing so may go, or what detriment may ensue by their loss of trade before they can obtain the remedy the demurring parties suggest as the other tribunal under the act. It is admitted by the demurrer to be a wrongful act, and I may suppose that they may commit other wrongful acts, before there is a joint appointment of a committee. Moreover, the other companies may refuse to concur in such appointment, and

therefore, instead of having the speedy remedy of an injunction—more speedy than any other in this country—they may be kept at bay for two or three years, and even when a joint committee is appointed, they may be so much swayed one way, that the plaintiffs may, after all, fail to obtain justice. I am not aware of any case that decides that the appointment of another tribunal ousts the jurisdiction of this court, which can just as well deal between all the parties with the question of prohibiting the use of the station in a particular way, as the tribunal alluded to. The plaintiffs are asking an immediate remedy on this bill, and I am bound to assume that the injury is a material one, and requires an immediate remedy. Without prejudicing the question, therefore, which can be entirely decided on this bill at the hearing, I am of opinion that it ought to be answered, and the demurrer must be overruled in the usual way.

May 8th.—On the motion for the injunction of this date the following order was made:—The defendants undertaking without prejudice to any question at the hearing, to allow the plaintiffs to use the line and conveniences as they have been accustomed to use, the upper sidings during a period to be fixed, for the purpose of delivery, not stacking, their coals at a point marked on the plan, as distant as 200 yards from the town-hall, and the plaintiffs' company undertaking to abide by any order the court may make at the hearing, as to the payment of 3*d.* per ton, let the motion stand over until the hearing of the cause.

Solicitor for the plaintiffs, *Noyes.*

Solicitors for the defendants, *N. and C. Milne.*

May 4 and 5.

CATLING v. THE GREAT NORTHERN RAILWAY COMPANY.

Specific performance—Arbitration—Lands Clauses Act—Possession—Interest—Costs—Withdrawal of opposition to an Act of Parliament.

C. agreed with a railway company, that, in consideration of the stipulations of the company, he sho ld withdraw his opposition to the Bill in Parliament, and it was agreed that if such Act passed in any form, the company should purchase the plaintiff's interest, and the contract contained various stipulations as to price, drainage, roads, &c., the value of the property, compensation, &c., in case of difference, to be referred to a surveyor. It was, inter alia, provided that the plaintiff should cease building. The Act passed, and the plaintiff sent in a claim for 46,000l., and the matter being referred to a surveyor, he awarded 16,675l., but was silent as to interest and costs; and added a statutory declaration that he made the award under the Lands Clauses Act. A dispute then arose, the plaintiff claiming against the company interest on the purchase-money and the costs of the reference, and filing a bill for the specific performance of the agreement. The plaintiff had ceased building, but the company had never taken possession:

Held, that, although the company had never had possession, it was the same thing, as the plaintiff was deprived of it, and the proceeding was as much under the Lands Clauses Act as if the royal assent to the Special Act had been obtained before the agreement, and as putting into motion the compulsory powers, and therefore in substance under that statute. The company were therefore liable for interest, and as the award was silent as to costs, it must be assumed that the surveyor intended the company to pay them, and they were therefore liable.

This bill was filed by David Bowker Catling, for the specific performance of an agreement dated the 19th April, 1866, entered into between the plaintiff and the defendant company in consideration of the withdrawal by the plaintiff of a petition of opposition to an Act promoted before Parliament by the defendants; it also asked for the interest on the purchase-money and the cost of a reference to arbitration, as well as damages. The plaintiff was the lessee for a term of eighty-eight years from the 29th Feb. 1864, of a plot of about eighteen acres of land at Seven Sisters-road, Holloway, at a rent of 325*l.* 10*s.*, under Sir John Taylor Coleridge and the Rev. Thomas Carter. In April, 1866, the defendant company, being the promoters of The Great Northern Railway (additional powers) Act 1866, which the plaintiff had presented a petition of opposition to, on the 19th of that month the agreement in question was entered into between him and the company. This instrument recited the above fact, and witnessed that it was thereby agreed—1st. That the plaintiff, in consideration of the stipulations on the part of the company thereinafter contained, should withdraw his petition, and all further opposition to the Bill; 2nd. That, in consideration of the withdrawal of the petition and such opposition, if the said Bill in any form should receive the royal assent, the company should purchase of the plaintiff, at a price to be ascertained as after mentioned, the leasehold interest of the plaintiff, subject to the apportioned rent of 100*l.* 5*s.* 9*d.*, in respect of the ground and buildings thereon, shown on the plan. And the company should also pay to the plaintiff compensation for the damage to the adjoining building property of the plaintiff, and for the loss of profit consequent on, or resulting from, the taking of the land by the company, the amount to be settled as after mentioned. The said company should also pay to the plaintiff the cost of altering the existing mode of drainage. The said purchase should be completed, and the purchase and compensation moneys and costs should be paid within six calendar months after the said Bill, in any form, should have received the royal assent. The said company should not have any right of entrance or exit to or from the land purchased from the plaintiff in or to the adjoining roads. If the present system of drainage of the said estates of the plaintiff was interferred with by the company, a substituted system should be made at their expense. 3rd. The value of the property to be purchased as aforesaid by the said company, and the amount of compensation to be paid, and the cost of the said drainage, should, in case of difference, be referred to a surveyor to be agreed upon between the parties in the usual manner. But it was agreed that the amount to be paid for the said ground should be ascertained by taking the value thereof at twenty-five years' purchase of the improved rents, which could be made by the plaintiff, beyond the ground-rent payable by him, subject, however, to deductions on account of and for the time occupied in making such improved rents. 4th. If the said Bill should, in any form receive the royal assent, the company should pay 25*l.* to the plaintiff's surveyor, and to his solicitors their reasonable costs of opposing the Bill. 5th. The plaintiff should at once cease from any further building on the said property. This agreement was executed by two directors, and the seal affixed. About the same time the company also agreed to purchase the lessor's interest for 4285*l.*, on withdrawal of the vendor's opposition, to be paid within three months after the passing of the Bill, with 5 per cent. interest from that day. The rent to be apportioned as provided by the 119th section of the Lands Clauses Act, in the proportion of 100*l.* 5*s.* 9*d.* to 225*l.* 4*s.* 3*d.* The Act passed, and the plaintiff sent in a claim in respect of the land required by the company (about five acres) of

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46,000*l.*, but the company objecting to such claim, on the 25th Oct. 1867 the question was referred, under the 3rd clause of the plaintiff's agreement, to Mr. John Clutton, the eminent surveyor, whose award it was agreed should be final and binding on both parties. On the 13th March 1868 Mr. Clutton made his award, whereby, in the usual form, he awarded that the sum of 13,490*l.* was the amount to be paid by the company for the purchase of the estate and interest of the plaintiff (subject to the apportioned ground-rent of 100*l.* 5*s.* 9*d.*) referred to in the agreement, and marked in the plan, and the buildings thereon. That 2600*l.* was the amount to be paid by the company to the plaintiff for damage to the adjoining building property, and for the loss of profit consequent on, or resulting from, the taking of the land by the company, and 675*l.* for alteration of drainage. Annexed to this award was a statutory declaration by the arbitrator that he made it under the provisions of the Lands Clauses Act. It then appeared that the company handed a cheque to their solicitors for the 16,675*l.*, but, an offer by the plaintiff to receive that sum, leaving all the other questions open, not being acceded to by the defendants, the cheque was not paid to the plaintiff, although draft deeds of surrender and release, and an agreement for an apportionment of the rent, were prepared and sent for his approval. A correspondence ensued between the respective solicitors upon the question whether the company were liable to pay interest on the purchase-money and the cost of the reference, the award being silent on that subject, and this bill was filed on the 8th June 1868, insisting upon the plaintiff's right to such interest and costs under the provisions of the Lands Clauses Act. He also claimed repayment of rent in respect of the land paid to the lessors subsequently to the 28th of Dec. 1866, which was the expiration of six calendar months after the act received the royal assent, from which day he also claimed interest. The bill charged that before the arbitration the subject of subsequent rent was referred to, and that, being a builder, and ready money being necessary for his operations, the non-completion of the contract was a serious detriment to the plaintiff. There was a considerable amount of evidence, and it appeared that all building had ceased upon the land from the time of the agreement.

Glasse, Q. C., *Waley*, and *Maidlow* appeared for the plaintiff, and contended that there was nothing to take the case out of the ordinary rule that interest was payable to the vendor from the date of the contract. That the plaintiff was entitled to be reimbursed what he had paid to his lessors since that date, and was also entitled to the costs of the reference. The discrepancy between the claim and the sum awarded was no test, for a case was on record of land in London being valued at 14,000*l.* and sold for 29,000*l.* As to the question of interest, the arbitrator only found what was referred to him, the purchase-money, the compensation, and the cost for drainage, and the other matters were left to the ordinary rule of law.

The following cases were cited:

Esdaile v. *Stephenson*, 1 Sim. & Stu. 122:
Dart's V. & P. 3rd edit. 82;
Greenwood v. *Churchill*, 8 Beav. 413;
De Visme v. *De Visme*, 1 M. & G. 336.

Cotton, Q.C., and *Stevens*, for the company, insisted that the difference between the claim and the award was so monstrous, that it was impossible for the parties to agree. By his conduct before the arbitration, the plaintiff, either waived or deprived himself of interest, and there was evidence showing the intention. [VICE-CHANCELLOR.—I cannot receive it, that would be going behind the award, which has not been sought to be set aside. I must assume that the arbitrator did his duty, he had no right to consider subsequent circumstances.] The plaintiff had caused great delay, and the company never had had possession. Interest could not be payable on the whole sum, 13,490*l.* only represented purchase money. The agreement was not an ordinary contract, and the rules of law as to interest did not apply to it. The value could not be ascertained under the Lands Clauses Act, because that Act only allowed three weeks to send in a claim, and that was not done here. There was no allusion to the Lands Clauses Act in the contract, and as to the reference to a surveyor, he was to be chosen by private agreement.

Morse v. *Merest*, 6 Madd. 26;
Perry v. *Smith*, 1 Car. & M. 554;

Glasse, Q.C., in reply on the question as to the costs of the reference.

The VICE-CHANCELLOR (after stating the facts). This contract being for valuable consideration, the withdrawal of opposition to a Bill in Parliament, which I must assume to have been of a formidable character; that was conclusive upon the company; and I am of opinion that the word "value" as used in the contract meant "price;" the expression "in case of difference," not being immaterial, because it evidently contemplated that the parties might fix the amount themselves. I am also of opinion that the payment to Mr. Isborne, the plaintiff's surveyor, and his solicitors, applies only to the agreement, and to nothing subsequent; and so far only am I against the plaintiff. The most material circumstance is, that the plaintiff was to cease any further building. It is contended that by this agreement the company were not put into possession, and that is true; they never took possession, not having Parliamentary powers; but the question is, not whether the purchasers have taken possession, but whether the vendor has not been deprived of it. It is clear that he has, and it is immaterial whether the company took possession or not. By the terms of the contract they virtually took the possession from the plaintiff, for the only purpose for which he required it, viz., building. I think it is a case in which the principles with respect to the payment of interest from the date of the contract are applicable. If it had not been for the six calendar months being fixed for the completion, I should have thought the company were bound to pay interest from the date of the contract. The Act gave the company compulsory powers to take the land; but, although there was an agreement, they never could have taken it unless the Act had become law; and therefore, taking the Act and the agreement together, it is clear they took it in the only way they could do so, namely, compulsorily, and it was as much a proceeding under the Lands Clauses Act as if the royal assent had been obtained before the agreement. It was a part of it that they should arrange the price between themselves, and they were only to call in a surveyor in case of difference. There was a difference; Mr. Clutton was referred to, and made his award, which was silent on the subject of costs. [The Vice-Chancellor referred to the award.] But annexed to it is a declaration that he would hear and determine under the Lands Clauses Act; and whether that was strictly correct or not, nothing can be more distinct than that Mr. Clutton considered it so; otherwise, to go before a magistrate and make such a declaration was a simple nullity. On the surrounding circumstances, I am further of opinion that the parties all proceeded on that assumption, and the defence of the company is most ungracious. I am bound to assume that the arbitrator faithfully and intelligently discharged his duty; and had he fixed the date of the award as

the time of payment, he would have miscarried, because, when parties enter into a contract and refer to arbitration some question under it, it must be treated as if inserted in the contract, for he may not make his award for years after. Therefore the price fixed must be regarded as if agreed upon on the 19th April 1866. On the question of damage, however, perhaps subsequent circumstances might be taken into consideration. The first question is from what period interest is to be paid, all parties agreeing to it from the date of the award, although on what principle I cannot understand. The plaintiff lost the land from the date of the contract, and it is well settled that wherever a contract fixes a day for completion, the purchaser must pay interest from that day, for he is entitled to the rents. Here it happens that there is no rent. Lord St. Leonards, in the 14th edition of his work, p. 627, lays that down. The plaintiff was charged with delay, but the dispute arose while the demand was made, and delay is in fact attributable to both, and I should be coming to an unwarrantable conclusion if I held the ordinary principle as to interest was not applicable to this case. I am of opinion, therefore, that the ordinary rule applies. As to *Esdaile* v. *Stephenson* (*snp.*), Mr. Stevens well knows that a vendor cannot be deprived of the interest and the rents. It happens here there are no rents; but the company have had everything they contracted for, and must pay interest from the date of the contract. The next question is, as to the ground rent. Now it is the basis of the contract that it was to be apportioned, and the company having purchased the reversion, are themselves entitled to it, and must bear the burthen from the time fixed for completion, the 28th Dec. 1866; and if the plaintiff has paid anything since in respect of it, he must be reimbursed. The next question is, as to the costs of the arbitration. No doubt the words in the Lands Clauses Act are "otherwise than by agreement," and no doubt if a landowner and a company agree in the ordinary case of a notice to treat, they may do so; otherwise they go to a justice and get two surveyors appointed. In this case there is one, but I consider it is no less a proceeding under the Lands Clauses Act, because the whole thing was under a contemplated Act of Parliament which became law, it was a purchase of the plaintiff's opposition, and I must take the whole as one piece of machinery, putting in motion the compulsory powers; and, although there is some apparent technical objection, in substance and in form it is under the Lands Clauses Act. Another thing is conclusive, which is the arbitrator's declaration, and therefore he did not provide for the costs of reference, and being aware of the terms of the 34th section of that Act, and that the costs of arbitration and "incident thereto" were payable by the company, he refrained from making an award as to costs, and I must attribute to him a deliberate intention that the promoters should pay them; and, had he been asked, he would have said so, and if not, would have given a larger sum. The company are most ungracious in raising this question and occasioning this suit, the cheque for 16,675*l.* being actually, as it is stated, drawn and handed to the solicitor, who, I believe, handed it back, because the company would not agree to leave all other matters open, the plaintiff accepting it on those terms. He was, therefore, baffled at every step, and there must be a decree for payment of interest to him at 4*l.* per cent. from the date fixed for the completion of the contract, for repayment of any ground rent paid by him during that time, and he must have the costs of the reference and the costs of suit.

Solicitors for the plaintiff, *Terrell* and *Chamberlain*.

Solicitors for the company, *Johnson*, *Farquhar*, and *Leech*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET, and R. T. BOULT, Esqrs., Barristers-at-Law.

Saturday, July 10.

Re THE ANGLO-EGYPTIAN NAVIGATION COMPANY.

Practice—Companies Act 1862, *sect.* 79, *cl.* 5—*Alleged collusion to assist a rival company—Petition—Costs.*

On a petition to wind-up the affairs of a limited liability company, on the ground of a misapplication of the funds by the directors, it must be conclusively shown that the interference of the court could be obtained under the Companies Act 1862, *sect.* 79.

One set of costs only allowed as between the respondents to the petition.

The Anglo-Egyptian Navigation Company was incorporated in April 1865, for the purpose of working a line of steamers between Liverpool, Egypt, and Syria, taking over for that purpose the steamships then owned and managed by Messrs. Chappel, Dalton, and Co., of Liverpool, and Messrs. Chappel and Co., of London, and "making such additions and improvements in the line as the requirements of the trade may render advisable."

An amended prospectus of the company stated "that the line as at present constituted" consisted of two principal and two auxiliary steamers. The capital of the company was announced to be 500,000*l.* in 25,000 20*l.* shares, of which 8250 were to be fully paid up and 16,750 were to be issued." The articles of the association were registered on the 3rd April 1865, and recited the terms of the contract, whereby Messrs. Chappel, the vendors, agreed to sell certain steamships to the company, and in this agreement it was stipulated that Messrs. Chappel and Co. should retain no shipping interests of their own in the Mediterranean, except a share in another line called "Bibby's line of Steamers," and in a ship called the *Araxes*. The affairs of Messrs. Chappel and Co. subsequently became embarrassed, and their interests had become vested in the International Financial Company, who had also brought out the Anglo-Egyptian Navigation Company, and Messrs. Bibby and Co. became ship's husbands to the several vessels belonging to the company. The general character of the allegations in the petition and the points sought to be raised by it were that the International Financial Company who had obtained by virtue of the number of their shares, a preponderating influence in the company's affairs had, instead of making calls on the shareholders, discharged the liabilities of the Anglo-Egyptian Navigation Company by selling off the company's fleet of vessels, which were now reduced to two—one of which had been chartered to a telegraph company, and were in fact using the company's remaining assets as affording facilities to and forming part of the working capital of Bibby's company.

The petitioner held 1300 fully paid up shares in the Navigation Company, and they also stated that the International Financial Company had received from Messrs. Chappel and Co. 35,000*l.* for bringing out the Anglo-Egyptian Navigation Company and 5000*l.* in addition for the purpose of improperly influencing the share market with respect to the shares of that company; that the losses thereby incurred had been continuous, and that the affairs of the company had also thereby become utterly hopeless.

Sir *Roundell Palmer*, Q. C., *E. E. Kay*, Q. C., and *Fischer* appeared for the petitioners and contended that sufficient had been shown to induce the company to direct the usual order for winding-up the affairs of the company.

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Wickens and *H. Davey* for the company, and *Fry*, Q.C. for certain shareholders who were instructed to oppose the petition, and

De Gex, Q. C. and *A. G. Marten* for other shareholders instructed to support it, were not called upon by the court.

The VICE-CHANCELLOR said he must dismiss the petition, as it did not appear to him to disclose such a case as should induce the court to grant the order under the section and clause in the Companies Act 1862 upon which the presentation of the petition had been founded. Of course it must be dismissed with costs, but he should only allow one set of costs, to wit, the parties appearing to oppose the petition.

Solicitors: *Ashurst, Morris,* and *Co.; Gregorys; Linklaters* and *Co.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Thursday, April 22, 1869.

DENSTON, (Assignee, &c.), *v.* ASHTON AND OTHERS.

Costs—Security for—Assignee of a bankrupt suing for the benefit of the estate.

Where the assignee of a bankrupt with the sanction and by the directions of the Commissioner of the Court of Bankruptcy, brings an action for the benefit of the estate, he will not upon the allegation that he is without visible means of paying costs if unsuccessful, be required to give security for costs.

This was rule calling upon the defendants to show cause why the order of Willes, J., directing that the plaintiff should give security for the defendants' costs in this cause to the satisfaction of the master, should not be rescinded. It appeared this was an action of ejectment brought by the plaintiff as assignee of one Henry Hawgood, a bankrupt, to recover from the defendants the possession of certain premises situated in Chiswell-street, Middlesex; and in support of the application for costs, it was alleged that the plaintiff is a carpenter, in a small way of business in East-street, Walworth, without any visible means of paying costs, and other facts tending to show that he would be unable to pay costs if unsuccessful in the action. On the other hand it was sworn by the plaintiff that he is the creditors' assignee of one Henry Hawgood, a bankrupt, who at the time he became bankrupt was in the occupation of the said premises; that he (the plaintiff) is a creditor in the sum of 140*l.*; that the allegations as to his means are untrue. It was also sworn by the attorney for the plaintiff that the action is brought under the advice of counsel, and with the sanction and direction of the Commissioner of the Court of Bankruptcy acting in the prosecution of the said matter, and that he believed there is a good cause of action, and that a verdict will be found for the plaintiff on the trial.

Bere showed cause.—Where a party is suing in a representative capacity, and is shown to be without means, the court will require him to give security for costs. [COCKBURN, C. J.: The plaintiff here is suing as an officer of the Court of Bankruptcy.] There is no direct authority in the books upon the point. In *Perkins* v. *Adcock*, 14 M. & W. 808, it was held that where the plaintiff was a bankrupt or insolvent, and had assigned the debt for which the action was brought, and is suing for the benefit of the assignee, the court would require security for costs; and in *Goateley* v. *Emmett*, 15 C. B. 291, this ruling was upheld. In *Elliott* v. *Kendrick*, 12 Ad. & E. 597, the plaintiff assigned all his effects to N. for the benefit of his creditors, with power to sue in his name; afterwards he became insolvent and also bankrupt, and had not obtained his certificate, and had no means of paying the costs of an action. N. having commenced an action in plaintiff's name, and without his authority (except under the assignment), the court stayed the proceedings till N. should give the defendant security for costs.

Day appeared in support of the rule—As this action is brought with the sanction and direction of the Court of Bankruptcy, the question is whether the plaintiff, who is in the performance of a public duty, is to be fettered by giving security for costs? The present case is different from those cited on the other side where no such authority was given. It would be very hard upon a plaintiff who is suing under the direction of the Court of Bankruptcy to be put under these terms. Here he is ordered to bring this particular action, and he is acting therefore merely as the officer of the court. [COCKBURN, C. J., The assignee having the bankrupt's egtate in him, could bring the action without the consent of the Court of Bankruptcy, but in order to protect himself he gets the authority of the Court of Bankruptcy. It is hardly as though the court had in the first instance directed the assignee to take these proceedings; he will get his costs out of the estate.] The Commissioner gives a judicial consideration, and would not direct an action to be brought if it would waste the estate; all the decided cases are where the action has been brought by private persons. [COCKBURN, C. J., Suppose the sanction of the Commissioner had not been obtained, would you contend that he would not be liable for costs?] There is no authority upon the point when he is exercising a public duty. [COCKBURN, C. J., The position of the defendant is equally the same whether the plaintiff sues with or without the authority of the court.] It is a common hardship which all persons occasionally suffer. [HAYES, J., Is not the general principle, that if an insolvent person is suing for another, he must give costs?] There is no official capacity in any of the plaintiffs in the cases cited. There are numerous instances, of course, of suits of this kind, but I know of no case in which the plaintiff has been required to give security for costs. [COCKBURN, C. J., The point being a novel one we will consider it.]

Cur. adv. vult.

July 3.—HAYES, J. now delivered the judgment of the court.—This was the case of a rule obtained to set aside an order of Willes, J., requiring the plaintiff to give security for costs in the action, which was ejectment by the plaintiff as assignee of one Hawgood, a bankrupt, to recover some premises formerly occupied by the bankrupt, and claimed by the plaintiff for the benefit of the estate. The order had been made on the ground of the plaintiff's poverty and alleged inability to pay costs if he failed, and because he was suing not for his own benefit but for that of the creditors. The case was argued in Easter Term, when cause was shown against the rule by Mr. Bere on the part of the defendant, and the rule was supported by Mr. Day on the part of the plaintiff. On the part of the defendant reliance was placed on the general rule for requiring security for costs in the case of an insolvent who is suing as a mere nominal plaintiff for the benefit of a third person, and the cases of *Perkins* v. *Adcock*, 14 M. & W. 808; *Elliott* v. *Kendrick*, 12 Ad. & E. 597; and *Goatley* v. *Emmart*, 15 C. B. 291, were cited. On the other hand,

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it was contended by Mr. Day that the case was distinguishable from the cases cited, and withdrawn from the ordinary rule on the ground that the plaintiff had, as assignee, a duty to collect the assets for the benefit of the estate, and that there was no instance in such a case of requiring security for costs which might obstruct him in the performance of his duty, and prevent the assets from being collected. We took time to consider the case, and being unable to find any authority in favour of enforcing security for costs in such a case, we were disposed against requiring it in the present instance. Very recently the subject has been before the Common Pleas, in the case of *Sykes and others* v. *Sykes*, 17 W. R. 799 (June 12); 20 L. T. Rep. N. S. 663, in which the plaintiffs sued as executors for an inquiry to the assets of the estate; and on an application by the defendant, security for costs had been ordered to be given by Brett, J., on the ground that one of the plaintiffs resided in Scotland, out of the jurisdiction of the court, and the other had become bankrupt and was unable to pay costs; and the court, who considered the case of an executor to stand on the same footing as assignee in regard to the duty of collecting the assets of the estate, held that the circumstances offered no ground for requiring security, and rescinded the order. This decision entirely agrees with our opinion, and therefore we think that the rule should be made absolute.

Rule absolute.

Plaintiff's attorney, *R. Jones*, New Inn.

Defendant's attorney, *T. E. Harper*, 17, Gracechurch-street.

April 20, *and July* 3, 1869.

PLAYFORD *v.* THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY (LIMITED).

Electric telegraph company—Transmission of message—Error in reading same—Damage to sendee—Right of action.

When a message is sent by a telegraph company the contract is one alone with the sender and not with the sendee of such message.

Where, therefore, A., resident in London, informed B., resident at Hull, that he had a cargo of ice at Grimsby, and requested an offer from them for the same by telegraph, and B. thereupon sent a telegraphic message by the defendants making an offer of 23*s. per ton, which was erroneously read off by the defendants' servants at London as* 27*s. per ton; whereupon A. caused the ice to be tendered to B. at Hull at this price, and B. refused to receive it, as not being the price he had offered.*

Held, upon an action brought by A. against the company for the loss he had sustained by their error, that the contract was between B. and the defendants, and that there was no relationship between A. and B. of principal and agent, and so the action could not be maintained.

This was a special case stated by consent of the parties and by a rule of the Court of Queen's Bench, dated the 19th day of November in the year of our Lord 1867.

This action was brought by the plaintiff against the defendant to recover damages for the misdelivery by them of a certain telegraphic message, under the circumstances stated in the following case: The plaintiff is a merchant in London, and dealt, amongst other things, in ice, the defendants are an Electric Telegraph Company (Limited) incorporated under the Joint Stock Companies Acts 1856 and 1857, and in the year 1862 they obtained for themselves a certain Act of Parliament, namely, 25 & 26 Vict. cap. cxxxi. local and personal, to enable them to carry on the works and business of an electric telegraph company. A copy of this Act accompanies and is to form part of this case. On the 28th May 1866, the plaintiff had a cargo of ice lying on board the schooner *Victor*, and wrote on that day to Messrs. Rice and Hellyer, ice merchants at Hull, informing them that the *Victor* was at Grimsby with about 100 tons of ice, and requesting from them an offer for the same by telegraph.

Accordingly the said Messrs. Rice and Hellyer went on the following morning about eleven o'clock to the defendants' office, at the quay side station at Hull, for the purpose of telegraphing to the plaintiff, and having obtained at that office from the defendants one of their ordinary printed forms for telegrams, filled it up, and thereby requesting them to send to the plaintiff the message of which, so far as it is material to the present case, the following is a copy: "We can give you 23*s.* for cargo now at Grimsby. Small ice, the same cash, 30 tons day."

The said printed form was directed to the directors of the defendants' company, and was headed, "Gentlemen, I request you to send the following message according to the conditions printed hereon, and I agree to abide by the same."

There was the following memorandum at the foot of the said printed form:

"All messages taken by this company are received subject to the following conditions."

The said conditions were as follows:

In order to provide against mistakes, and more effectually insure delivery, every message of consequence ought to be repeated by being sent back from the station at which it is to be received to the station from which it is originally sent, half the usual price for transmission will be charged in addition for repeating the message. The company will not be responsible for mistakes or delays in the transmission of, nor for the non-delivery of, unrepeated messages, from whatever cause arising, either upon its own lines or those of any other company or government which may be employed to forward the message to its destination. Nor will the company be responsible for mistakes or delays in the transmission of, nor for the non-delivery of, a repeated message to any extent above 5*l.*, unless it be insured at the rate of 1*l.* per cent.

A fac-simile copy of the said printed form with the said message on it, as written by the said Messrs. Rice and Hellyer, is hereunto annexed marked A., and it is to form part of this case.

When Messrs. Rice and Hellyer had filled up the printed form as aforementioned, they handed the same back to the defendants at their said office, and paid them the sum of 1*s.* 6*d.* for transmitting to the plaintiff by telegraph the said message, which was to be forwarded and was forwarded as an uninsured message. No charge was tendered for repeating such message, and it was forwarded as an unrepeated message. As soon as the said message was delivered to the defendants as aforementioned, it was despatched by them to their central station at Hull, and was thence forwarded by them to their head office in London, where it was duly received at 11·43 a.m. of the same day, and where the mistake in respect of which the present action is brought originated as hereinafter mentioned.

The telegraphic apparatus which was then and is still used by the defendants in their said head office in London was the best telegraphic apparatus then known and was in perfect condition. There is a long slip of paper attached to the said telegraphic apparatus, and on a message being transmitted to the said head office the letters and numbers contained in such message are, by means of the said apparatus and the telegraphic wires connected therewith represented on such slip of paper by certain combination of dots and of strokes of different lengths which respectively denote the various letters and numbers. These are read off by that clerk of the defendants at the said office, whose duty it is to

receive the message, and who at once writes down the said letters and numbers on a certain printed form. When the message so sent by the said Messrs. Rice and Hellyer was being transmitted to the defendants' head office it was received there by Edith Smeaton, a clerk of the defendants, whose duty it was at the time to receive such message to read it off and to write it down on the telegram paper in manner aforementioned. In reading off the message from the slip of paper attached to the telegraphic apparatus as afore mentioned she mistook the combination . . . . which was on the slip and which denotes the number 3 for the combination . . . . which denotes the number 7, and she consequently wrote down on such printed form as aforesaid instead of the message actually sent by Messrs. Rice and Hellyer the following message:

"We can give you 27*s.* for cargo now at Grimsby; small ice, the same cash, 30 tons day."

A telegram paper with the last-mentioned message on it (a facsimile copy of which is hereunto annexed marked B., and is to form part of this case) was then forwarded by the defendants to the plaintiff.

On receipt of the said telegram the plaintiff ordered the schooner *Victor* to proceed to Hull with the said cargo of ice for the said Messrs. Rice and Hellyer, but they refused to accept the same except at the price of 23*s.* per ton; and it is admitted that by reason of the aforesaid error in the telegram the plaintiff sustained damages to the amount of 39*l.* 1*s.* 6*d.*, and that if entitled to recover at all, he is entitled to recover the said sum of 39*l.* 1*s.* 6d.

The said Edith Smeaton had been at the time when she made the aforesaid mistake in the service of the defendants for about two years. The defendants had used all due care in testing her competency before engaging her as a clerk, and in fact she was in every respect well qualified for the performance of her duties as such clerk, and had made during the said period of two years a less number of mistakes in reading of messages than the average number of mistakes made during the same period by the numerous clerks who were employed by the defendants in the same department.

The extreme charge which the defendants could, under sect. 75 of the aforesaid statute 25 & 26 Vict. c. cxxxi. have made for transmitting the aforesaid telegraphic message from Hull to London was 2*s.*

It is the practice among ice merchants that when a merchant who desires to sell a cargo of ice requests from another merchant an offer for such cargo by telegraph, and the latter makes such offer by telegraph, and the offer is accepted for the merchant accepting such offer to deduct from the price of the cargo sold the cost of the telegram.

The plaintiff has not repaid to the said Messrs. Rice and Hellyer the said sum of 1*s.* 6*d.*, so paid by them to the defendants for the said telegram, nor have the said Messrs. Rice and Hellyer claimed the said sum from the plaintiff.

The court is to be at liberty to draw such inferences of fact as a jury would be entitled to do.

The question for the opinion of the court is whether, under the circumstances as above stated, the defendants are liable to the plaintiff for or on account of the mistake committed as aforesaid in the transmission of the said telegraphic message.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff for 39*l.* 1*s.* 6*d.* with costs of suit.

If the court shall be of contrary opinion then judgment shall be entered for the defendants with costs of defence.

Littler appeared for the plaintiff, and contended that the defendants were liable, for that the plaintiff had a property in the message sent. He quoted Scott and Jarnagin's treatise on the law relating to Electric Telegraph Companies, and the cases cited upon the subject therein.

Pollock, Q. C. (*A. L. Smith* with him) appeared for the defendants, and argued that there was no liability as between the plaintiff and the defendants. He cited:

Swain v. *Shepherd*, 1 Moo. & Rob. 223;
M'Cance v. *The London and North-Western Railway Company*, 31 L. J. 65, Ex.;
Harrison v. *The London, Brighton and South Coast Railway Company*, 31 L. J. 113, Q. B.

The argument sufficiently appears in the following judgment:

Cur. adv. vult.

July 3.—LUSH, J. delivered the following judgment of the court.—The plaintiff having a cargo of ice on board a schooner of his at Grimsby invited an offer for it from Messrs. Rice and Hellyer, merchants at Hull, and requested them to make such offer by telegraph. Accordingly Messrs. Rice and Hellyer sent to the office of the defendants' company at Hull a message for transmission to the plaintiff by which they offered to take the ice at 23*s.* per ton. In the reading off of the message at the defendants' office in London, a mistake was made in the figures, and the telegram sent to the plaintiff represented the offer to be 27*s.* instead of 23*s.* per ton. The plaintiff, thereupon, in acceptance of the supposed offer, ordered the schooner to proceed to Hull with the ice, and upon her arrival there the mistake was discovered. Messrs. Rice and Hellyer refused to receive the cargo except at 23*s.* per ton, and this action was brought by the plaintiff to recover the damage he had sustained by reason of the mistake, and which amounted to 39*l.* 1*s.* 6*d.* It was stated as a fact in the case that when an offer made upon the invitation of the seller by telegraph is accepted, the cost of the telegram is allowed to the buyer on account. On delivery of the message for transmission, Messrs. Rice and Hellyer signed the ordinary printed form by which the defendants stipulated that "they would not be responsible for mistakes or delays in the transmission of, nor for the non-delivery of unrepeated messages from whatever cause arising, and that half the usual price for transmission would be charged in addition for repeating the message." By 25 & 26 Vict. c. cxxxi. (private Act), certain powers for laying down the line were conferred on the defendants, and by sect. 61 it was enacted "that the use of any telegraph and apparatus erected and formed under the provisions of the Act for the purpose of receiving and sending messages, should, subject to the prior right of use thereof for the service of Her Majesty, and subject to such charges and reasonable regulations as might from time to time be made and entered into by the company, be open for the sending and receiving of messages by all persons alike without favour or preference;" and sect. 75 limits the charges to be made by the company to the rates specified in the schedule. It appeared that if the message had been repeated, the charge for such repeated message, according to the Company's scale, and the prize by Messrs. Rice and Hellyer would have exceeded the traffic rate. It was contended on behalf of the plaintiff, first, that the defendants were liable either as upon a contract with him, made through Messrs. Rice and Hellyer, as his agents, or for the breach of a duty to take due care of a message which it was argued became his property as soon as it was delivered to the defendants; and, secondly, that the stipulation that they would not be responsible for any mistakes however caused, unless a charge was paid which exceeded the maximum allowed by the act was an unreasonable regulation within the meaning of sect. 61, and therefore void. As we are against the

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plaintiff on the first point, it is unnecessary to give any opinion upon the second. The obligation of the company to use due care and skill in the transmission of the message is one arising entirely out of contract. There is nothing in their special Act which affects their relation either to the sender or the sendee of a message, or makes it different from what it would have been had no Act of Parliament been passed. We cannot agree with the judgments given in the American courts in the cases cited in the argument that there is any analogy between a consignment of goods by a carrier and the transmission of a telegram. We cannot see how the person to whom a telegraph message is sent can be said to have a property in the message any more than he could had it been sent orally by the servant of the sender. The only question, therefore, is, with whom was the contract made? And to this there can be but one answer. It was made with Messrs. Rice and Hellyer. The offer was sent by them on their own behalf and in their own interest. In so doing they acted, it is true, on the invitation of the plaintiff, but not as his agent, or as representing him; and the circumstances that there was an implied understanding between them, that in the event of his accepting their offer he should reimburse them the expense of making it, in no way alters the relation between the two parties, which was that of seller and buyer, and not that of principal and agent. It follows that the plaintiff, who is a stranger to the contract with the company, cannot maintain an action against them for the breach of it. Our judgment is, therefore, for the defendants.

Judgment for the defendants.

Attorney for the plaintiff, *Morley*.

Attorneys for the defendants, *Crosley* and *Burn*.

May 31 *and June* 8.

CARY *v.* DAWSON.

*Bankruptcy—Contingent debt not provable under—Liability in an action—*12 *&* 13 *Vict. c.* 106, *s.* 178—24 *&* 25 *Vict. c.* 133. *s.* 154.

The M. Insurance Company had, in Jan. 1866 *lent, a large sum in Consols to be deposited by the promoter of a Bill then before Parliament. The plaintiffs, the defendant, and others, six in all, entered into an undertaking with the company, that if the Bill was thrown out the Consols should be returned, and that if it passed (which was the event that happened), an equal amount of stock should be transferred to the company, and that a sum in the nature of interest on the value of the Consols (at the time they were lent) from the end of six months to the date of the transfer should be repaid to the company. In June* 1866 *the defendant was adjudicated a bankrupt. In July he obtained his certificate. In August the Bill passed, but the Consols were not transferred till the* 8*th July* 1867, *and the plaintiffs were compelled to pay under the undertaking* 500*l. as an equivalent for interest. Upon an action brought against the defendant to recover his contribution for one-sixth part of the above sum, he pleaded his bankruptcy:*

Held, that this claim was not provable under his bankruptcy, and so his bankruptcy was no answer to the action.

In this case, which was tried before Blackburn, J., a verdict was returned for the defendant, with leave to the plaintiff to move to enter a verdict for himself. The declaration was upon the usual money counts for money paid, &c., to which the defendant pleaded his bankruptcy.

H. James having accordingly obtained a rule *nisi*,

Murphy showed cause.

H. James appeared in support of the rule.

The facts and arguments sufficiently appear in the following judgment.

Cur. adv. vult.

June 8.—LUSH, J.—This was an action for money paid. The only material plea was bankruptcy. On the trial, before Blackburn, J., it appeared that the Marine Insurance Company had, in Jan. 1866, lent a large sum in consols to be deposited by the promoters of a Bill then before Parliament. The plaintiff, the defendant, and others, six in all, entered into an undertaking with the company that if the Bill was thrown out, the Consols should be returned, and that if it passed (which was the event that happened), an equal amount of stock should be transferred to the company, and that a sum in the nature of interest on the value of the Consols (at the time they were lent), from the end of six months to the day of the transfer should be paid to the company. Interest for the first six months had been paid to the company as the consideration for the loan of the consols. In June 1866 the defendant was adjudicated bankrupt. In July 1866 he obtained his certificate. In Aug. 1866 the Bill was passed, but the Consols were not transferred until 8th July 1867, and the plaintiffs were compelled to pay, under the undertaking, 500*l.* as the equivalent for interest. The action was brought to recover contribution for one-sixth part of this sum. A verdict was entered for the defendant on the plea of bankruptcy, with leave to enter a verdict for the plaintiff. A rule accordingly was obtained, against which cause was shown in this term. The only question was whether the claim against the defendant in respect of his undertaking could in any way have been proved under the bankruptcy, for, if so, the defendant was discharged by his certificate. Had the undertaking been to pay the value of the consols within a reasonable time after the passing of the Bill, together with interest from a fixed day up to the actual payment, there seems to be no doubt that the principle debt would have been provable under the 12 & 13 Vict. c. 106, s. 178, as a contingent liability, and the interest would in that case have been so much considered an accessory to the principal that it might have been proved along with it, as in *ex parte Barwis*, 25 L. J. Bank. 10, though in this case at the time of the bankruptcy it was uncertain what sum might be payable as interest along with the principal in the event (which has happened) of the bill not being passed till after the fixed day. But though a promise to replace a particular amount of Consols at a future day is not in substance different from a liability to pay a sum of money, and though if the contract be broken before bankruptcy, the amount which is then ascertained may be fixed (see *Betteley* v. *Stanisly*, 12 Com. B. N. S. 477); still, whilst the day at which the stock is to be replaced, and consequently the value of what is then to be replaced is at the time of the bankruptcy unascertained, we think it cannot be treated as a liablity to pay money within sect. 178. The 24 & 25 Vict. c. 134, s. 153, removes the objection that a jury is required to ascertain the amount when the liability to damages is at the time of the adjudication already incurred; but there is no provision in the bankrupt laws as yet under which such a liability not yet incurred at the time of bankruptcy can be proved. The liability, therefore, under the promise to pay the interest must, if provable at all, be proved as a separate matter, and we think that the case of *Harbury* v. *Tucker*, Ell. Bla. & Ell. 914; 28 L. J.

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56, Q. B., is a decisive authority that it cannot be proved under the 12 & 13 Vict. c. 106, s. 178. The question then arises whether it can be proved under the 24 & 25 Vict. c. 154? We think that though the general words, "any other sums of money, whether yearly or otherwise," taken by themselves would include every kind of payment, yet they must be restrained by the context to sums of money so far *ejusdem generis*, with premiums of insurance, that the liability may at the time of the adjudication be capable of valuation. This is distinctly laid down by Giffard, L. J., in *Ex parte Hastie*, 38 L. J. 283, Ch.; 20 L. T. Rep. N. S. 93; 17 W. R. 152, and we are unable to see how, or on what principle a value could have been put in June 1866, when the adjudication took place on the liability of the defendant in case he and his co-contractors failed to transfer the stock in due time according to their undertaking, to pay interest until they did perform it. We think, therefore, that the rule must be made absolute.

Rule absolute.

Attorney for the plaintiff, *E. J. Parsons.*

Attorneys for the defendants, *Tatham* and *Son.*

Wednesday June, 2, 1869.

REG. *v.* DIPLOCK.

Coroner—Election of—Validity of votes—Decision of Sheriff final—Quo warranto.

Upon an election of coroner, the legality of votes tendered to and received by the sheriff cannot be questioned upon a quo warranto information.

This was an information in the nature of a *quo warranto* against Dr. Thomas Bramah Diplock for exercising the office of coroner for the Western division of the county of Middlesex.

The writ stated that after the 9th Aug. 1844, and within that part of the county of Middlesex which for the purpose and by virtue of the 7 & 8 Vict. c. 92 had been duly created and was the Western district of the said county, there ought to be a coroner, and that Thomas Bramah Diplock, M.D., on the 7th April 1868, did use and exercise without any legal warrant, royal grant, or right whatsoever the office of coroner for the said district, &c.

The plea alleged that after the 7 & 8 Vict. c. 92, the justices of Middlesex having duly divided the county of Middlesex into districts, Her Majesty by order in Council divided the said county into districts, one of which districts being the Western division of such county, and on the death of one James Bird, who exercised the office of coroner for one of the districts, the justices ordered a list to be prepared by the clerk of the peace of the several parishes, townships, or hundreds in each of the said districts specifying the place at which the court for the election of coroner was to be holden, and the place or places at which the poll was to be taken. That a writ was delivered to the sheriff commanding him the sheriff that in their full county within the said division, by the assent of such persons as should be duly qualified to vote at the election of coroners according to law, they should cause another coroner to be chosen and certify his name; and that afterwards an election took place at Brentford, on the 19th Feb. 1868, and the court was duly held by the sheriff at the said place, and Dr. Diplock and W. Hardwick and J. Walter offered themselves as candidates, and the said Dr. Diplock was duly qualified, and, a poll being demanded, the sheriff adjourned the court to the next day, and the said sheriff thereupon deputed and appointed such a number of persons as then seemed meet and convenient for the taking of the poll to be poll clerks to take the said poll with him, and the said sheriff thereupon caused booths to be erected for taking the poll at the court or principal place of election, and at other polling places being respectively within the said district and being the places appointed in this behalf by the quarter sessions as aforesaid; and the said sheriff thereupon also caused to be affixed on the most conspicuous part of each of the said booths the names of the several parishes, townships, and places for which such booth was respectively allotted, and that before they began to take the said poll every clerk so appointed as aforesaid was duly sworn truly and indifferently to take the same poll, and to set down the names of each elector, and place of his residence, and for whom he should poll, and to poll no elector who was not sworn if required to be sworn by the candidates or either of them; and the said sheriff appointed for each candidate such one person as was nominated to him by each candidate to be inspector of every clerk who was so appointed for taking the poll as aforesaid. And the said Thomas Bramah Diplock further saith that the said poll was duly taken by the said clerks in the presence of the said sheriff, on the 21st day of February, 1868, at the several places aforesaid and continued for one day only for eight hours of such day, and the said poll was not kept open later than four of the clock in the afternoon of the said day, and that the said poll clerks truly and indifferently took the said poll, and, in books provided by the said sheriff for the purpose, set down the names of each elector and the place of his residence, and for whom he polled; and the said poll-clerks polled no elector without first being sworn in accordance with the provisions of the said Act when required so to be by the said candidates or either of them. And that at the close of the said poll the said poll clerks inclosed and sealed their several books, and publicly delivered them so inclosed and sealed to the said sheriff, who duly received and kept all the poll books unopened until the reassembling of the court, and that the said court reassembled on the day next but one after the close of the poll, the same not being a Sunday, and then and there the said sheriff openly broke the seals on the said books and cast up the numbers of votes as they appeared on the said several books, and openly declared the state of the poll and, made a proclamation not later than two of the clock in the afternoon of the said day that the said Thomas Bramah Diplock was duly chosen by a majority of the persons residing within the said district as were at the time of the said election duly qualified to vote at the election of a coroner for the said division of the said county, and so the said Thomas Bramah Diplock avers that he was, after the receipt of the said writ as aforesaid, at the same election so held, under and by virtue of and in obedience to the said writ, and according to the provisions of the said statute, and before committing any of the alleged acts in the said information alleged, to wit at the time, and in manner aforesaid, duly proclaimed by the said sheriff to be the coroner for the said division, duly chosen and elected to be such coroner as aforesaid, by a majority of such persons residing within the said district as were at the time of the said election duly qualified to vote at the election of coroner for the said division of the said county; and that the said Thomas Bramah Diplock then and there was duly sworn and took the oaths required by law to be administered to and taken by a person appointed or elected coroner for any county, and accepted and took upon himself the duties of the said office, by virtue whereof he the said Thomas Bramah Diplock, during all the time in the said information in that behalf mentioned at the Clarence Hotel, North End, Fulham, in the said western

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district of the said county, hath used and now exercised and still doth use and exercise the said office of coroner of the said county for the said district of the said county, and hath there claimed and yet doth there claim to be coroner of the said county for the said district of the said county, and to have, use, and enjoy all the liberties, privileges, and franchises to the office of the coroner of the said county for the said district of the said county, belonging and appertaining as it was lawful for him to do, without this, that he the said Thomas Bramah Diplock hath usurped or doth usurp the said office, liberties, privileges, and franchises, upon our said Sovereign Lady the Queen in manner and form as by the said information is above supposed; all which said several matters and things, he, the said Thomas Bramah Diplock, is ready to verify as the court here shall award; wherefore he prays judgment, and that the aforesaid office, liberties, privileges, and franchises in form aforesaid, claimed by him the said Thomas Bramah Diplock, may for the future be allowed to him; and that he may be dismissed and discharged by the court here of and from the premises above laid to his charge.

The replication alleged, 1st, that the said Thomas Bramah Diplock was not seised as of fee of land within the said district, and was not in other respects duly qualified. 2nd, That the said Thomas Bramah Diplock was not elected to the said office by a majority of valid voters duly qualified. 3rd, That in the alleged majority of voters were included votes given at polling booths other than the polling booths allotted for the parishes, townships, and places within which the properties in respect of which the said votes were given were situate; and that but for including such votes the said Thomas Bramah Diplock would not have had a majority of valid votes recorded for him at the said election. To the second replication there was a demurrer.

By the 7 & 8 Vict. c. 92 (An Act to amend the Law respecting the Office of County Coroner), it *is by sect. 10* enacted:

That from and after the division of any counties as aforesaid into coroners' districts, upon every election to be made of any coroner or coroners for any county, the sheriff of the county where such election shall be made shall hold a court for the same election at some convenient place within the district, for which the election of coroner shall take place, on some day to be by him appointed, which day shall not be less than seven days, nor more than fourteen days after the receipt of the writ *de coronatore elegendo*; and in case the said election be not then determined upon the view with the consent of the electors there present, but that a poll shall be demanded for determination thereof, then the said sheriff, or, in his absence, his under-sheriff, shall adjourn the same court to eight of the clock in the forenoon of the next day but one, unless such next day but one shall be Saturday or Sunday, and then of the following Monday; and the said sheriff, or, in his absence, the under-sheriff, with such others as shall be deputed by him, shall then and there proceed to take the said poll in some public place or places by the same sheriff, or his under-sheriff as aforesaid, in his absence, or others appointed for the taking thereof as aforesaid, and such polling shall continue for two days only (altered by the 22 & 23 Vict. c. 116, s. 2, to one day only) for eight hours in each day, and no poll shall be kept open later than four of the clock in the afternoon of either of the said days.

Sect. 13 contains provisions for the taking of the poll, and enables the sheriff, if required, by or on behalf of any candidate to administer the following oath to any voter:

I *swear (or being one of the people called Quakers, or entitled by law to make affirmation*, solemnly affirm) that I am a freeholder of the county of , and have a freehold estate consisting of . lying at , within the said county; and that such freehold estate has not been granted to me fraudulently or colourably on purpose to qualify me to give my vote at this election; and that the place of my abode is at (*and if it be a place consisting of more streets or places than one, specifying what street or place*); and that I am twenty-one years of age as I believe, and that I have not been before polled at this election; adding (*except in cases of solemn affirmation*) so help me God.

The 14th section subjects a party taking a false oath, or making a false declaration, to the punishment of perjury.

The 15th section provides for the declaration of the poll by the sheriff.

Keane, Q. C. (*Day* with him) for the relator, and contended that the plea was bad.

Gray, Q. C., for the defendant, stated that he should contend that this court could not entertain the question, for that the question of the right of the voters to vote was one alone for the sheriff.

Keane.—This is a most novel objection, which was not taken in *Reg.* v. *Day*, 3 Ell. & Bla. 859, nor in *Re the Coronership of Hemel-Hempstead*, 5 De G., M. & G. 228.

Gray, Q. C.—The sheriff is the only party to decide whether or not the voters, who are in fact suitors in the County Court, are duly qualified, and the return of the sheriff being a judicial act, this court will not review his decision (2 Inst. 175).

Keane was heard in reply.

COCKBURN, C.J.—I am of opinion that the plea is good. The sheriff in taking the poll at the County Court is no doubt exercing judicial functions. Certainly before the passing of the 7 & 8 Vict. c. 92, it was his undoubted duty to make a scrutiny at the time, in the same way as in the case of an election of members to serve in Parliament, when as we know, the right of the voters used at the time of the election to be inquired into and judicially determined, and I take it that where there was formerly a scrutiny, it was not intended by the statute that there should be an appeal to this court instead. It is true that the scrutiny has been rendered practically impossible by the limitation of the time for polling, which precludes such a course being adopted, but we cannot say that on that account the power and duty of taking a scrutiny have been transferred to this court. What the Act of Parliament has done, has been to shorten the time for voting to one day, and it has substituted for the former scrutiny, which has thus become practically impossible, the oath of the person who tenders his vote. It may well be that this state of things is open to objection on the ground of inconvenience, but probably the Legislature has thought that upon the whole, the risk of proceedings for perjury which might follow upon a false declaration, is a sufficient protection.

MELLOR, LUSH, and HAYES, JJ., concurred.

Judgment for the defendant.

Attorneys for the relator, *Merriman* and *Buckland*.

Attorney for the defendant, *F. J. Hand.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers at-Law.

Friday, June 4.

Re THE ESTATE AND EFFECTS OF JOHN GREENWOOD (deceased).

Revenue—Legacy duty—Legacy payable after death of an annuitant to different persons in succession chargeable at the same rate of duty—Rate of duty thereon and when payable—Legacy Duty Act (36 Geo. 3, c. 52), ss. 6, 9, 12—Right to begin—Practice.

J. G., by will, gave all his real and personal estates (not specifically bequeathed) to trustees, upon trust to pay an annuity of 100l. a year to his wife for life, and after her decease to pay to his natural daughter, M. S., the sum of 600l.; and after making several other bequests, then as to a certain freehold public-house,

after the decease of his wife, upon trust to pay the rents and annual income to be derived therefrom unto his natural daughter E. M. for her life, and after her death to stand possessed of the said public-house, in trust for such of the children of the said E. M. as might be then living, and the issue of any that might be dead, share and share alike. And as to all the residue of his estates, after answering the several purposes aforesaid, he directed his said trustees to invest the same, and pay two-thirds of the dividends thereof unto the said E. M. during her life, and after her death the principal to be equally divided between her children on attaining twenty-one years; the remaining one-third to be paid unto the said M. S. during her life, and after her death the principal to be equally divided between her children. By a codicil to his will the testator stated that the said freehold public-house had been sold and realised 2200l., and he therefore revoked the devise of the said public-house in his will mentioned in favour of the said E. M. and her children, and in lieu thereof he directed his said trustees to stand possessed of the sum of 2200l. and invest the same, and to pay the interest arising therefrom unto the said E. M. for her life, in manner in his said will expressed with reference to the rents of the said public house so sold as aforesaid; and after her death to stand possessed of the said sum of 2200l. for the benefit of the children of the said E. M. as in the said will mentioned, and he thereby gave and bequeathed the same to them accordingly. Upon the testator's death, his widow being still alive, the executor in the residuary account deducted from the net amount of the residue on which duty was now payable the sum of 2800l. which he claimed to detain to answer the above outstanding legacies of 600l. and 2200l. The commissioners of Inland Revenue, on the other hand, claimed payment of duty on the said two legacies as having fallen into the residue.

Held, by the Court of Exchequer (Kelly, C.B. and Bramwell, Channell, and Cleasby, BB.), that legacy duty at the rate of 10l. per cent. was payable at once by the executor upon the two several sums of 600l. and 220l. By Kelly, C.B. and Bramwell and Channell, BB. as to both sums, and by Cleasby, B. as to the 2200l., under the express provisions of sect. 12 of the Legacy Duty Act (36 Geo. 3, c. 52) as "a legacy or residue, or part of any personal estate given over for the benefit of, or so that the same shall be enjoyed by, different persons in succession, chargeable with duties at one and the same rate;" and that, according to the provisions of that section, or of the 1st, 2nd, or 3rd sections, of the Act, or of the whole of them taken together, the Crown was entitled to that amount of duty; and by Cleasby, B. as to the 600l. under sect. 6 of the same Act.

In this case, which was a writ of summons from the Exchequer, calling on the executor to show cause why he should not deliver an account of the deceased's estate, and pay the legacy and succession duties chargeable thereon, the practice as to the right to begin being stated to have varied, the court decided to hear counsel for the Crown in the first instance. (a)

This was a case of a writ of summons issued out of the Court of Exchequer at the suit of the Crown, under the provisions of the Crown Suits Act 1855 (28 & 29 Vict. c. 194), calling upon one William McFadzen, the executor of the last will and testament of John Greenwood, deceased, and also trustee of certain property to which certain persons became entitled as successors upon the death of the said John Greenwood, deceased, to show cause why he should not deliver to the Commissioners of Inland Revenue an account upon oath of all the legacies and of all the property of the said John Greenwood, deceased, paid or to be paid or administered by him as such executor as aforesaid. And also an account of all the property to which or to the income whereof the persons aforesaid became beneficially entitled as such successors as aforesaid upon the death of the said John Greenwood, deceased, by reason of the disposition thereof, made by the last will and testament of the said John Greenwood, deceased, the predecessor or otherwise and of the value thereof, and also pay the duty chargeable under the Legacy Duty Acts upon the said legacies and property of the said John Greenwood, deceased. And also the duty chargeable under the said Succession Duty Act upon the said property as such succession as aforesaid and the costs of these proceedings.

From the affidavit filed by the executor's solicitor in answer to the said writ, it appeared,

1. That the said John Greenwood, of Liverpool, in the county of Lancaster, licensed victualler, duly made and executed his last will and testament in writing, dated 7th Dec. 1859, whereby he gave all his real and personal estates whatsoever (not specifically bequeathed) unto the use of Henry Morris and William McFadzen, their heirs, executors, and assigns, upon the several trusts therein declared concerning the same (that is to say) upon trust, *inter alia*, to pay into the hands of his wife, Mary Greenwood, for her own use and benefit, the clear sum of 100l. per annum during her life, and from and after the decease of his said wife he directed his said trustees, or the survivor of them, or the heirs, &c., of such survivor, or other the trustees or trustee for the time being of his said will, to pay to his natural daughter, Martha Sutcliffe, the sum of 600l. for her own use and benefit absolutely. And after making several other bequests, then as to all that freehold public-house at Liverpool called the Queen's Arms, after the decease of his said wife, upon trust that his said trustees or trustee for the time being did and should pay the rents and annual income to be derived from the said Queen's Arms unto his natural daughter, Elizabeth McArville, for her life, and from and after her death; then the testator directed his said trustees to stand possessed of the said hereditaments called the Queen's Arms, in trust for such of the children of the said Elizabeth McArville as might be then living, and the issue of any that might be dead, share and share alike. And as to all the residue of his estate after answering the several purposes aforesaid, he directed his said trustees or trustee to invest the same in their or his names or name as therein mentioned, and to pay two-thirds of the dividends derived therefrom unto the said Elizabeth McArville during her life for her own sole and separate use absolutely, and after her death the principal to be equally divided between her children, share and share alike on their attaining twenty-one years, and the lawful issue of a deceased child, the remaining one-third thereof to be paid unto the said Martha Sutcliffe during her life for her own sole and separate use absolutely; after her death the principal to be equally divided and paid between and to each of her children. And by a codicil to his will bearing date the 31st day of March 1863, the said testator stated that the said freehold public-house called the Queen's Arms, had been sold and realised 2200l., and he therefore revoked the devise of the said public-house in his will mentioned in favour of the said Elizabeth McArville and her children; and in lieu thereof he directed his said trustees or trustee to hold the sum of 2200l., and invest the same in their or his names or name, and to pay the interest to arise therefrom unto the said Elizabeth McArville for her life in manner in his said will expressed with reference to the rents of the said public-house so sold as aforesaid, and after

(a) See the case of *Re De Lancey's succession*, argued subsequently on the same day, and reported *post*, in which the court held that the appellant should begin.

her death to stand possessed of the said sum of 200*l.* for the benefit of the children of the said Elizabeth McArville as in the said will mentioned, and the testator thereby gave and bequeathed the said 2200*l.* to them accordingly. And after revoking one other devise the said testator in all other respects confirmed his said will.

2. That the said testator, John Greenwood, died on or about the 4th May 1868, and probate of his said will was granted on or about the 8th June 1863 to the said William McFadzen, the surviving executor, the said Henry Morris having died in the testator's lifetime.

3. That Mary Grenwood, the widow of the said testator, John Greenwood, is still living.

4. That the residuary accounts of the personal estate, and of moneys arising out of the real estate of the said John Greenwood, were duly prepared by the executor on the 19th June 1867, for the purpose of the amount of legacy duty, payable in respect of the bequests contained in the said will being duly assessed, and that the net amount of such residuary personal estate and moneys amounted, according to the statement in such accounts, to the sum of £4958 3 6

That from such net amount the executors claimed to be allowed to make the following deductions:—						
Detained to pay outstanding legacies	£2800	0	0			
Annuities:						
Thomas Greenwood ...	49	9	10			
Hannah Carter	38	12	1			
Mary Greenwood Rathbone	381	16	7			
Mary Greenwood, testator's widow, born 17th Sept. 1797	761	19	0			
				4031	15	6
Leaving as net residue on which duty was payable				£926	8	0

That the said accounts were duly tendered by the executor to the Commissioners of Inland Revenue; but were refused at the office of the said commissioners on the ground that they were incorrectly drawn, the said commissioners claiming the payment of duty upon two legacies of 600*l.* and 2200*l.*, they having, according to their view of the case, fallen into the residue. The executor, however, declined to pay the duty upon such legacies until after the death of the said testator's widow; but he offered to pay the sum of 92*l.* 12*s.* 10*d.* for the duty, after the rate of 10*l.* per cent. upon the sum of 926*l.* 8*s.*, the said residue and moneys to which he claimed to be entitled, and to retain for the use of the said Elizabeth McArville and Martha Sutcliffe, being natural children of the deceased.

5. That the said William McFadzen has paid duty on the annuities left to the several parties mentioned in the said will and also expressed his readiness to pay duty on the residue, *after deducting the aforesaid sums of* 2200*l.* *and* 600*l.*

6. That the said William McFadzen, before paying the duties claimed upon the said residuary estate, is desirous of obtaining the opinion of this honourable court whether or not duty is payable upon the sums of 2200*l.* and 600*l.* (being legacies left by the testator to his two natural children Elizabeth McArville and Martha Sutcliffe, to be paid to them after the decease of the testator's wife) (who is still living) at once, or whether the payment of the said duty ought to be postponed until the final distribution of the said testator's residuary personal estate after the death of the widow of the said testator, the said two legatees being the persons entitled to the said residue.

The following sections of the Legacy Duty Act (36 Geo. 3, c. 52) were referred to and relied on as material to the case.

Sect. 6:

By this section the duties thereby imposed shall in all cases in which it is not thereby otherwise provided, be accounted for, answered, and paid by the person or persons having or taking the burthen of the execution of the will, &c., or the administration of the personal estate of any person deceased, upon retaining for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy or part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and also upon delivery, payment, or other satisfaction or discharge whatever of any legacy, &c., to which any other person or persons shall be entitled.

By sects. 8, 10, and 11, the duties payable on legacies given by way of annuity, whether annually or for life or lives, or for years determinable on life or lives, or for years or other period of time, and the duty on legacies whose value can only be ascertained by application of the allotted fund, and the manner of calculating the same, and of the payment thereof are prescribed.

Sect. 9:

That the value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated, and the duty shall be charged thereon, in the same manner as hereinbefore directed with respect to other annuities (sect. 8); and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy after deducting the value of such annuity, and the duty for such annuity shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal quarterly payments, in the same manner as the same would be payable according to the provisions hereinbefore contained, if such annuity had been a direct gift to the annuitant, and subject to the like proviso in case such annuity shall determine before four years' payment shall become due; and the payment which shall be made for such duty shall be retained by the person or persons paying the same out of the first four years' payment of such annuity, if so many shall become due, or out of so many of such payments as shall become due by equal portions.

Sect. 12:

The duty payable on a legacy, or residue, or part of residue of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by, *different persons in succession*, who shall be chargeable with the duties hereby imposed *at one and the same rate*, shall be charged upon, and paid out of, the legacy or residue, or part of residue so given, *as in the case of a legacy to one person*; and where any legacy or residue, or part of residue, shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under, or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid, in like cases of partial interests charged on any property given otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy or residue or part of residue so to be enjoyed in succession shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same or such part thereof as shall be so received, or of all the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession.

The *Solicitor-General* (Sir J. D. Coleridge, Q. C.), with him were the *Attorney-General* (Sir R. P. Collier, Q. C.), and *C. Hutton*, commenced to argue this case on the part of the Crown, when

C. Crompton, who appeared to show cause on the part of the executor, claimed the right to begin.

KELLY, C. B. (after some consultation on the bench).—According to what I am informed the practice has been in such cases, I think we should first hear Mr. Crompton show cause.

The *Solicitor-General.*—I have no wish to interfere with, nor have I any experience of what the practice has been in such cases; but I am told that it has been both ways in this court. It certainly seems more convenient, if I may be allowed to say so, that the Crown should let the other side know how they put their claim, because, failing to satisfy the court that they are entitled to this duty, a great deal of time would be saved.

BRAMWELL, B.—I do not remember such a case as this before. What would happen if no one appeared on the other side?

The *Solicitor-General.*—I apprehend I should have to satisfy the court why they should make the executor pay the duty claimed from him.

BRAMWELL, B.—I should have thought so, too.

KELLY, C. B.—If the practice has at all varied we must settle the question for ourselves. We will therefore hear counsel for the Crown in the first instance in the present case. (*a*)

The *Solicitor-General*, on the part of the Crown, then proceeded to argue as follows:—The point is, whether 2800*l.*, the capital of which is not to be paid until after the decease of a certain person, ought or ought not to pay duty at the present time, and it arises on the construction of the testator's will. [KELLY, C.B.—Does it not turn on the Legacy Duty Act, the question being, as I take it, whether 10*l.* per cent. legacy duty should be paid at once, or upon the death of the widow, when the legacy is to take effect in favour of the illegitimate children?] With submission, it depends on the construction of the will. The question is, Is the property or beneficial interest in this money at the present moment in the widow or in the illegitimate children of the testator? If in the widow, then it is conceded that the 10*l.* per cent. duty ought not to be paid by the executors; but if on the true construction of the will, the children have the present interest, subject only to the 100*l.* a year to the widow, then they ought to pay the duty at once. On the true construction of the will, the whole realty and personalty are charged in the hands of the trustees with 100*l.* a year to the wife, the 2200*l.*, and the dividends arising from its investment, are by the codicil put in exactly the same position as the receipts of the public-house would have been in if not sold. [KELLY, C. B.—How under the terms of the will can this legacy of 2200*l.*, which is to be divided amongst several children, take effect until Mrs. McArville's death, she having a life interest?] The executor has furnished an account, and claims certain deductions from the residue. The residue passes at once into the beneficial possession, in different measures and degrees, of the two illegitimate children, and upon that residue, whatever its amount may be, the executor is bound to pay legacy duty, and he does not dispute that it is so; but the question is what deductions from the residue he has a right to claim. [BRAMWELL, B.—If I understand the matter rightly, when a legacy is payable to certain persons after a life estate, the legacy is not due until after the life falls in. Why then are these persons called upon to pay 10 per cent. upon this 2200*l.* now?] Because, on the true construction of the will, it is part of the residue, and the residue having passed into their beneficial possession the duty ought to be paid. They are liable to pay upon the general residue, and so legacy duty is payable at once thereon. The will operates as a gift *in presenti* of the entire estate to the residuary legatees, subject to the annuity, and there is no pause in the succession as regards the 600*l.* and 2200*l.*, the daughters or their children being entitled to the intermediate income thereof as residuary legatees during the widow's lifetime. It will, perhaps, be contended, *contra*, that this 2800*l.* is a security for the annuity to the widow; but the executor has retained 761*l.* 19*s.* to answer the purchase-money of an annuity of 100*l.*, according to the widow's age, and he cannot have it both ways and the 2800*l.* also, as by the account he claims to do. With regard to 600*l.* of the 2800*l.*, the legatee is entitled, though not to the sum itself until after the widow's death, yet to the interest of it now, there being no trust for accumulation. Legacy duty is payable at once upon the whole of the *corpus* of the estate, except the 761*l.* 19*s.*, either as being legacies retained, or as constituting, until the time of retainer arrives, part of the general residue of the testator's estate.

Crompton, for the executor, *contra*, showed cause in obedience to the writ of summons. The account tendered is correct, and the executor is not liable to more duty than by such account he charges himself with. The annuities given by the will have been capitalised according to the Act at 49*l.*, 38*l.*, 381*l.* and 761*l.* respectively, for the purposes of assessing the duty thereon, which has been paid. The 2800*l.* has been put aside by the executor because the legatees are not entitled to either principal or interest until after the widow's death. Were the executor to invest the capitalised amounts and purchase these annuities in order to enable him to pay the 2800*l.* at once, he would commit a breach of trust. No legacy duty is payable so long as the annuity exists. [BRAMWELL, B.—Upon what section of the Act do you found that statement?] The 6th section, which is the principal section relating to the present question, makes the duty payable when the executor either retains the legacy for the benefit of the persons entitled, or pays it over to them, and the Crown is not entitled to duty until that period. The will contains no direction to the executor to accelerate the coming into possession of the residue by purchasing an annuity for the wife. But he has to pay these annuities out of the *corpus* of the property remaining in his hands. The whole amount is uncertain and contingent, and cannot be really estimated until it is known what really comes into possession on the widow's death. he can only be liable now to pay duty on the surplus dividends after the annuity is satisfied, as he may pay them over from time to time to the residuary legatees. The 9th section, relied on *contra*, merely says that duty is to be payable on the annuities; it does not say how it is to be paid on the legacies if they are not received until after the annuitant's death. The section referred to applies to the case of a legacy payable at once with an annuity out of it. These two sums, 600*l.* and 2200*l.*, cannot, it is submitted, be considered as part of the residue. Sects. 9 and 12, as to payment of duty on a legacy charged with an annuity, apply where the legacy is payable at once. Here, by the will the legacy is deferred. But that these legatees are entitled to the surplus income during the widow's life, there would be no claim by the Crown for duty at present.

(*a*) But see the case of *Re De Lancey's succession*, reported post.

The testator's intention obviously was that there should be no distribution of the residue until his wife's death, the annuities being his first object. The executor cannot accelerate, and the Crown has no right to insist upon his accelerating, the trusts of the will. It is very probable, looking at the terms of the will and codicil, that the testator was not certain whether or not the income of his estate would be more than enough to pay these annuities. If otherwise, why did he not devise the rents of the public-house at once to Mrs. McArville? The 2200*l.* is a security for the wife's annuity. The annual proceeds are part of the residue, and must be invested as much as any other part of the residue which is not as yet distributable, until the proper time of distribution. He referred also to sect. 10, and submitted that the account was right and the executor entitled to judgment.

C. Hutton replied.—There is no express trust for accumulation in the will, and the implied trust to that effect, which seems to be relied on by the other side, cannot avail against the express and absolute gift of the residue. The *corpus* of the estate is admittedly more than enough to pay all the annuities and these legacies, and to leave a surplus besides. The Crown, therefore, is entitled to the whole duty at once upon the residue, under the 12th section; the policy of the Act being, too, it is to be remembered, to accelerate the payment of duty.

Kelly, C. B.—I am of opinion that the Crown is entitled to the judgment of the court. The question arises as to two sums of 2200*l.* and 600*l.*, and the annual proceeds of both sums for a certain period of time, or until a certain event shall happen; Now, in order to determine this question according to the provisions of the Act of Parliament, we must first ascertain what is the legal effect of the will taken together with the codicil thereto. Now, it appears that the testator, who was possessed of, among other things, a freehold public-house, and considerable personal property, made this will, by which he bequeathed to his wife an annuity of 100*l.*, to be charged and chargeable upon the whole of his real and personal estate. In his lifetime it appears that he had disposed of the public-house mentioned in his will, and accordingly by a codicil he left the produce or what is supposed to be the nett produce of the public house, namely, the sum of 2200*l.* to his daughter, Mrs. M'Arville, for life, and the remainder to her children. And the sum of 600*l.*, which is clearly part of his personal estate, and has nothing to do with the possession of the public-house, he by his will left to his daughter Martha Sutcliffe, but to be payable to her only at the death, or from and after the death, of his wife.

Now the question arises when and in what form and manner, looking to the whole of the provisions of this will and to the Act of Parliament, the legacy duty is payable upon those two sums of 600*l.* and 2200*l.*? We must deal with them separately, because the right of the several legatees to them arises under very different circumstances. First, as to the 600*l.*; the testator, as I have observed, being possessed of a considerable personal estate, and having bequeathed several legacies which are admitted to have been provided for, and are not now in question, left this annuity of 100*l.* to his wife. It appears that his personal estate is of very considerable value, far exceeding the value of this annuity, for the executor claims to retain 2800*l.* of the personal estate in his hands, independently of and over and above the sum of 761*l.* 19*s.*, the value of the annuity of 100*l.* to the widow. Now, on looking at the 9th section of the Act of Parliament, we are enabled at once to dismiss from the case, and to set aside all reference whatever to this annuity, or its value. By that section of the Act, where an annuity is bequeathed payable out of the personal estate of a testator, the mode to be adopted for the payment of the legacy duty is this: the legacy is to be valued, and then the duty, if any be payable, is to be paid by the annuitant in the way pointed out in the Act, upon the value of that annuity. Then, with regard to the rest of the personal estate, which may be termed the residue, if it be sufficient, the value of that annuity is to be deducted from the whole amount of the personal estate upon which it is charged, and whatever is the residue the legacy duty becomes payable on that according to law, that is, according to the other directions of the Act of Parliament applicable to the legacy or residue in question. Well, deducting that, it appears clear, from the account rendered by the executor, that he has become possessed, independently of all other claims, of 2800*l.*, plus the 761*l.*, the value of the annuity. We have first, then, to deduct from that the aggregate of those two sums, and then we find that the executor has in his hands the clear net sum of 2890*l.*, the residue of the personal estate of the testator, and we are now to consider what and when, that is to say, what is the duty payable, and when is it payable upon that residue? Now that is divided into two sums, and first in respect of the sum of 600*l.* In order to determine what legacy duty is payable upon the 600*l.*, and when it is payable, we must look to the whole of the provisions of the will in relation to this sum. It is a part of the residue. Before, therefore, we can determine how it is bequeathed, and consequently in what manner legacy duty is to be imposed, we must take the residuary clause of the will into consideration, together with the clause bequeathing this sum of 600*l.* to Martha Sutcliffe; and, taking the whole of the will together, its effect is obviously this: the residue is bequeathed, in the first instance, to executors, and they are to hold upon trust only to invest, from time to time, the annual rents and proceeds of the personal estate; and with regard to the whole of the residue or annual proceeds and capital, it is bequeathed and disposed of, in the first instance, in this way: two-thirds to Mrs. McArville, who is the testator's natural daughter, for her life, with remainder at her death, the capital to be divisible and to be divided equally among her children; and with regard to the other third, it is bequeathed to Mrs. Sutcliffe, and at her death to be divided among her children. So that included the capital of the sum of 600*l.*, with which alone we are dealing now. But I may add, to avoid any complication, or any question arising upon what might have altered the effect of the Act of Parliament, as applicable to these legacies, that, with respect not only to the 600*l.*, but to the 2200*l.*, and with respect to the annual proceeds of both those sums, until the one and the other would become payable, that is, with respect to the whole of the residue of the personal estate, the whole aggregate sum of 2800*l.* is bequeathed in some way or another, or payable at some time or times or another, to Mrs. McArville and her children, and to Mrs. Sutcliffe and her children. Now these legatees are all strangers in blood to the testator, and each and every of them liable to 10*l.* per cent. legacy duty upon whatever may be the amount of their legacies. Then we have to see next, in what way these legacies are payable, in order that we may determine whether there is anything in the effect of the dispositions in the will that would disentitle the Crown to claim at once, upon the ground of the residue being ascertained, which it is at 2800*l.*, and the legacy duty being payable immediately upon that entire sum. When we look to the residuary clause its effect is this,—the whole residue (let it be in whatever way and at whatever

time it may arise) is bequeathed as to two-thirds to Mrs. McArville and her family, and as to the remaining third, to Mrs. Sutcliffe and her family. A question has been raised as to how those annual proceeds are to be disposed of in the meantime, and until, at all events, this sum of 600*l.* shall become payable, which is not until the death of the widow, who is still alive. Looking at the residuary clause, I am of opinion that the annual proceeds of this sum of 600*l.* fall into the residue, and become payable under the residuary bequest in the proportion of the two-thirds and one-third to the two ladies before-mentioned, and ultimately to their children. Then how stands the legacy of 600*l.* apart from any other obligations arising out of the other provisions of this will? Why, this 600*l.* parcel of the residue is left during the life of the widow to Mrs. McArville and Mrs. Sutcliffe, in the proportion of two-thirds and one-third, and at the death of the widow altogether and at once to Mrs. Sutcliffe. How then stands the case? It is exactly and precisely a case within the provision of the 12th section of the Act of 36 Geo. 3, c. 52, which enacts "That the duty payable on a legacy or residue or part of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with duties hereby improved at one and the same rate, shall be charged upon and paid out of the legacy or residue in part of residue so given, as in the case of a legacy to one person." Then here is a legacy of 600*l.*, of the annual proceeds of it during the life of the widow of the testator in the proportions before-mentioned to Mrs. McArville and to Mrs. Sutcliffe, and on the death of the widow, of the whole of it to Mrs. Sutcliffe. Both Mrs. McArville and Mrs. Sutcliffe are strangers in blood, and so are liable to the duty of 10 per cent., within the precise words of this provision of the Act, that is where the duty is thereby imposed at one and the same rate. It is clear, therefore, that the legacy of 600*l.* is to be dealt with by the Crown with respect to their claims of duty, exactly as if it had been a legacy of 600*l.* to one person alone. The question has been raised whether, looking at the peculiar terms of the residuary clause, the annual proceeds of the 600*l.* are payable in the meantime, and during the life of the widow, to the two jointly—that is to Mrs. McArville and Mrs. Sutcliffe, or whether they are to accumulate until the death of the widow, and then to be payable either to the two or to the one, as it may be? I think that the effect of this clause is that the annual proceeds are not to accumulate, but that they are liable to be dealt with in the same way as the dividends, interest, or annual proceeds of the rest of the residue of the personal estate—that is to say, they are to be given to those two persons in the proportions provided by the will. But, if it be otherwise, whether the payment of the annual proceeds to those two persons is to be made during the life of the widow or is to be postponed until after her death, either Mrs. McArville and Mrs. Sutcliffe jointly, or Mrs. Sutcliffe alone, is entitled to the 600*l.*, as well as to the annual proceeds, until the principle or capital should become payable. In either case here is a simple legacy of 600*l.*, whether payable at once or payable at a future date is perfectly immaterial, and upon that sum legacy duty attaches but once, whether under the provisions of the 12th section or under the earlier sections of the Act. Under these circumstances, whatever may be the construction of the will, the result is that 600*l.* is left, sooner or later, the annual proceeds as well as the capital, to these two persons, or one of them, and their respective families, and that 10 per cent. would attach and be payable to the Crown, whenever the legacies were paid by the executor to the legatees, or were retained by them, and so came to their hands, and were held by them for the benefit of the legatees. It is quite immaterial when that sum should become payable to the legatees; they are all liable to the same rate of duty, and consequently the Crown is entitled to this amount of duty, according to the provisions of the 1st, 2nd, and 3rd sections, or of the 12th section of the Act of Parliament; or of the whole of these sections taken together. With regard to the 2200*l.*, it is unnecessary to say more than that, whether that sum shall be payable only under the codicil, upon the death of the widow, to Mrs. McArville, or whether the proceeds thereof, in the meantime, shall be payable during the life of the widow, in the proportions of two-thirds and one-third, to the two daughters or their families, is perfectly immaterial, because it comes under the same principle; it is a portion of the residue in moneys numbered, in the hands of the executor, and it is payable, sooner or later, in one proportion or another to Mrs. McArville or Mrs. Sutcliffe, or their families, or to the whole together. Some of these persons, either one family or another, must, sooner or later, be entitled to the sum of 2200*l.*, and as they are all liable to the same rate of legacy duty, namely, 10 per cent., that amount of duty is chargeable, and immediately on the money coming into the hands of the executor, whether paid over by him to the several legatees, or retained, from the time of the money coming into his hands, for the benefit of those who should ultimately be entitled to the various component parts of that sum. Under these circumstances we have only to look at the different sections of the Act to which I have referred to clear the case from the complication arising from mixing up the annuity and the liability to pay it out of the rest of the estate, to see that the residue, taken separately by itself—that is, the 2200*l.* and the 600*l.*, is payable sooner or later to one or the other or all of these several persons, who are liable to the same rate of duty, and that therefore the Crown is entitled to the duty as soon as the money is received by the executor, and from the time it is retained in his hands for the benefit of the legatees who are ultimately entitled.

Bramwell, B.—I am of the same opinion.

Channell, B.—I am of the same opinion, and for the reasons given.

Cleasby, B.—I am of the same opinion. But I will just say, that with regard to the 2200*l.* I do not think there is much difficulty. As I read the will and codicil together, the 2200*l.* go in succession to persons paying the same duty, and therefore come within the 1st clause of sect. 12. But I confess that, as regards the 600*l.*, I felt some difficulty—perhaps, even more than the Lord Chief Baron—because if this 600*l.* had been given, for instance, to "such persons as shall be then my next of kin," so that you could not ascertain what duty was payable upon it until the death of the tenant for life,—then, although the executor retained it in his hands for the purpose of paying the legacy, undoubtedly the legacy duty would not have been payable until the death of the tenant for life, when it could be ascertained who the persons were who were beneficially entitled to the legacy; and whether the duty were 3 or 10 per cent., or whatever other rate it might be. But that is not the case here. Undoubtedly this does not come within the 12th section. This clearly is not the case of taking a legacy in succession, nor is it that it comes within the 9th section. The 9th section applies to the case of an annuity like that of the 100*l.*, where the rest is given to a particular person, who immediately

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after deducting the amount of the valuation of the annuity is to be paid the amount of his legacy. But here there is a particular sum charged upon the same fund that is subject to the annuity. Now, we know what the sum is which is to be paid; for it is a gift to Mary Sutcliffe, who is to pay 10*l.* per cent., and the executor retains the money for the purpose of paying that legacy. It strikes me that it comes within the 6th section. Then, when the executor pays the 600*l.* to the legatee, when the latter becomes entitled to payment, he will deduct the duty which he has paid on account of that legacy, which in this case will be 10 per cent. As soon as the amount of duty is ascertained the executor must pay it, but afterwards the person who receives the legacy repays it by having it deducted from the amount paid him by the executor.

Judgment for the Crown for payment of a duty of 10l. per cent. on the 2200l. and 600l. at once.

Attorneys for the appellant, the executor, *Wright* and *Venn*, 2, Paper-buildings, Temple, E.C., agents for *W. Morris*, Liverpool.

Attorney for the Crown, *The Solicitor of Inland Revenue*, Somerset House.

UNITED STATES DISTRICT COURT—IN ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate.

SOUTHERN DISTRICT OF NEW YORK.

THE SHIP STRATTON AUDLEY AND HER CARGO.

Salvage—Corporations for wrecking purposes—Costs.

Where a vessel and her cargo, worth 250,000 dollars, was towed off the Romer shoal at the entrance to the harbour of New York, on which she had touched, the service occupying six hours, and being performed by two tugs which were owned by a corporation, incorporated for wrecking purposes, the masters and crews of the tugs being hired on regular monthly wages, with an agreement that they should not share in any salvage awarded for services rendered by the tugs, and a suit was brought against the ship and her cargo in the names of the masters of the two tugs and the corporation which owned them, for themselves and the crews of the tugs, claiming to recover 25,000 dollars salvage:

Held, that under the agreement by which the masters and crews were hired, they must be left out of the case altogether.

That the corporation could not claim, as assignee in advance, of what might otherwise be the claims of the masters and crews for salvage, and as the latter had cut themselves off by their contract with the company from making any claim for salvage, such claim never had any existence, so as to be capable of assignment after the fact.

That the corporation itself could not be a salvor.

That the corporation was entitled to a proper compensation for the use of the two steamers and the appliances on board them for the service rendered, and that the case was to be considered as one of contract for work and labour, without reference to the value of the ship and her cargo.

That the hazard to the tugs was also to be taken into consideration, but not the expense to the corporation of keeping the tugs in readiness to perform such work and labour.

That on the evidence, 1500 dollars was a sufficient compensation, and as an offer of 2000 dollars had been made as a compromise before suit, no costs were allowed.

BLATCHFORD, J.—This is a libel filed by Thomas F. Marshall, master of the steamer *Yankee*, and David A. Wolcott, master of the steamer *Rescue*, and the Atlantic Submarine Wrecking Company, a corporation created by the State of New York, and authorised to engage in the business of wrecking and of assisting vessels in danger and distress, and who were the owners of the said steamers. The libel is filed by the libellants for themselves and the crews of the said steamers, and claims the sum of 25,000 dols. as a reasonable compensation, by way of salvage or otherwise, for the services of the libellants and of the said crews, in removing the British ship, *Stratton Audley*, and her cargo, from off the Romer Shoal, near the entrance to the lower bay of the harbour of New York, where she was aground, on the 23rd March 1869. The answer gives substantially a correct version of the facts of the case, as they appear in evidence. The ship was bound from Calcutta to New York. She took a pilot off Barnegat light, about half-past six o'clock in the evening of March 22. At a quarter before eleven o'clock at night, whilst running for the bar at the entrance to the lower bay, she encountered a snow squall, which obscured the coast lights. Her port anchor was then let go, but the chain parted. Her starboard anchor was then dropped. She dragged some distance with this, until she brought up in 27ft. of water. She drew 17¾ft. forward; and 19¼ft. aft. The tide, which was very high, being driven in by an easterly wind, so that low water was as high as ordinary high water, fell while the vessel lay in this position, so that there came to be but 21 feet of water under her aft, and as there was considerable sea on, she struck bottom occasionally near her stern, and when she struck she thumped heavily. About six o'clock in the morning, the steamtug *Yankee* came within hail of the ship, and was asked by her master what the charge would be for towing the vessel off? Marshall, the master of the *Yankee*, asked, in reply, how much water the ship drew. The answer from the ship was, "about 20 feet." Marshall asked how much water there was alongside of the ship. The answer was "about 21 feet." Marshall asked if she was not striking. The reply was, "once in a while." Marshall then said he would tow the ship off for 1000 dols. The master of the ship said that was too much, and offered 500*l.* The *Yankee* then drifted out of hailing distance. She soon came up again to the ship. The master of the ship then asked Marshall, "How much did you say?" Marshall replied "2000*l.*" The master said "I understood you dollars." "No," said Marshall, "I said pounds." It was then agreed that the *Yankee* should render her assistance, and that the amount of compensation should be left to arbitration. The *Yankee* then got a hawser to the ship about half-past six a.m. The *Rescue* soon came up and aided the *Yankee* in pulling, there being a hawser from the stern of the *Rescue* to the bow of the *Yankee*, and another hawser from the stern of the *Yankee* to the ship. The latter hawser, which belonged to the *Yankee* and was a new one, 8in. in circumference, parted, and was put in place again with another hawser which belonged to the ship. The two were then pulled with until the ship's hawser broke. The pulling with the hawser was continued, the ship being moved as the sea lifted her, until that hawser parted again. The hawser from the *Rescue* to the *Yankee* parted two or three times. The result was that, by the use of hawsers, and hawsers alone, and the power of the two tugs, the ship was hauled off into deep water about noon, a space of six hours from the time the *Yankee* reached her. She was towed by the tugs to New York, arriving there about four p.m. She was an iron vessel, and, so far as appears, was not injured or strained. When the *Yankee* reached her, it was

the beginning of the ebb tide and the wind had shifted from the eastward and had come out right from the south and west, but the sea did not abate. It was low water about ten a.m., and about that time the wind got around to the west or north-west. The answer avers a willingness and readiness on the part of the claimaints, at all times, to submit to arbitration the question of the amount to be allowed to the libellants for the service as one of towage, but alleges that the libellants have at all times insisted on submitting their claim to arbitration as one of salvage. The claim is pressed upon the court by the libellants as one of salvage. The value of the ship and her cargo was 250,000 dols. The value of the two steamers at the time was about 80,000 dols., and the value of the wrecking apparatus and material on board of them was about 50,000 dols. more. I think, on the evideuce, that the peril to the ship at and after the time when the *Yankee* reached her has been very much exaggerated by the libellants. So, too, the danger to the steamers has been inordinately magnified, in order to enhance the value of the service. But substantial service was rendered to the ship by the two steamers, and for that service a liberal, but at the same time reasonable, compensation must be awarded. The ship was undoubtedly in a condition to be the subject of a salvage service, but on the principles settled in the case of *The Coast Wrecking Company* v. *The Morning Star*, 14 L. T. Rep. N. S. 420 (*a*), no salvage compensation for the service rendered can be awarded to any of the libellants. The masters and crews of the steamers were hired on wages by the corporation, which owned the steamers and all the apparatus and material on board of them. They received those wages steadily, whether the steamers were employed or not. Their compensation for the services they rendered to this ship, and for the time occupied in rendering those services, was not at all dependent on the success of those services. They did not render them directly to the ship, but incidentally in the discharge of and as a part of their duty to their employers. When they were hired they were given to understand by the corporation that they should receive wages, and that they should have no share otherwise in any earnings of the vessels or of the corporation; and none of them will have any share in anything that may be awarded to the libellants in this case. The masters and crews of the steamers must therefore be wholly left out of the case. The corporation cannot claim as assignee in advance of what might otherwise be the claims of its hired servants for salvage; and those servants, having cut themselves off by their contract with the corporation, from setting up any claim for salvage in this case, such claim never had any existence, so as to be capable of assignment, after the fact. Nor can the corporation itself be a salvor. It cannot hire persons on wages, and claim salvage for services rendered by those persons. If such a principle were to be admitted, it would have to be extended to individuals; and yet it was never heard that one person could hire another on wages to perform a salvage service to a vessel in distress, and to have no share otherwise in the compensation therefor, and that after such service had been rendered by the latter, the former, who had taken no personal part in it, could claim salvage compensation therefore as such. Yet that is precisely the claim which the libellant corporation in this case is urging, when it asks to be paid as if it had been an individual salvor. The main element, which the law recognises and requires as an element in a salvage service, is wholly wanting in the case of a corporation. That element is the impulse and stimulus, which spurs the individual salvor to manifest boldness and heroism, and incur risk and peril, by the expectation of the large compensation which the law awards in cases of success. That element was wholly wanting in this case. The ship and her cargo, as a consideration for their liability to pay a salvage compensation, were entitled to the exercise of all the energies which individual salvors could put forth, impelled by all the hopes of salvage reward which could operate to stimulate those energies. There were no such hopes of salvage reward in this case on the part of the officers and crew of the steamers; and it is at least doubtful, in view of the fact that the *Yankee* failed, through timidity, to reach the ship until on the third attempt to do so, while a pilot boat and her yawl boat seem to have had no difficulty in navigating safely in a no less boisterous sea, whether the same energies were put forth by those on board the *Yankee* to reach the ship promptly that would have been manifested if they had been working for themselves and not merely for their employers. The master of the *Yankee* says that he turned back on his first attempt to reach the ship, because he considered the risk too great, and that he abandoned the second attempt because he would not run the risk till daylight. It is very questionable whether wrecking corporations for salvage business, with their employés placed on the footing occupied by those of this corporation, are, on the whole, of advantage to commerce. There is, on the one hand, the benefit of associated capital of large amount, with well-fitted appliances for the business. But this has the effect to drive individual salvors out of the business; and the daring, and courage, and insensibility to danger, nerved by the prospect of large reward, which are manifested continually by individual salvors, are replaced by the poor substitute of hired labour, which has nothing to gain by taking risks, and is, therefore, likely to fail to use promptly at critical moments the ample means placed at its disposal. This corporation is entitled to a proper compensation for the use of its two steamers, and of such of its appliances on board of them as were used in the service rendered to their ship. The case must be viewed as one of contract for work and labour, without reference to the value of the ship and her cargo as an element in the measure of compensation. Marshall, the master of the *Yankee*, placed it in that position, by what passed between him and the master of the ship. It is manifest that the latter, by regarding 1000 dollars as a large charge, and offering 500*l.*, had no idea that he was subjecting his vessel and cargo to a salvage charge. It is entirely clear, on the evidence, that if he had been told that if he allowed himself to be towed off from where where he was by the *Yankee* he would in the end be obliged to pay her owners a compensation of 25,000 dollars for the service, he would have assumed the risk of remaining there, the wind having already changed to a favourable quarter, until a vessel more moderate in her demands should come to his aid. The hazard to the steamers and the property on board of them, whatever it was, is to be taken into view as making the service worth more than if there had been no hazard to them. But the idea that a proportion of the cost of maintaining the steamers and property for occasional service, and of the current expenses of the corporation, while such steamers and property were not employed in the service of this ship, is to be paid by this ship, is wholly inadmissible. In this case the corporation would have had a claim for compensation for the time and services of the steamers in endeavouring to pull the vessel off, even if they had failed. Their compensation must, of course, be greater because of their success. I wholly reject the testimony of the

(*a*) This case was affirmed on appeal.

so-called expert witnesses on both sides, who give evidence as to their opinion of the value in money of the services rendered. They proceed on grounds which are unsound, and not in consonance with views, which as above stated must govern this case. On the whole evidence, I think 1500 dols. is ample compensation in this case. And as the claimants, before suit was brought, offered to pay 2000 dols. by way of compromise, I allow no costs to the libellants.

For libellants, *E. W. Stoughton* and *J. E. Parsons.*

For claimants, *E. C. Benedict*, *T. Scudder*, and *Martin* and *Smith.*

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

February, 4, 5, *and* 19.

Present: The Right Hon. Lord CHELMSFORD, Sir JAMES W. COLVILE, Sir JOSEPH NAPIER.

RODGER AND OTHERS v. THE COMPTOIR D'ESCOMPTE DE PARIS AND OTHERS.

Hong Kong — Stoppage in transitu — Continuance of transitus—Assignment by insolvent consignees to secure antecedent debt before arrival of bills of lading—Indorsement in performance of agreement in assignment —Special stipulation as to remittances.

A mercantile firm carried on business at London and Hong Kong. The London firm purchased goods of merchants in Manchester for the firm at Hong Kong. The goods were forwarded to London to the shipping agents of the firm there, and were shipped for Hong Kong on the latter's instructions. The bills of lading were in the ordinary form, but the invoices relating to the greater part of the goods contained the stipulation that the Hong Kong firm should remit the proceeds of Sales to the London firm to meet acceptances given to the vendors of the latter.

The Hong Kong partner and consignee of the goods had had bill transactions with banking firms there, resulting in a large unsecured debt.

Being pressed for payment, the consignee on behalf of the firm executed to the banks an assignment of various other property and all goods and bills of lading to arrive within a certain period. This assignment included the goods mentioned above.

Afterwards, on the arrival of the goods, the consignee indorsed and handed over the bills of lading, in performance of the agreement in the assignment.

The Hong Kong branch of the firm was at this time insolvent, and had been so at the date of the assignment :

The owners of the vessel in which the goods were shipped, refused to deliver the goods to the indorsees of the bills of lading, in consequence of notices to stop given them by the unpaid vendors, and the indorsees thereupon brought an action for conversion against the ship owners :

On appeal to the judicial committee :—

Held, first, that the transitus did not terminate till the arrival of the goods at Hong Kong, for the general rule is that where goods are sold to be sent to a particular destination, named by the vendor, the right of the unpaid vendor continues until they arrive and are delivered there according to the bills of lading ; and second, that, as the assignors had not, at the date of the assignment, possession of the bills of lading, and, as nothing was advanced on the faith of them, the effect of the assignment could only be to transfer the interest that the assignors had in the goods expected ; this interest being subject to special stipulations as to remittances in the case of part of the goods, and in all to the lien of the unpaid vendors :

The general rule is that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. An exception, founded on the negotiable quality of the document, is made in the case of the holder of an indorsed bill of lading, who may, in the course of commercial dealing, transfer a greater right than he himself has. But this exception is confined to the case where the transferor is himself in actual and authorised possession of the bill of lading, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest.

This was an action of trover brought by the respondents against the appellants in the Supreme Court of Hong Kong for 305 bales of merchandise which were shipped at London for Hong Kong on board a vessel called the *Min*, by the direction of George Lyall and Charles Frederick Still, of London, deliverable to Lyall, Still, and Co., or their assigns, according to the bills of lading, of which the respondents became the transferees. The appellants were the owners of the *Min*.

They pleaded a denial of the conversion, and also a denial that the goods were the goods of the plaintiffs (the respondents) as alleged.

The case was tried at Hong Kong before the Chief Justice, and a special jury, and a verdict was found for the plaintiffs, for the amount of the value of the goods.

A motion was afterwards made to have this verdict set aside and a nonsuit entered, pursuant to leave reserved at the trial on the ground that the plaintiffs had not proved that they were indorsees of the bills of lading for valuable consideration without notice so as to pass property, or that a new trial should be directed on this and other grounds of objection. An order was made that the motion be refused with costs.

This appeal was brought for the purpose of having this order and the verdict found for the plaintiffs set aside, and judgment of nonsuit entered or a new trial directed.

It appeared that the goods in question were purchased from merchants at Manchester in the autumn of 1866 by George Lyall and Charles Frederick Still, of London, for their firm at Hong Kong, which traded there under the style of Lyall, Still, and Co. Mr. George Frederick Maclean was the resident partner and manager at Hong Kong.

One parcel of these goods was purchased from B. Liebert and Co., on a ten months' credit, which was the usual course in such transactions as between Manchester and Hong Kong merchants.

It was part of the contract that remittances of proceeds of sales should be made from Hong Kong to meet the acceptances of George Lyall and Charles Frederick Still, given for the price of the goods, on receipt of the bills of lading.

The second parcel was purchased from Samuel Mendel on a nine months' credit, with a stipulation of a similar character as to remittances.

The third parcel was purchased from Calvert and Co. on a six months' credit, without any special stipulation.

The object of the long credit was to give ample time for realising proceeds, so as to make remittances according to agreement.

When the time arrived for forwarding the goods from Manchester, Lyall and Still, of London, employed Killick, Martin, and Co., as shipping agents there, to secure tonnage in the *Min*, which was then in the berth for Hong Kong. When this was secured, Lyall and Still directed the vendors at Manchester to forward the goods to Killick, Martin, and Co. for shipment in the *Min* : and they also directed Killick

Martin, and Co. to receive the goods so to be forwarded to them simply for the purpose of the shipment. In accordance with these instructions the goods were packed and marked at Manchester ready for shipment, and were sent up to Killick, Martin, and Co., with whom Lyall and Still had contracted for the carriage from Manchester to Hong Kong. All the charges were included in one through freight.

The goods were shipped on board the *Min*; bills of lading for them, deliverable to Lyall, Still, and Co., or their assigns, were signed by the master, and were handed over to Lyall and Still, who accepted the draft of the vendors for the price in each case.

Before this period the firm at Hong Kong was in a failing condition; their deficit was about 4 lacs of dollars, and, in November,, their condition had not improved. At the end of November and beginning of December, Maclean had bill transactions with the respondents (two banking firms at Hong Kong), by which he got large advances on the undertaking to furnish shipping documents for silk cargoes, to be ready for the mail of the 15th Dec. from Hong Kong.

On the 13th Dec. the transactions of the firm were at a stand; they had ceased to make purchases or shipments of tea or silk as theretofore; they were under the necessity of returning bills of their correspondents, and had refused payment of their acceptances to the amount of 150,000 dollars. This was well known at the time in Hong Kong.

On the 14th Dec. Mr. Kaiser, the manager of one of the two banks, addressed a letter to Lyall, Still, and Co, requiring them to furnish, in the course of the day, the shipping documents according to their undertaking; to which Mr. Maclean replied, that they were unfortunately unable to comply with this request.

On the 17th, Mr Kaiser wrote another letter, insisting on getting the documents or a return of the advance made on the faith of the undertaking to furnish them, and he concluded his letter in these words: "I must ask your immediate attention to this matter, and beg to warn you that my now offering to receive back the money obtained by you must not be looked upon as in any way binding me to treat the matter as one of debt, as I shall hold myself perfectly at liberty to deal with the matter as one of a mnch more serious character than a mere debt, if it be not at once satisfactorily arranged."

Mr. Kaye, the resident manager of the other bank, had had a conversation with Mr. Maclean in reference to the refusal of Lyall, Still, and Co. to pay their acceptances. He also became impatient and urgent for an arrangement, on account of the advance made by his bank. The two banks then combined, and Maclean was pressed; as he could not give them the documents he promised to give them all he had.

He made out a memorandum which he handed to Mr. Pollard, the counsel for the banks, in order that he might prepare a formal assignment. This was prepared, and was executed on the 22nd Dec. by Mr. Maclean in the name of the firm, which was at this time insolvent with liabilities uncovered to the amount of 8 lacs of dollars.

The assignment stated the consideration of it to be, first, a debt of 85,714 dollars 28 cents owing by Lyall, Still, and Co. to one of the banks, and of 50,000 dollars to the other; next, the agreement to furnish bills and shipping documents, upon the faith of which the advances were made, which constituted the debts to the banks and the release of all claim upon the part of the banks in respect of this agreement. It then proceeds to make over to the banks, "the whole of the property, premises, and chattels specified in the schedule at the foot, with all the estate, right, title, interest, claim or demand of Lyall, Still, and Co. therein or thereto, or arising thereout or therefrom." It further provides for doing all acts that might be required to give full and formal effect for securing and perfecting the assignment.

In the schedule, the first item is a share in the Hong Kong Club. There are other items of shares in various insurance companies; an equity of redemption, and two items in these words: "All goods and bills of lading or other documents for all goods now on the way hither to arrive in Dec. 1866, or Jan. 1867." "All goods or documents for goods alluded to in a telegram dated 9th Nov. 1866, from London partners to Hong Kong firm, received by steamer *Clan Alpine*, *viâ* Calcutta, in the words, 'are shipping more goods; shirtings thirteen six, shipment remitted;' and all goods or documents for goods purchased and shipped and now on the way hither."

The documents arrived on the 27th Dec. 1866, and 1st Jan. 1867, including the bills of lading for the goods shipped in the *Min*. These were indorsed, and handed over by Mr. Maclean (together with the policies on the goods) to Mr. Kaiser, in performance of the agreement in the assignment.

After the arrival of the *Min* at Hong Kong, a demand was made on the part of the unpaid vendors, by persons authorised on their behalf, to claim possession of the goods, and this demand was acceded to on behalf of the owners of the *Min*. Subsequently the respondents, as transferees and holders of the bills of lading, made a like demand which was refused.

Sir *Roundell Palmer*, Q.C., and *Manisty*, Q.C. (*Baylis* with them), for the appellants.—The right of the unpaid vendors to stop these goods *in transitu* was not defeated by the indorsement of the bills of lading by Maclean to the respondents; for the indorsement was neither *bonâ fide* nor for valuable consideration. The indorsement was merely in pursuance of the contract contained in the assignment of Dec. 22, 1866. The only consideration that can be suggested must be that which supports the assignment; but there was no consideration for the indorsement. But the respondents should have shown that there was money advanced specifically as consideration for the indorsement of the bills of lading—(see *Spalding* v. *Ruding*, 6 Beav. 381.) This assignment was a most sweeping and general security, and applied to various property other than the goods the subject of these bills of lading. Such an assignment could only transfer the interest that the assignors had. In the assignment there is an agreement to hand over all documents, &c., connected with the property transferred, and to make all transfers, &c.. of the property "and of our estate and interest therein legal or equitable." In the construction of such general words the maxim given in Sheppard's Touchstone (p. 88) must be applied—"That if the words have double intendment, and the one standeth with law and the other is against law, it be taken in that sense which is agreeable to law . . . . (For) the law prefers a less estate by right to a larger estate by wrong." Applying this rule of construction it must be held that, as to Liebert and Mendel's goods, the effect of the indorsement was only to create a trust in the indorsees to sell the goods and to apply the proceeds to meet the acceptances by Lyall and Still of the bills drawn by the vendors. This was the understanding as to these goods, as is shown by the terms of the invoices. There could not have been in this assignment a contract to make the bills of lading a security for the antecedent debt. The principal of the observation of Wigram, V.C., in *Whitworth* v. *Gaugain*

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(3 Hare, 428) that "there is no principle upon which a court of justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor," applies to the construction of the assignment here. The respondents as indorsees of these bills of lading are (by 18 and 19 Vict. c. 111, s. 1) "subject to the same liabilities . . . . as if the contract contained in the bills of lading had been made with themselves," and the special appropriation of the proceeds mentioned above; was a part of such liability. In the judgment in the case of *Cuming* v. *Brown* (9 East, 514), it is observed, "If the plaintiff (the indorsee of a bill of lading) had known all the circumstances of the case as they stood between consignor and consignee, he would have known nothing which should have made it unfair in the consignee to assign or in himself to accept the assignment of the bill of lading. If he had assisted in contravening the actual terms of the sale on the part of the consignor or his reasonable expectations arising out of them, or his rights connected therewith, it would have been otherwise, and he would in that case have stood in the same position as the consignee. If, for instance, he had known that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that being accepted it was not likely to be paid—in that case the interposition of himself between the consignor and consignee in order to assist the latter to disappoint the just rights and expectations of the former, would have been an act done in fraud of the consignor's right to stop *in transitu*, and would, therefore, have been unavoidable to the party taking an assignment of the bill of lading under such circumstances and for such purposes:" (See, too, *Barrow* v. *Coles*, 3 Camp. 92.) And in *Virtue* v. *Jewell*, 4 Camp. 31, it was held that the right of the unpaid vendor to stop *in transitu* is not taken away by the indorsement of the bill of lading to a third party, who had notice of the consignee's insolvency. These two decisions exactly apply here, the respondents must be considered to have had, at the time of assignment or indorsement, constructive, if not actual notice of the terms of the sale, of the consequent rights of the vendors, and of the insolvency of the respondents. There was misdirection by the judge below in directing the jury that the bills of lading only could be looked to for the purpose of affecting third parties with notice of private arrangements incident to a sale. Here there was implied notice of the special stipulation as to remittances, in the case of Liebert and Mendel's goods. For the words in the bills of lading refer to the goods only as so many bales of "merchandise," and to ascertain the description of the goods the invoices containing the stipulation would necessarily be looked to. And with regard to notice by the respondents of the insolvency of Lyall and Still, the judge directed the jury only to consider whether there was actual notice, but did not properly explain the doctrine of constructive notice. It was not enough that the respondents did not actually know of the insolvency, if they abstained from inquiry with the design of escaping knowledge. This was what they in fact did, and the design of this sweeping assignment was to collect all that could be had of the property of those whose insolvency was suspected. Lyall, Still, and Co. at Hong Kong, were entrusted with Liebert and Mendel's bills of lading only as agents within the Factors Acts, and the transfer of them to secure an *ante advent* debt was invalid under those acts. As to Calvert's goods, though there was stipulation as to remittances, yet the right of the vendor to stop was not defeated by the assignment nor indorsement. The following cases were also cited:

Haille v. *Smith*, 1 Bos. & Pull. 563;
Evans v. *Trueman*, 1 M. & Rob. 10;
Gobind Chunder Sein v. *Ryan*, 9 Moo. J. A. 140;
Gurney v. *Behrend*, 3 E. & B. 622;
Pease v. *Gloahec*, 3 Moo. P. C. N. S. 556; 1 L. R. P. C. 219; 15 L. T. Rep. N. S. 6.

Mellish, Q C., *Kay*, Q.C. (*Holl* with them) for the respondents.—Lyall, Still, and Co., were not factors but owners of the goods. As to Liebert's goods, the terms of the letter of Sept. 9, 1861, and subseqent letters, the facts that he drew and George Lyall and Frederick Still accepted bills for the price of these goods, including interest during their currency, and commission, that the insurance and freight were paid by them, and the goods re-invoiced by them to the Hong Kong branch of the firm, show that they took and dealt with the goods as owners, and that the goods were assigned to Lyall, Still, and Co. at their own risk and not as factors. And as to Mendel's and Calvert's goods, the invoices thereof stating that they were "bought on account and for the risk of George Lyall and Frederick Still, of London," and the facts that they were paid for by drafts drawn by the vendors on and accepted by the above firm, including interest and commission, as in Liebert's case, shows that these goods also were consigned to Lyall, Still, and Co. at their own risk as purchasers and not as factors. [Lord CHELMSFORD intimated that argument on this point was unnecessary, as the relation of principal and agent could not be established.] There was no misdirection by the judge below. He directed the jury that the *transitus* continued till the ship's arrival at Hong Kong, and that meanwhile it was competent to the vendors to stop; that the relation was not that of principal and agent; and that the transfer was for valuable consideration. The question left to the jury was as to the *bona fides* of the transfer. The judge, too, was right in directing the jury to look at the bills of lading as guiding them to the nature of the transaction. This was right, for the bill of lading contains the contract and not the invoice, which simply contains the amount and description of the goods; and it is not the custom of trade that the invoice should contain any stipulation limiting the effect of the bill of lading, so that here it cannot be contended that the respondents were affected with constructive notice of the special terms contained in the invoices of Liebert and Mendel's goods. When the attempt was made by the vendors to stop the goods, they were not *in transitu*, for the goods were delivered in London to the agents of the London branch of the firm, and they were shipped under their orders and the bills of lading were made out after their direction, so that there was, in fact, an actual or constructive delivery to the purchasers, by which the right to stop would be determined. And as to the goods bought of Mendel and Calvert, there is the conclusive fact that the goods are shown by the invoices to have been bought "on account of George Lyall and Charles Frederick Still," and were invoiced to them only. The cases of *Jones* v. *Jones*, 8 M. & W. 431; *Wentworth* v. *Outhwaite*, 10 M. & W. 436, show that under these circumstances there was an end to the *transitus* at London. The respondents were transferees for valuable consideration, *bonâ fide* and without notice, of the bills of lading. There is not evidence that the respondents knew of the insolvency at the date of the assignment, and if they did, this would not make the assignment improper, unless there was also notice that the vendors were unpaid. And that notice that vendors were unpaid would not be sufficient to affect the indorsement, without notice of the insolvency is shown by *Cuming* v. *Brown*, 9 East, 506. The right to stop is not a security or lien on goods, it is only a right to invest

the property in the goods. The proper principle in these cases is well expressed by Buller, J., in the case of *Lickbarrow* v. *Mason*, 6 East, 34 note: 1 Sm. L. C. 6th edit. 744, who observes, "After these authorities, taking also into consideration that there is no case whatever in which it has been held that goods can be stopped *in transitu*, after they have been sold and paid for, or money advanced upon them *bonâ fide* and without notice, I do not conceive that the case is open to any arguments of policy or convenience; but if it should be thought so, I beg leave to say that in all mercantile transactions, one great point to be kept uniformerly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible. [Lord CHELMSFORD asked whether any case had decided that a bill of lading could be transferred as a security for antecedent debt, so as to defeat the right of the unpaid vendors to stop *in transitu*. *Mellish*, Q.C., referred to *Pease* v. *Gloahec*, the *Marie Joseph*, L. Rep. 1 P. C. 219; 15 L. T. Rep. N. S. 6. Lord CHELMSFORD read the note to *Lickbarrow* v. *Mason*, 1 Sm. L. C. 6th edit. 766, where *Re Westzinthus* 5 B. & Ad. 817 is cited as showing that "where a bill of lading may be and has been pledged by the consignee of the goods as a security for his own debt, the legal right to the possession of the goods passes to the pledgee; but the right to stop them *in transitu*, in case the consignee should become insolvent is not absolutely defeated, as it is in the case of the sale of a bill of lading by the consignee; for the vendor may still resume his interest in them, subject to the rights of the pledgee, and will have a right at least in equity to the residue which may remain after satisfying the pledgee's claim. And further if the goods comprised within the bill of lading be pledged along with other goods belonging to the pledger himself, the vendor will have a right to have all the pledger's own goods appropriated to the discharge of the pledgee's claim before any of the goods comprised within the bill of lading are so. . . . And *Spalding* v. *Ruding*, 6 Beav. 376, confirms *Westzinthus's* case, and shows that the goods cannot be retained as security for a general balance of account, but only for the specific advance made upon the security of the bill of lading."] The observation in *Virtue* v. *Jewell*, 4 Camp. 31, that the right to stop is not taken away by an assignment of a bill of lading for valuable consideration with notice of the consignee's insolvency was a mere *obiter dictum*; *Cuming* v. *Brown* was not cited, and the case stands alone. The argument that there was no consideration for the indorsement of the bill of lading is not good, for the indorsement was in pursuance of the contract contained in the assignment. With respect to the trusts to which Liebert and Mendel's goods are alleged to have been subject, the stipulation as to the remission of the proceeds of the goods to meet the drafts accepted for the price thereof, was a mere term of the contracts for those goods, but did not under the circumstances affect the goods with any trust or equitable lien. And in any case, the respondents had no notice of such lien, and so could not be affected by it. They, as transferees of the bills of lading, saw nothing on the face of them to guide them to any such stipulation. The doctrine of constructive notice does not apply here. It was laid down in *Jones* v. *Smith*, 1 Hare 43, that that doctrine applies in two cases; first, where the party charged knew that the property in dispute was encumbered or in some way affected, in which case he is deemed to have notice of the facts and instruments, to a knowledge of which he would have been led by due inquiry after the fact which he actually knew; and, secondly, where the conduct of the party charged evinces that he had a suspicion of the truth, but wilfully or fraudulently determined to avoid receiving actual notice of it. The respondents had no knowledge that there was any limitation on the bills of lading, they were not put on inquiry, and their conduct evinced no suspicion nor wilful avoidance of knowledge. See, too, *Bill* v. *Cubitt*, 3 B. & C. 466. It was contended for the appellants that respondents neglected to look at the invoices which contained the stipulation as to remittance, but such neglect would not of itself affect the title of the respondents. In *Raphael* v. *Bank of England*, 17 C. B. 161, it was held that one who takes a bank-note or other negotiable security *bona fide*—*i. e.*, giving value for it, and having no notice at the time that the party from whom he took it had no title—is entitled to recover on it, even though he had at the time the means of knowledge, of which means he had neglected to avail himself. Willes, J., in that case (quoting Parke, B., in *May* v. *Chapman*, 16 M. & W. 355), says (at p. 174), "Notice or knowledge means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes, a suspicion in the mind of the party, and the means of knowledge in his power wilfully disregarded." So that it is clear that the mere omission to look at the invoices does not affect the *bona fides* of the respondents. And as to Calvert's goods, there was no special stipulation as to remittances, and there is not, therefore, any ground for alleging that those goods were consigned to the Hong Kong branch of the firm as factors, or that they are affected by any trust whatever. Lyall, Steel, and Co. paid the freight and insurance of the goods from Manchester to Hong Kong, and to the extent of the amount so paid they had at any rate a first charge or interest in the goods which they were in a position to, and did in fact, assign to the respondents.

Sir *Roundell Palmer*, Q. C., replied.

Judgment was delivered by Sir JOSEPH NAPIER, which, after stating the facts as above set forth, proceeded:—In order to decide between the rival claimants, two questions have to be answered—First. Did the *transitus* terminate before the demand was made on behalf of the appellants? Secondly. Was the transfer of the bills of lading made to the respondents for valuable consideration, and without notice of such circumstances as rendered them not fairly and honestly assignable, and so as to transfer to the respondents a property in the goods freed and discharged from the proprietary lien of the unpaid vendors. The general rule is, that where goods are sold to be sent to a particular destination named by the vendee, the right of the unpaid vendor to stop them continues until they arrive and are delivered there according to the bills of lading. The *transitus* continues whilst they are in charge of some third party contracted with as carrier for the purpose of forwarding them, and who has them in charge simply for this purpose. It may suffice to refer to the recent case of *Berndtson* v. *Strang* (L. Rep. 4 Eq. 481; 16 L. T. Rep. N. S. 583). The documents in evidence as well as the oral testimony in the present case, establish beyond doubt that Hong Kong was the destination agreed upon between vendors and vendee; and the other parties who intervened, for the purpose of having the goods forwarded to their destination, had them in charge for this purpose only. Their Lordships, therefore, entertain no doubt that the *transitus* had not ended before the arrival at Hong Kong. The second is the real question in the case. The respondents contended that they gave value for the bills of lading: that they had no notice of any special terms of agreement between the vendors and vendees of which they say that they were not informed, and as to which they

also say that they were not bound to make inquiry. The managers of the banks (Messrs. Kaiser and Kaye), were not examined as witnesses at the trial; but it plainly appears on the evidence adduced by the plaintiffs (the respondents) that the insolvency of Lyall, Still, and Co. was known to the banks at the time of the assignment, and it is but reasonable to suppose that they were quite familiar with what also, on the same evidence, appears to be the usage of trade as between Manchester and Hong Kong: (See *Newsome* v. *Thornton*, 6 East, 19.) At the time the bills of lading were handed over to them, no money was advanced, no benefit was conferred or promised on the faith of these securities. They were transferred simply (as stated in the evidence of the plaintiffs) *in performance of the agreement in the assignment.* We have, therefore, to refer to the assignment itself to see what was the interest in these bills of lading that was agreed to be transferred, as part of what was assigned for the consideration expressed. The general rule so clearly stated and explained by Lord St. Leonards in the case of *Mangles* v. *Dixon*, 3 H. of L. Cas. 702, is that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule was not disputed, but it was contended that the case of a bill of lading is exceptional, and must be dealt with on special grounds.

Doubtless, the holder of an indorsed bill of lading may in the course of commercial dealing transfer a greater right than he himself has; the exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorised possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. In such a case, if the vendor is unpaid, one of two innocent parties must suffer by the act of a third: and it is reasonable that he who by misplaced confidence has enabled such third person to occasion the loss should sustain it: *Lickbarrow* v. *Mason*, 2 T. R. 70. But in this case, at the time of the assignment, Maclean had not possession of the documents; nothing was advanced on the faith of them. There is merely a general description of documents expected to arrive, without knowing their contents or how far they might be limited or qualified. The property of the firm in the goods expected, was not only subject to special stipulations in the contracts of sale in the case of two of the three parcels, but was also subject in all the three to the lien of the unpaid vendors. And can it be contended that before Maclean got possession of the documents when his firm was in a condition of undoubted insolvency, and the terms of the documents were not disclosed, there was conveyed to the respondents by this assignment the benefit of a prospective breach of trust and violation of contract? There is not a word in the instrument that could be held to convey a greater interest than the assignors had. The power they might afterwards acquire of committing a fraud upon the vendors is not "property, estate, interest, claim, or demand, legal or equitable." "It is," says Sir Edward Coke, "a general rule that whensoever the words of a deed or of the parties without deed may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." (Co. Litt. 42a.) *Constructio legis non facit injuriam;* as it is pithily said in the passage from the Touchstone referred to by Sir Roundell Palmer in his able argument: "The law in its genuine construction prefers a less estate by right to a larger estate by wrong." The rule that words shall be construed most strongly against him who uses them gives place to a higher rule; higher because it has a moral element, that the construction shall not be such as to work a wrong. The lien of the unpaid vendor is allowed by law for the very purpose of protecting him against the insolvency of the vendee; and the assignment in this case, which left the assignors in insolvency, even if it could be said that it did not find them so, would be sufficient to originate the very right, which according to the argument for the respondents, it is also sufficient to extinguish. In the case of *Spalding* v. *Ruding*, 6 Beav. 376, the vendor's right was asserted as against property which had so far passed into the hands of the consignee that he was enabled by mortgage of the bills of lading to pass the interest in the goods to the extent of that mortgage; the right of stoppage *in transitu* was upheld as against the surplus, in preference to a claim of the mortgagee to apply it to liquidate the balance of a general account. This (as Vice-Chancellor Wood observes in the case already referred to—*Berndtson* v. *Strang*, L. Rep. 4 Eq. 486; 16 L. T. Rep. N. S. 584.—on the question of *transitus*) was in some degree an extension of what was supposed to be the right of the consignor, and it shows the desire to give this right a full and equitable protection. Doubtless the vendor's claim cannot prevail against the claim of a transferee for value given on the faith of a negotiable security fairly and honestly taken; to the extent to which he has so given value, he has a prior claim. But the rule is founded on the reason of it, as already explained; *cessante ratione, cessat ipsa lex.* Where there is no advance made or value given upon the faith of the documents; where the object is simply by a sweeping clause to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent, for an improvident advance made upon the faith of a totally different security; where, upon the true construction of the assignment, no interest passed that would place the assignee in a better position than the assignor, and the bills of lading which subsequently came to hand were transferred expressly in performance of the agreement in this assignment and without other consideration whatsoever, it appears to their Lordships that such a transfer so made, and under such circumstances, cannot be held sufficient to defeat the vendor's claim.

Their Lordships therefore are of opinion that the Chief Justice ought to have nonsuited the plaintiffs, inasmuch as, upon their evidence, it did not appear that they had acquired a property in the goods sufficient to sustain an action of trover for the conversion alleged, which took place after the assertion of the right of stoppage. They will therefore recommend Her Majesty that the order appealed against should be set aside, together with the verdict found for the respondents, and that a judgment of nonsuit should be entered.

The appellants to have their costs of this appeal.

Order reversed.

Solicitors for appellants, *Reed, Phelps,* and *Sidgwick.*

Solicitor for respondents, *Ambrose Parsons.*

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June 14, and July 5.

(Present: The Right Hon. Lord ROMILLY, M. R.; Sir WILLIAM ERLE; Sir JAMES W. COLVILE; and Sir JOSEPH NAPIER.)

THOMAS STEPHENS (app.) *v.* JOHN BROOMFIELD AND ANOTHER. (resp.)

THE GREAT PACIFIC.

Bottomry—Damaged ship sold—Proceeds of sale—Utter loss—Constructive total loss—Loss—Salvage—Construction.

Money was borrowed on bottomry of a ship and freight. Afterwards the ship put into an intermediate port in a damaged state, and was then sold as unworthy of repairs.

The condition of the bond was, that it should be void if the obligors should pay the sum lent, with interest, &c., "or in case of loss of the ship or vessel such an average as by custom shall have become due on the salvage, or if on the said voyage the ship or vessel should be utterly lost, &c.," in consequence of perils of the seas. On a suit by the bondholders against the proceeds of the sale:

Held (affirming the judgment of the Admiralty Court), that the bondholders were entitled to the whole proceeds of the sale; for, first, the ship was not "utterly lost," the doctrine of constructive total loss having no application to bottomry; secondly, there was no "loss" of the vessel within the meaning of the bond; and, thirdly, there was no special provision in the bond qualifying the general rule, that the lender on bottomry is entitled to the whole of the property saved, if included in his security:

Semble, that the clause "in case of loss of the ship, such an average as shall have become due on the salvage" must be construed as intended to secure the payment to the bondholders of something which the shipowners might become entitled to receive from third parties in respect of the ship, and not a division of what might by saved from a wreck, or the proceeds of a necessary sale of the ship, between the bondholders and the shipowners.

This was an appeal from an order of the judge of the High Court of Admiralty.

The cause was one of bottomry, promoted by the respondents (the plaintiffs in the court below), as the legal holders of a bottomry bond against the proceeds of the sale of the ship.

The appellant (the defendant in the court below) was mortgagee of the ship, and intervened in the cause for the purpose of defending his interest in the proceeds of the sale against the claim of the bondholders.

The facts of the case are stated in the judgment.

The question arose on the terms of the bottomry bond, which being otherwise in the usual form, contained the following condition:

Now, the condition of the above written bond is such that if the said ship or vessel shall with all reasonable speed sail from the port of Sydney aforesaid and duly prosecute and complete the said intended voyage or voyages, and that without deviation except as aforesaid, and the perils, damages, casualties, and accidents of the seas, rivers, and navigation excepted; and if the above bounden William Baillie, his executors or administrators, or some or one of them, or the owners of the said ship or vessel do and shall well and truly pay or cause to be paid unto the said John Broomfield and Reginald Whitaker or either of them, their or either of their administrators or assigns, or to their or either of their attorney or attorneys' agent or agents thereto lawfully constituted the full and just sum of 7301*l.* 15*s.* 9*d.* of sterling British money, being the principal money secured by this bond, together with the interest or premium of 45*l.* per cent. for the voyage before the expiration of twelve hours after the safe arrival of the said ship or vessel at her port of discharge in the United Kingdom, or, in the case she shall proceed to Cork, in Ireland, then before the expiration of twelve hours after the safe arrival, or in case of loss of the ship or vessel such an average as by custom shall have become due on the salvage, or if on the said voyage the said ship or vessel should be utterly lost, cast away, or destroyed in consequence of fire, enemies, men of war, pirates, storms, or other unavoidable perils, damages, or casualties of the seas, rivers, and navigation to be sufficiently shown and proved by the said William Baillie, his executors or administrators, or some or one of them or by the owners of the said ship or vessel, then this bond or obligation to be void and of no effect, or otherwise to remain in full force and virtue.

The appellant, in his answer, set out the bond with its condition, and contended that, on the terms of the bond, and under the circumstances of the case, the bond had never become payable, that nothing was due thereon, and that in any case the respondents were not entitled to the whole of the proceeds of the sale, but to such an average only as by custom should have become due on the salvage.

The respondents, on this answer being filed, gave notice of their intention, to move the judge in court to reject so much of the answer as set up (1) that nothing was due on the bond; and (2) that the respondents were only entitled to an average on the sum of 3628*l.* 8*s.* the amount of the proceeds of the sale paid into court. This motion, which was in the nature of a demurrer, was heard on Nov. 10 and 11, 1868, and on the hearing all facts stated in the answer were taken to be true.

Sir Robert Phillimore, on Nov. 17, 1868, gave judgment holding that the bond became due and payable on the sale of the ship; that there was not such an absolute total loss as could discharge the borrower on bottomry from liability, the ship existing *in specie* at the time of the sale; that the words of the condition must be construed as contemplating an event that had not happened—viz., the ship's ceasing to exist, but *débris* of wreck only remaining. The learned judge, therefore, made an order, pronouncing for the prayer of the respondent, and directing the articles in question to be struck out of the answer, with costs of the motion against the appellant: (20 L. T. Rep. N. S. 44.)

From that order the present appeal was brought.

Sir *George Honyman*, Q. C. (*Clarkson* with him) for the appellant.—We contend that on the terms of the bond and under the circumstances of this case, the respondents cannot recover the whole proceeds of the sale, but only "such an average as by custom shall have become due." The proceeds of the sale here are, in fact, salvage. The bond contemplated two events—(1) a loss with salvage, in which case a customary average on the salvage was to be due; and (2) an utter loss in which case the bond was to be void. We admit that the latter event has not, but contend that that the former event, has happened. There was here a constructive "loss," for the ship was so damaged that the requisite repairs would have exceeded in amount the value of the ship when repaired. Repairs in such a case were, commercially speaking, impossible, for as observed by Maule, J. in *Moss* v. *Smith*, 9 C. B. 103," in matters of business a thing is said to be impossible when it *is not* practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it into deep water, though it might be possible by some very expensive contrivance to recover it. So, if a ship sustains such extensive damage that it would not be reasonably practicable to repair her—seeing that the expense of repairs would be such that no man of common sense would incur the outlay—the ship is said to be totally lost." The above case, however, was one of insurance, and we admit that circumstances which would constitute a constructive total loss within the meaning of a policy of insurance would not do so so as to discharge the borrower on

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bottomry. But all that we can contend is, that there was a "loss" within the terms of this bond. The above remarks of Maule, J. have been often quoted, and were approved by Jervis, C. J. in *Rosetto* v. *Gurney*, 11 C. B. 186, and by Williams, J. in *Adams* v. *Mackenzie*, 13 C. B., N. S., 444; 7 L. T. Rep. N. S. 711. "Salvage" in the bond must mean property saved on a loss, and here the proceeds of the sale would be within the term. And of these proceeds we say that the respondents are entitled to such a portion as by custom may be due. *Thomson* v. *The Royal Exchange Assurance Company*, 1 Mau. & Sel. 30, may have determined that "in the case of bottomry nothing short of a total destruction of the ship will constitute an utter loss." But the report of that case does not state the form of the bond. It probably contained only a condition avoiding the bond on an utter loss, but no clause, as in the present, providing for a partial loss with salvage. The same comment may be made on the cases of the *Catherine* and the *Elephanta*, 15 Jur. 231, 1185, and the *Dante*, 4 No. Ca. 408; 2 W. Rob. 427, which went no further than that of *Thomson* v. *The Royal Exchange Assurance Company*. And, further, in the *Elephanta*, it did not appear that the ship could not be repaired: (Parsons on Maritime Law, vol. 1, p. 422 note) There was no wrongful act on the part of the master in selling the ship. The evidence shows that that act was a prudent one. As to the mode of calculation of the "average" that would be due to the respondents, this must depend on the custom. Probably the right way would be for the respondents to share the proceeds of the sale with the appellant in the proportion of the amount of the loan to the value of the property on which the loan was made, *i.e.*, the ship and freight. This is suggested by Boulay-Paty (Cours de Droit Commercial Maritime, vol. 3, tit. 9, s. 15, "De la Responsabilité du prêteur, en cas de naufrage et perte partielle"). The question there discussed is this:—Whether, when money has been advanced on a cargo of greater value than the loan, and the cargo has been partially lost by shipwreck or other accident, the lender may take the whole of the cargo saved (supposing it not to exceed the loan), or whether he must come to a contribution with the borrower. And he takes the following example:—The value of a cargo 20,000f., the loan on the cargo 15,000f., the value of the cargo saved 4000f.; shall the lender take the whole of the 4000f., or only 3000f., viz., three-quarters of the value of the cargo saved, as the loan was three-quarters of the value of the cargo when the advance was made? And he says (p. 183) that Valin considers that the lender ought to take 3000f. only, because "le contrat à la grosse doit être réduit à la valeur, non du total des effets sauvés, mais de la portion desdits effets, qui soit en même raison avec le total desdits effets, qu'était la somme prêtée avec le total en chargement." On the whole then our contention is that the event, as to which the bond made a special provision, has arrived, that there has been a partial loss with salvage (the proceeds of the sale being so considered), that thereupon the bondholders are entitled to a certain proportion of the proceeds of the sale such as may be determined according to custom, or the rule suggested by the French authorities, and we therefore now ask that the order of the court below may be varied by rejecting only such part of the answer as alleges nothing to be due on the bond, and by admitting the part alleging that the respondents are entitled to an average only.

Cohen (*Butt*, Q. C., with him), for the respondents. The cases cited on the other side with reference to constructive loss do not apply here. A policy of insurance, and a bottomry bond are different things, and the liabilities to which they give rise must be determined on different principles. In *Barr* v. *Gibson*, 3 M. & W. 390, a ship sold and assigned by deed was at time lying stranded and so damaged as to be unworthy of repairs, and a question arose as to whether the vendor's covenant that he had power to transfer her as a ship had been broken. Parke, B., says (p. 400), "The question whether the subject of the transfer bears the character of a ship or not may, in some extreme cases suggested in argument, be one of great nicety and difficulty. In the present case we do not think that any such difficulty exists. We are of opinion, that upon the evidence given on the trial, the ship did continue to be capable of being transferred as such at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance (*Thomson* v. *Royal Exchange Assurance Company*, 1 Mau. & Sel. 31), which proceeds upon a different principle, and may take place with less of damage to the ship itself than occurred in this case. It proceeds upon the loss of the subject insured for beneficial purposes." The doctrine of constructive total loss is one applied only to contracts of insurance, and is merely a convenient mode of adjusting the acknowledged rights of insurer and insured. The law as stated by Story, J., in the *Draco* (2 Sumn. 193), is clear that, "if after the risk on a bottomry-bond has commenced the voyage is voluntarily broken up by the borrower in any manner whatsoever . . . . the bond becomes presently payable." Again, the sale was in direct violation of the clause in the bond providing that the ship should "be delivered to no other purpose whatsoever until payment of this bond is first made." As was said in the *Draco* (*ubi. sup.*, p. 195), "The sale constitutes *per se* a violation of the contract in its substance." (See, too, Parsons on Shipping, vol. 1, p. 137.) The loss of a ship within the meaning of a bottomry-bond means an actual total loss. Nothing short of the extinction of the subject hypothecated will discharge the borrower. And if there be a partial loss, what is saved belongs absolutely to the lender. This is the principle settled by the authorities. See

Thomson v. *Royal Exchange Assurance Company*, 1 Mau. & Sel. 30;
The Catharine, 15 Jur. 231;
The Elephanta, 15 Jur. 1185;
Abbott on Shipping (11th edit.), 126;
3 Kent's Commentaries (11th edit.) 454.

The rights of the respondents here, then, being so extensive, it is most unlikely that by the condition of the bond they could have intended to limit those rights, and to admit the shipowners to share property saved. And there is, in fact, nothing special in this clause, "in case of loss such an average as shall have become due on the salvage." These very words occur in the form of a bottomry bond, given in Abbott on Shipping (11th edit.), append. cccxcv. (And see Weskett, Digest of the Laws of Marine Insurance, edit. 1781, pp. 46, 48, 57, 58.) We therefore contend that the respondents are entitled to the whole proceeds of the sale, and that the judgment of the court below ought to be affirmed.

Sir *G. Honyman*, Q. C., in reply, commented on
Adams v. *Mackenzie*, 13 C. B., N. S., 446; 7 L. T. Rep. N. S. 711; and
Pringle v. *Hartley*, 3 Atk. 195.

July 5.—Judgment was delivered by Sir J. W. COLVILE:—There is no contest concerning the facts out of which this appeal has arisen. The *Great Pacific* having taken an outward cargo from Liverpool to Brisbane, was, after its discharge, chartered from the latter port by the Guano Consignment Company of Great Britain to sail to Callao, and thence to the Chinchas, where she was to load a cargo of guano, and return therewith *via*

Callao to such port or place within the United Kingdom as the charterers might select. Between Brisbane and Callao she was compelled to put into Sydney for repairs; and to defray the cost of these repairs the master raised the sum of 5037*l.* 13*s.* 5*d.* on bottomry; and on the 29th March 1867, executed a bottomry bond, hypothecating the ship and freight for that sum with maritime interest at 45 per cent. The vessel then proceeded on her voyage, reached the Chinchas, took in her cargo there; but on her homeward voyage was obliged to put into Valparaiso in a damaged state, and was then sold for 3628*l.* 8*s.*, under circumstances which it is admitted would, as between assurers and assured, constitute a constructive total loss. The money was paid into the Admiralty Court, and the holders of the bottomry bond (the respondents on this appeal), brought their suit to enforce their claim against it. The suit was defended only by the appellant, who, claiming to be a mortgagee of the vessel, has intervened to protect his interest; and the sole question between the parties is, whether the respondents as bondholders are entitled to the whole, or to any, and what part of this sum of 3628*l.* 8*s.* The appellant, in his answer, set forth the bond, with its condition, which, amongst other things, provided that the obligation should be void if the obligors should pay, "in case of loss of the ship or vessel such an average as by custom should have become due on the salvage; or if, on the said voyage, the said ship or vessel should be utterly lost, cast away, and destroyed," in consequence of the perils of the sea. And the appellant insisted, that under these provisions, and upon the facts above stated, the bond had never become payable, and that nothing was due thereon; or that if it had become payable, the respondents were not entitled to the whole of the sum of 3628*l.* 8*s.*, but only to such an average as by custom should have become due thereon, and to no more. To these defences the respondents took a proceeding in the nature of a demurrer by moving that so much of the answer as set them up should be rejected. The learned judge of the Admiralty Court granted that application, and this appeal is brought against his decision. It is obvious that if either defence is to prevail, the constructive total loss involved in the sale of the vessel at Valparaiso must be treated as a "loss" within the meaning of that stipulation, in the condition of the bond upon which the defence is founded. It was admitted at the Bar, and could not have been disputed with effect, that the vessel cannot be said, by reason of what occurred at Valparaiso, to have been utterly lost, cast away, or destroyed; and consequently that the appeal cannot be supported in so far as it impugns so much of the learned judge's order as rejected the averment that nothing was due upon the bond. Therefore, the only question now to be decided is whether, on the true construction of the words "in case of loss of the ship or vessel such an average as by custom shall have become due on the salvage," and upon the admitted facts of the case, the respondents are entitled, not to the whole, but only to some undefined portion of the sum in court. The general law is succinctly stated in Kent's Commentaries, vol. 3, p. 359. Speaking of a loan on bottomry he says, "There is not, in respect to the contract, any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on bottomry. The property saved, whatever it may be in amount, continues subject to the hypothecation." In support of this he cites *Thompson* v. *The Royal Exchange Assurance Company*, 1 Marr. & Sel. 30; and the doctrine is supported by the modern Admiralty cases of the *Catherine* and the *Elephanta*, 15 Jur. 231, 1185; the *Dante*, 2 W. Rob. 427; the American case, before Story, J., of the *Draco*. 2 Sum. 157, and by other authorities. The first proposition is, moreover, admitted in this case by that abandonment of the principal ground of appeal which has already been mentioned. The learned counsel for the appellant have, however, argued on the authority of a passage in Valin, which is cited at page 188 of the 3rd volume of Boulay-Paty's Cours de Droit Commercial Maritime, that when the vessel is lost, the lender on bottomry is entitled only to such a proportion of the value of the property salved as the sum lent bore to the value of the whole property hypothecated. Valin, it is to be remarked, is speaking of the hypothecation of a cargo; and it is not clear that his doctrine, if true, would apply to the proceeds arising from the sale of a ship or the débris of a ship. Boulay-Paty, however, goes on to show that this opinion of Valin was contested by both Pothier and Emérigon; that it was not received in France under the old law, and is certainly not recognised by the codes as part of the maritime law. The general rule undoubtedly is, that if the vessel is lost, the lender on bottomry, though his remedy is limited to the value of the property salved, is entitled to the whole of what is saved, provided it was included in his security. Therefore, that the bondholders in this case are as between themselves and the shipowners, or a mortgagee of the ship (whose rights are as much bound in bottomry as those of the owner of a ship not mortgaged) entitled to the whole of the proceeds of the sale of the vessel, then existing as a vessel in specie, unless there be some special provision in this particular contract which qualifies that right, is a proposition which, in their Lordships' opinion, does not admit of reasonable doubt. It has, however, been argued that such a provision is to be found in the words now to be considered. It is contended that the "loss" of the vessel there spoken of, when contrasted with the words in the following sentence, which import its utter loss and destruction, must be taken to mean something short of such utter loss, and to include a constructive total loss; that the proceeds of the sale may be properly described as salvage; and consequently that the effect of this clause is to make those proceeds divisible between the bondholders and the shipowners in proportions to be ascertained according to some custom of the existence and nature whereof nothing in the shape of proof has been suggested. It does not, however, follow that because the words, "the loss of the vessel," mean something short of utter loss and destruction, they, therefore, include "a constructive total loss," which, as has already been shown, they would not include upon the construction of ordinary bottomry bonds. It is obvious that a vessel may be so wrecked as to be no longer a vessel *in specie*, and so as to become a mere *congeries* of planks, and yet that there may be salvage of its materials to a considerable amount." In the case of the *Catherine*, 15 Jur. 232, Dr. Lushington says, "If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit." The clause under consideration may have been intended to secure that right by making it a condition for the avoidance of the bond that the obligors should account for such salvage. Again, it seems to be a forced and unnecessary construction of the clause to hold that it necessarily implies any division or apportionment between the bondholders and shipowners. That the former, who were entitled to the security of the whole ship when in a seaworthy condition, should contract that in the event of the deterioration of their security, by a constructive total loss or otherwise, they should share the proceeds with their debtors is so improbable an hypothesis, that the construction is only to be admitted if there is no escape from it. The

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clause, as Mr. Cohen showed, is not a special one, it is to be found in the form of a bottomry bond given in the appendix of Abbott on Shipping. Whatever it means, their Lordships believe that it was intended to secure the payment to the bondholders of something which the obligors might become entitled to receive from third parties in respect of the ship, and not a division of the proceeds of the sale of the vessel between the bondholders and the shipowners. It would meet the case suggested at the Bar in which the vessel having been voluntarily stranded with a view to the preservation of the cargo, general average upon the cargo salved might become due from the owners of that cargo to the owners of the ship. That such average would become due if the ship, failing to get off, is totally lost, seems to be a question upon which jurists are not agreed (see Abbott on Shipping, 10th edit, pp. 373 to 375, and 2 Phillips on Insurance, 1315); but the clause may, nevertheless, have been designed to cover such average, if the right to it existed. Their Lordships, however, think that they are not called upon to determine upon what particular subject the clause might operate, because it can have no operation in the present case unless there has been a loss of the vessel within the meaning of it. For the reasons above given, they are of opinion that there has been no such loss; and, being of that opinion, they will humbly advise Her Majesty to affirm the order of the Admiralty Court, and to dismiss this appeal with costs.

Order affirmed

Proctors for the appellant, *Cotterill* and *Sons*.

Proctors for the respondents, *Westall* and *Roberts*.

June 16 *and* 18; *July* 15.

(Present: The Right Hon. Lord ROMILLY, M. R., Sir WM. ERLE, Sir JAMES W. COLVILE, and Sir JOSEPH NAPIER.)

THE OWNERS OF THE STEAMSHIP LION (apps.) *v.* THE OWNERS OF THE VESSEL YORK TOWN (resps.)

THE LION.

Damage—Passengers—Compulsory pilot—Construction—17 & 18 Vict. c. 104, ss. 379, 388—6 Geo. 4. c. 125, s. 55.

A collision having occurred between two vessels in the Thames, the owners of the vessel in fault claimed exemption from liability for the damage on the gronnd that the vessel was in charge of a duly licensed and compulsory pilot at the time of the collision:

Held (affirming the judgment of the court below) that the captain's wife and her father, who were on board without the privity of the owners, and who had not agreed to pay any fares when they came on board, though such fares were paid after the collision, were not "passengers" within the meaning of the 17 & 18 Vict. c. 104, s. 379, so as to make the employment of a pilot compulsory. The owners of a ship, in charge of a pilot voluntarily taken on board, are responsible for his default whilst so acting, since 17 & 18 Vict. c. 104, by sect. 388, requires that the pilot should be compulsorily employed within the district where the injury occurred in order to exempt the owners from liability.

The case of Lucey *v.* Ingram, 6 *M. & W.* 302, *does not conflict with that of the* Stettin, *Bro. & Lush.* 199, *the former case having been decided on* 6 *Geo.* 4, *c.* 125, *s.* 55, *and the latter on* 17 *&* 18 *Vict. c.* 104, *s.* 388, *and the provisions of the two sections being distinguishable.*

The meaning of particular words in a statute, in the absence of express definition, "is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used." Per Abbott, C. J. in 1 *B. & C.* 136, *approved.*

This was an appeal from an interlocutory decree of the High Court of Admiralty, in a cause of damage brought by the owners of the *York Town* (the respondents) against the steamship *Lion*, of which the appellants are the owners, to recover compensation for damages sustained in a collision between the two vessels.

The collision occurred on Dec. 8, 1867, in Blackwall Reach on the Thames.

The *Lion* was in ballast, and was proceeding from London to Hull. She was in charge of Richard West, a duly licensed pilot for the district within which the collision occurred. In the trial below it was admitted that the collision was wholly occasioned by the default of the said pilot, and the question then arose whether the appellants were excused from liability for the consequences of the collision, on the ground that they were compelled by law to have a pilot. By the Merchant Shipping Act 1854, the answer to this question depended on whether the *Lion* was, or was not carrying passengers at the time of the collision, pilotage being compulsory in the former case, but not in the latter.

It appeared by the evidence that the master of the *Lion* had, before starting from London, taken on board for conveyance to Hull his wife and her father, and that they were on board at the time of the collision. It further appeared that the master of the *Lion* had instructions not to carry anyone other than the crew, without payment of fare, except by the special permission of the owners; that no such permission had been given to him to carry his wife and her father, and that they did not pay any fares until after the arrival of the *Lion* at Hull, subsequently to the collision.

Other material facts will be found stated in the present judgment, and in that of the court below: (18 L. T. Rep. N. S. 803.)

Sir Robert Phillimore, on June 12, 1868, decided that the payment of fare was necessary to constitute the class of passenger whose presence on board imposes the obligation of taking a pilot; that these persons were not passengers at the time of the collision; that the subsequent payment of fares, with the object of exempting the owners of the *Lion* from liability, could not give them that character, and that the employment of a pilot not being compulsory, the damage must be pronounced for.

This judgment was the subject of the present appeal.

The statutory provisions on which the case turns, and which were referred to in the arguments of counsel, are chiefly, 6 Geo. 4, c. 125, s. 55:

No owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason of, or by means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this Act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof.

Sect. 303:

For the purpose of the enactments herein contained with respect to surveys and certificates of passenger steamships, the word "passengers" shall be held to include any persons carried in a steamship other than the master and crew, and the owner, his family, and servants, &c.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) s. 354:

The master of every ship carrying passengers between any place situate in the United Kingdom . . . . and any other place so situate, when navigating upon any waters situate within the limits of any district for which pilots are licensed by any pilotage authority under the provisions of this or any other Act . . . . shall, unless he or his mate has

a pilotage certificate enabling such master or mate to pilot the said ship within such district . . . . employ a qualified pilot to pilot his ship; and if he fails to do so, he shall for every offence incur a penalty not exceeding 100*l.*

Sect. 379:

The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts, that is to say:—(1) Ships employed in the coasting trade of the United Kingdom, &c., &c. (5) Ships navigating within the limits of the port to which they belong, &c.

Sect. 388:

No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of any ship within any district where the employment of such pilot is compulsory by law.

Milward, Q. C. and *Clarkson*, were for the appellants. They referred to

The Passengers' Act 1855 (18 & 19 Vict. c. 119);
Lucey v. *Ingram*, 6 M. & W. 302;
Milligan v. *Wedge*, 12 Ad. & Ell. 737;
The General Steam Navigation Company v. *The British and Colonial Steam Navigation Company*, L. Rep. 3 Ex. 330; 4 Id. 238; 19 L. T. Rep. N. S. 357; 20 Id. 581.

Dr. *Deane*, Q. C. (the Admiralty Advocate) and *Butt*, Q.C. were for the respondents. They referred to

The Stettin, Bro. & Lush. 196; 6 L. T. Rep. N. S. 613;
The Agricola, 2 W. Rob. 13;
The Eden, 2 W. Rob. 442;
The Annapolis, Lush. 301; 4 L. T. Rep. N. S. 417.

Cur. adv. vult.

July 15.—Judgment was delivered by Lord ROMILLY, M. R.—In this case the *Lion*, a screw steamer, proceeding from London to Hull, ran into the *York Town*, in broad daylight, at eleven a.m., on the 8th Dec. 1867, at Blackwall Reach. The *York Town* was being towed by two steam tugs down the river, when the *Lion*, without any excuse of following, ran into her stern and did her considerable damage. The question is, are the owners liable for this damage? In order to determine this, it is necessary to decide, first, whether the *Lion* was under the charge of a duly licensed pilot at that time; and secondly, whether it was compulsory on the *Lion* to take a duly licensed pilot. If these questions are answered in the affirmative, then the owners are exonerated. If in the negative, they are liable. But if the first question be answered in the affirmative, and the second question in the negative, then it becomes necessary to ascertain whether a decision made as to the meaning and effect of the statute of 6 Geo. 4, c. 125, s. 55, is applicable to cases which come within the scope of the 388th section of the Merchant Shipping Act (17 & 18 Vict. c. 104). As to the first question, West, the pilot, had two licences, one a waterman's licence, which would be of no avail, and the second a regular licence from the Trinity House authorising him to act as pilot for home trade passenger ships within the limits in which the collision occurred; the consequence is, that he is a duly licensed pilot having charge of the vessel at that time. As to the second question, whether it was compulsory on the *Lion* to take a pilot, the answer depends on whether this was a passenger ship at the time of the collision; and this their Lordships are of opinion depends upon whether there were any passengers on board the *Lion* at the time of the collision. The facts cannot be more correctly set forth than as in the judgment of the learned judge in the court below (18 L. T. Rep. N. S. 803): "Having been seven days in London, the captain wrote to his wife and to his father-in-law to come to London and go with him to Hull; he did not write to the owners, or tell their agents in London, or anybody that he was going to take those persons with him; they paid nothing for their living on board the ship, but they paid for their fare, in the circumstances about to be mentioned, 7*s.* 6*d.* each, which he swore positively was the proper second class fare, though Malcolm, the agent for the owners of the *Lion*, as positively swore afterwards that it was the first-class fare. For this money no receipt was produced, though the captain swore that he had paid it, and Malcolm that he received it. The captain admitted that he had said nothing to either of these persons, previously to their coming on board, as to their payment of fare; that, he said, he arranged during the passage, but after the collision had happened; the father-in-law swore that the first time he ever spoke about his paying was when in Hull, and the ship alongside the quay. The captain admitted, on cross-examination and in answer to the court, that he was aware that he was bound to pay light dues, unless he went in in ballast without passengers on board; that he ought to have told the lighthouse authorities that he had passengers on board, and that he had not done so. He said that he paid the fares to his owners on his arrival in Hull; but Mr. Malcolm said that 'the settlement,' as he called it, was made about the middle of January, and after the correspondence with the Trinity House or the Board of Trade, to which reference was made, and, therefore, to be presumed, after he knew that the pilot had reported that there were no passengers on board. The captain also swore, and in this was confirmed by Malcolm, that his instructions were never to take persons on board without payment as passengers, except with special permission." In this state of things, were the captain's wife and her father passengers? They were on board on the invitation of the captain without the privity of the owners, who had not contracted any obligation to have them carried in the vessel, and no duty was imposed on the owners in relation to these two persons. The meaning of particular words in an Act of Parliament (to use the words of Abbott, C. J., 1 B. & C. 136) "is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used." It is in this sense that the meaning of the word "passengers" is to be here considered, and, so considered, their Lordships are of opinion that the captain's wife and her father were not passengers within the meaning of the clause, as to the employment of pilots, in the 17 & 18 Vict. c. 104, and the exoneration of owners of ships. If the ship was not carrying passengers she was exempted from the compulsory pilotage by the 379th section of the Merchant Shipping Act. It becomes necessary, therefore, to decide what the position of the owners is when the vessel was in the charge of a duly-licensed pilot whom it was not incumbent on them to employ. The pilot must therefore be considered as having been voluntarily selected by the owners, who are responsible for his default whilst acting as pilot in charge of their ship, unless they can bring their case within the exoneration clause, sect. 388, which enacts that: "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." In the opinion of their Lordships this case is governed by the decision of the *Stettin*, Bro. & Lush. 199; 6 L. T. Rep. N. S. 613, the authority of which is recognised by Kelly, C. B. in the case of the *General Steam Navigation Company* v. *British Colonial Steam Navigation Company*, 37 L. J. 206, Ex.; 19 L. T. Rep. N. S. 357, the ground of which decision is explained by Byles, J., in delivering the judgment of the Exchequer Chamber, 38 L. J. 99, Ex.; 20 L. T. Rep.

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N. S. 581. The learned judge expounds the 388th section as requiring "that the pilot should be compulsorily employed within the district where the injury occurred," in order to exempt the owners from responsibility for his default. "This," he says, "obviates all the mischief which might be apprehended from captains of ships unnecessarily and improperly employing pilots to escape the responsibilities of navigation, and preserves the sole responsibility of the pilot in the whole district for which he was employed." He adds that their decision does not conflict with the case of the *Stettin*, where the pilot was taken on board, where and when by law there was no necessity to take him." This explanation will be found to be strictly applicable to the present case. In answer to this it is strongly objected on the other side that the case of *Lucey* v. *Ingram*, 6 M. & W. 302, is directly at variance with the case of the *Stettin*, and that as it was not cited in the case of the *Stettin*, the authority of that case is consequently thereby weakened. Their Lordships are of opinion that there are two answers to this. In the first place it is to be observed that as the case of *Lucey* v. *Ingram* had been under the notice and consideration of Dr. Lushington in several cases before he decided the case of the *Stettin*, it must be taken to have been present to his mind at that time; but, secondly (and which is more material, as it explains why Dr. Lushington did not think it necessary to refer to that case), upon a close examination it does not appear to have any conclusive bearing upon the case of the *Stettin*, and, if so, it has not upon the present case. The case of *Lucey* v. *Ingram* was decided upon the 6 Geo. 4, c. 125, ss. 55 and 72, and though it was contended in argument that the sections are equivalent, or nearly so, to the 17 & 18 Vict. c. 104, s. 388, it does not so appear upon a minute examination. The 72nd section of 6 Geo. 4 made it incumbent on the pilot to act, if he were required so to do by the master or owner of any ship wanting a pilot, and the former section, sect. 55, exonerates the owners from responsibility "for any damage which should happen by reason of the neglect, default, or incapacity of any licensed pilot acting in the charge of such ship under or in pursuance of any of the provisions of this Act." This was held to include two cases, first the case where the pilot was bound to act when required; and, secondly, the case where the owners were bound to employ a pilot; and Parke, B., in delivering the judgment, refers to its comprehensive terms as an "extended exemption," and he suggests the probable policy from which this extended exemption arose (see 6 M. & W. 316). That this decision is to be considered as properly to be referred to the special and extended exoneration enacted by the 6 Geo. 4, c. 125, is manifest as well from the judgment delivered by Parke, B. as from the observations of Dr. Lushington in the case of the *Agricola* (2 W. Rob. 20), and the case of the *Eden* (2 W. Rob. 446), and per Kelly, C.B. (37 L. J. 205, Ex.; 19 L. T. Rep. N. S. 363). It was cited in argument in the case of the *Annapolis* (Lush Rep. 301 and 304; 4 L. T. Rep. N. S. 417, 419), where Dr. Lushington refers to the ordinary principle of exemption as explained by him in the case of the *Maria*, 1 W. Rob. 106, and in the *Annapolis*, and he states this principle to be in strict accordance with that of the 17 & 18 Vict. c. 104, s. 388 (see Lush. 311, 312; 4 L. T. Rep. N. S. 423, 424). The distinction between the sections in the two statutes when compared is obvious:—"6 Geo. 4, c. 125, s. 55. It is further enacted that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel under or in pursuance of any of the provisions of this Act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof." "The stat. 17 & 18 Vict. c. 104, s. 388, enacts that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." It is plain, therefore, that the first clause gives immunity to the owner whenever the vessel is in charge of any licensed pilot, where he is qualified to have charge of the vessel, or where no duly qualified pilot has been appointed to take charge thereof; while the second clause, sect. 388, of the Merchant Shipping Act only applies to the case where the employment of the pilot is compulsory by law. Accordingly, contrasting the extended exoneration in 6 Geo. 4, c. 125, s. 55, with the more limited exoneration in 17 & 18 Vict. c. 104, s. 388, and the policy suggested by Parke, B., as the ground of the former with that suggested by Byles, J., with reference to the latter, their Lordships are of opinion that the true interpretation of the enactment by which the present case is governed depends on this, whether the employment of the pilot was compulsory, and that it cannot be affected by anything decided in *Lucey* v. *Ingram*, and that the authority or soundness of the decision in the case of the *Stettin* is not in any way prejudiced by the omission to notice the case of *Lucey* v. *Ingram*. The 17 & 18 Vict. c. 104, s. 388, has been acted on in the case of the *Stettin*, and has also been clearly expounded in the judgment of the Exchequer Chamber in the case of *The General Steam Navigation Company* v. *British Colonial Steam Navigation Company*, and according to the principle of these decisions the owners are not exonerated from responsibility for the default of the pilot whom they have selected and placed in charge of their ship when by law there was no obligation imposed on them to take such pilot and put him in charge. Having come to the conclusion that there were no passengers on board the *Lion* at the time of the collision, their Lordships are of opinion that the master was not under any compulsion to take a pilot; and, secondly, that having taken a pilot, even assuming that the pilot was bound to act, this does not in such circumstances exonerate the owner from responsibility for the errors committed by the pilot in a case where they were not compellable to take a pilot and put him in charge of the vessel. In the observations their Lordships have made, they have acted on the assumption that West was a duly licensed pilot, and that he had charge of the vessel; but it would be improper to part with this case without calling attention to the fact that West himself swears that he took charge of the ship as a waterman, and not as a pilot. He was not engaged by the captain, but was sent by Charles Roots, another pilot; whether sent by the owners or not does not appear. Their Lordships therefore concur with the learned judge of the Court of Admiralty in opinion that the presence of the captain's wife and her father in the *Lion*, in the circumstances of the case as detailed in the evidence, did not constitute them passengers; that no act done after the collision could convert them into the character of passengers if they did not previously fill that character; and also that the *Lion* had not on board of her at the time of the collision a pilot employed by them under compulsion of law; and that the owners of the *Lion* are liable to pay to the owners of the *York Town* the damage done to her by the inexcusable collision of the *Lion*; and their Lordships will therefore humbly advise Her

Majesty that the decision of the learned judge of the Court of Admiralty be affirmed, with costs.

Judgment affirmed.

Proctor for the appellants, *Thomas Cooper.*

Proctor for the respondents, *Ellis, Parker,* and *Clarke.*

June 21 *and July* 5.

(Present: The Right Hon. Lord ROMILLY, M.R., Sir WILLIAM ERLE, and Sir JOSEPH NAPIER.)

The OWNERS of the ship PAULINE CONSTANCE ELEONORE, the OWNERS of the Cargo, and the Master and Crew (apps.) *v.* The HAMBURGH AMERICAN STEAM PACKET COMPANY, the OWNERS of the steam-vessel GERMANIA (resps.)

THE GERMANIA.

Damage—Collision—Lights, invisible from vessel coming end-on—Proper rate for steamer in the channel—Duty of mutual assistance after a collision—Inspection, as to sufficiency of lights—Look-outs—24 Vict. c. 10, *s.* 18—25 *&* 26 *Vict. c.* 63, *ss.* 29, 33, *sched. table* (C.) *art.* 3, 15.

A collision occurred at night in the English Channel between two foreign vessels, a steamship and a barque, by which the former was slightly and the latter badly damaged. At the time the barque was carrying lights, but these were not seen on board the steamship till after the collision, because, being placed in the mizzen rigging, from their position and the peculiar form and rig of the barque, a vessel coming end-on was unable to see them. In a cause of damage instituted by the owners of the barque against the owners of the steamship:

Held (varying the judgment of the court below), that the damages, losses, and costs, must be borne equally between the two vessels, for; first, the barque was in fault in carrying lights not so placed as to comply with the regulations; and, secondly, the steamship was in fault in going at an improper rate (eleven knots an hour) on a hazy night in a crowded channel; and, after the collision, in pursuing her course without affording or tendering any help to the barque.

An inspection, under the provisions of sect. 18 *of the Admiralty Court Act* 1861, *to ascertain whether the lights carried by a ship were such as the regulations require, ought to be made at night.*

There ought to be two look-outs at the bowsprit.

A steamship proceeding at an improper rate in a channel crowded with ships, incurs the responsibility of damage occasioned by her being unable to obey the direction that, on risk of a collision, it is the duty of the steamship to keep out of the way of the sailing vessel.

The first duty of any vessel that by collision injures another, is to wait to ascertain the extent of that injury, and to tender what assistance it may be able to protect life and property.

This was an appeal from a judgment of the High Court of Admiralty, in a cause of damage instituted against the steamship *Germania* on behalf of the owners of the Dutch barque *Pauline Constance Eleonore,* of the owners of the cargo laden therein at the time of the collision, and of the master and crew for their private effects, to obtain compensation for the damages sustained in a collision between the two vessels that occurred in the English Channel, off Dungeness, about ten p.m. on the night of April 16, 1868. The *Pauline Constance Eleonore* was a barque of the burthen of 579 tons register, and was on a voyage from Java to Amsterdam, laden with a cargo of coffee, sugar, and other merchandise.

The *Germania* was a screw steamship of about 2800 tons register, and was on a voyage from Hamburgh to New York, with cargo, mails, and passengers.

The two vessels were meeting each other on opposite courses. Those on board the barque saw the lights of the *Germania* at a distance of from two to three miles. Those on board the *Germania* saw no lights on the barque before the collision. Other material facts are stated in the present judgment.

There was much contradictory evidence as to whether the *Pauline Constance Eleonore* carried lights at all, and, if she did carry them, whether they were so placed as to be visible to those on board the *Germania.* In the trial in the court below, a model was put in evidence to show the position of the lamps, the lower sails, the relative breadths of the barque, and the height of the lamps from the poop, and the visibility of the lights depending in a great measure on the accuracy of the model and measurements and the actual position of the lamps, the learned judge for the first time put in force the provisions of sect. 18 of the Admiralty Court Act 1861 (24 Vict. c. 10), and made an order for the inspection of the barque, then lying in Dover Harbour, by the Trinity Masters, accompanied by a viewer and proctor on each side. The Trinity Masters did not see the lamps lighted, having made the survey in the daytime.

Their report gave particulars of measurements and position of the lights, and added that "at a distance of more than 350ft. with masts in line, from a window elevated at least 40ft, although side lights were in their places, they were not visible."

Subsequently the learned judge put further questions to the Trinity Masters, in reply to which they stated that they were "clearly of opinion that the lights so shown on board the barque did not comply with the regulations (*b*) and (*c*) of Article 3 (Schedule C to 25 & 26 Vict. c. 63), inasmuch that they did not show an uniform and unbroken light over an arc of the horizon of ten points of the compass, and that they could not show that unbroken light from right ahead to two points abaft the beam. . . . We desire to call attention to the ingenious argument of the Queen's Advocate, that although the side lights of the barque were fixed at a narrow part of the vessel, nevertheless, from a loftier vessel they would have been visible over the broadest part of her. We do not think this to have been an unbroken light from right ahead as required by the regulations, seeing both courses were set, lower rigging and a labyrinth of running gear must intercept the lights, if they could have been seen at all, which we think impossible."

Sir Robert Phillimore, on 15th July 1868, gave judgment determining that proper lights were burning on the barque at the time of the collision, but that (on the report and opinion of the Trinity Masters) these lights were not so placed as to comply with the regulations, and that, therefore, in accordance with the provisions of 25 & 26 Vict. c. 63, s. 29, the barque must be declared to be alone to blame for the collision: (See 19 L. T. Rep. N. S. 20.) From this judgment the present appeal was brought.

The provisions of statutes, to which reference was made, are the following:—Admiralty Court Act 1861 (24 Vict. c. 10) s. 18:

Any party in a cause in the High Court of Admiralty shall be at liberty to apply to the said court for an order for the inspection by the Trinity masters, or others appointed for the trial of the said cause, or by the party himself or his witnesses, of any ship, or other personal or real property, the inspection of which may be material to the issue of the cause, and the court may make such an order in respect of the costs arising thereout as to it shall seem fit.

The Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) s. 29:

If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of that Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary.

Sect. 33:

In every case of collision between two ships it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship, her master, crew and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision. In case he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default; and such failure shall also, if proved upon any investigation held under the third or the eighth part of the principal Act, be deemed to be an act of misconduct, or a default for which his certificate, if any, may be cancelled or suspended.

Sects. 57 & 58 as to when foreign ships are subject to regulations in Table (C.) in the schedule to the Act.

Schedule, Table (C.), articles 3 and 15.

The *Solicitor-General* (Sir J. D. Coleridge, Q. C.), Sir *J. B. Karslake*, Q. C., the *Queen's Advocate* (Sir Travers Twiss, Q. C.), and Dr. *Spinks*, Q. C., were for the appellants.

Dr. *Deane*, Q. C., *Butt*, Q. C., and *Pritchard* were for the respondents.

Cur. adv. vult.

July 5.—Judgment was delivered by Lord ROMILLY, M.R.—This is an appeal from the High Court of Admiralty on behalf of the owner, master, and crew of the barque *Pauline Constance Eleonore*, and of the owner of the cargo and private effects contained therein, for the loss sustained by a collision with the steamship *Germania*, off Dungeness, at ten o'clock on the night of the 16th April 1868. The Court of Admiralty has determined that the barque was wholly in the wrong, dismissed the defendants from the case, and condemned the plaintiffs in costs. The barque was a Dutch vessel, 579 tons register, proceeding from Java to Amsterdam; she was steering east by north, making about six knots an hour; the wind was moderate from north-north-west. The *Germania* was a screw steamer of 2800 tons. She was not under sail, and was proceeding from Hamburgh, bound to New York. She had a crew of 135 persons, with a large number of passengers. The *Germania* sighted the barque about two minutes before the collision. She ported her helm, and the barque struck her on the port side midships obliquely, with her stem and and port bow. The damage done to the *Germania* was very slight, that done to the barque was very great. The barque obtained assistance from a steam-tug and two boats' crews, and was only saved from sinking by being run ashore at Hythe. The *Germania* neither afforded nor tendered any assistance, but pursued her course without once abating her speed. In the court below it was held that the barque was wholly in the wrong, by reason of her lights being placed in such a situation that they were not seen on board the steamship. The appellants insist that there could have been no sufficient lookout on board the *Germania*, and that if there had been, the lights of the barque must have been visible before the collision. The evidence is distinct that the lights on board the barque were burning bright, and were visible to vessels passing her; this is distinctly proved by Laming, the master of the lugger *Alma*, who spoke her at half-past nine, p.m., before the collision, as well as by Middleton and the crew on board the vessel; we agree with the judge of the Admiralty Court that this fact is clearly proved. The lamps, however, were placed in the mizzen-rigging, but from their position and the peculiar form of the barque, a vessel coming end on would be unable to see them; this is established by the report of the Trinity Masters, who went down to the dock where she was lying to examine her, and who reported that at a distance of more than 350 feet, with masts in line from a window elevated at least 40 feet, although the side lights were in their places, they were not visible. Their Lordships are not quite satisfied with this report; they think that the examination, in order to be perfectly fair, ought to have been at night: and they regret that the Trinity Masters did not also, by going one or two points to one side, have ascertained whether the light on that side was visible. This is the more material because the two vessels were not coming end-on—the *Germania* was steering due west, the barque was steering east-by-north. It is quite certain that, assuming the lights to be burning, they would, even as placed, be visible from a vessel steering four or five points on either side of the exactly opposite course which the barque was taking. The exact deviation at which the lights would be visible is not to be ascertained from the report of the Trinity Masters. Their Lordships consider this an omission which is to be regretted; they, however concur with the learned judge in the opinion expressed by him, that the lights of the barque, though burning, were not so placed as they ought to have been, to have enabled a vessel coming end on to see them, and that consequently the barque must be considered to have by this defect to some extent occasioned the collision. The evidence of what occurred on board the *Germania*, so far as their Lordships consider it necessary to refer to it, is to this effect:—The look-out on board the *Germania* consisted of this, viz: "one on the look-out at the bowsprit, another one on the look-out on the bridge." The chief officer, and also the pilot, but who had not charge of the vessel, were also on the bridge. Their Lordships are informed by the naval assessors who assist them that it is the usual practice in king's ships to have never less than two look-outs at the bowsprit, and their Lordships are not satisfied with the sufficiency of the reason alleged for having only one of these look-outs in the present case. The evidence of the chief officer is to this effect. The first report was from the look-out man, who reported ship right a-head, the officer of the watch saw something a-head, and ported the helm directly. He says that the time taken was about a minute from the time when he first saw her to the time when the collision took place. The evidence of the pilot, who was on the bridge at the time, is to be taken with great allowance, as it appears that he had on the previous day met with an accident which had affected his head, and had evidently for the time to some extent impaired his memory; accordingly, his evidence is contradictory, and by no means so distinct as to these matters as that of the chief officer. In the first place, he had not noticed anyone on the bridge besides the chief officer and himself. In the next place, he states that the *Germania* was steering west-by-north, or west-half-north, which, if correct, would make a greater deviation from coming end on. He fixes the time at two minutes, or a minute and a-half from the time when the vessel was first seen at the time of the collision. He states that he saw the barque before anyone else, and then contradicts that statement. In fact their Lordships are of opinion that, under the circumstances of this case, his evidence must be, when it contradicts the evidence of the chief officer, to a great extent disregarded.

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The evidence of Jenson, the look-out man, does not entirely agree with that of the chief officer. The chief officer states, that the look-out man cried, "a ship right ahead;" he is cross-examined as to whether he did not say "a light right ahead;" he does not remember to have heard it. The lookout man says, he cried out after, "the ship right ahead, she shows no light." Gilling, who was on the bridge at the time of the collision, on the port side, heard the look-out man twice report the barque as "a sail right ahead," but says nothing about the word "lights" being used. Lohse, the sailmaker, confirms the look-out man that he said "she shows no light." It is not necessary to go through the rest of the evidence on the part of the *Germania*, which all goes to the question of whether the barque did or did not carry lights, because their Lordships consider that question quite settled; that the barque did carry lights, and that they were not seen on board the *Germania* till after the collision, when the red light was seen. This the witnesses on board the *Germania* state they saw moving, but which their Lordships believe to have been an error on the part of the witnesses, and that what they saw was the red light of the barque on port side. The night was dark and hazy, and the *Germania* in a channel crowded with vessels was proceeding at eleven knots an hour, the vessels were approaching at the rate of about twenty miles an hour, that is a mile in every three minutes. Their Lordships are of opinion that if a steamship proceeds at such a rate at such a time, and in such a place, she incurs the responsibility of the damage which is necessarily occasioned by her being unable to obey the direction, which is her first duty viz., that it is for the steamboat to get out of the way of the sailing vessel: (see 25 & 26 Vict. c. 63, sched. C. art. 15.) How far the lights on board the barque could have been discerned on a dark hazy night, when the fog was clearing off, their Lordships have not the means of ascertaining; but according to the evidence on board the barque, the lights of the *Germania* were not discerned before she was as near as two miles or two miles and a half. The *Germania* seems to have treated the whole matter with the most perfect indifference; she neither slackened her speed, nor took any other step in the matter, except to port her helm. She made no inquiry as to the state of the other vessel, but ran on her course without affording the slightest assistance to a vessel obviously very seriously injured by the collision which had just taken place. With respect to English vessels it is established by the regulations (see 25 & 26 Vict. c. 63, s. 33) that a vessel pursuing this course is liable to all the damage produced by the collision, and their Lordships cannot but consider that it is a matter to be gravely reprehended in any case. Whether the persons in charge of the *Germania* supposed that by proceeding at once on their voyage they could escape all consequences, it is impossible to surmise; but the first duty of any vessel that by collision injures another is to wait to ascertain the extent of that injury, and to tender what assistance it may be able to protect life and property. Their Lordships, therefore, find it impossible to exonerate the *Germania* from all participation in the cause of the collision, and shall humbly advise Her Majesty that the damages, and losses, and costs ought to be borne equally between the two vessels.

Judgment varied.

Proctors for the appellants, *Dykes* and *Stokes*.

Proctors for the respondents, *J. R.* and *G. Burchett*.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCKE, Esqrs., Barristers-at-Law.

Friday, July 9.

(Before Lord Justice GIFFARD.)

Re THE UNION CEMENT AND BRICK COMPANY (LIMITED.)

Company—Winding-up—Discharge of solicitor—Costs unpaid—Lien—Order 11th Nov. 1862, Rule 58.

Where an official liquidator is appointed by the Court in a winding-up, the 58th rule of the General Order of the 11th Nov. 1862, which requires that the file of proceedings "shall be kept by him, or otherwise as the judge may, from time to time, direct," must be considered part of his appointment, and a solicitor acting for him must be taken to know the extent of his powers over such file. And no official liquidator can by contract or otherwise give any lien upon documents which come within that rule.

Where, therefore, a solicitor was discharged by the official liquidator, he was ordered to deliver up all the documents mentioned in the 58th rule, notwithstanding that there was due to him a considerable amount of costs incurred in the winding-up.

This was an appeal by Mr. Pulbrook who from the commencement of the winding-up until February last, had acted as the solicitor for the official liquidator, but had been at the last-mentioned date discharged by him, against an order of Stuart V.C. directing him to deliver up to the official liquidator all the documents constituting the file of proceedings in the winding-up, notwithstanding that there was due to Mr. Pulbrook, for his costs in the winding-up, a sum of nearly 200*l*, in respect of which his bill had been some time back delivered.

The hearing before the Vice-Chancellor and his Honour's judgment are reported in 20 L. T. Rep. N. S. 649, and it is unnecessary here to restate the facts.

Greene, Q. C., and *Brooksbank*, for the appeal, contended that the relationship of solicitor and client existed between the parties, and that the solicitor was therefore entitled to the ordinary lien. The Companies Act 1862, in no way interfered with that right, and the only sections having any reference to delivery or production of papers and documents were the 100th and 115th. They referred to

Paine and Leyton's case, L. Rep. 4 Ch. App. 215;
In re Cameron's Coalbrook &c., Railway Company, 25 Beav. 1;
Potter's case, De. G. & Sm. 728; *Weymouth* v. *Knipe*, 3 Bing. N. C. 387; and in the analogous right of the solicitor of an assignee in bankruptcy;
Ex parte Underwood, 1 De. G. Cas. in Bank. 199;
Lambert v. *Buckmaster*, 2 Barn. & Cr. 616;

The papers were claimed under the 58th Rule of the General Order of 11th Nov. 1862, but that order was made under the powers given by the 170th section of the Act, and if it destroyed the solicitor's lien it was an order *ultra vires*.

Dickinson, Q. C. and *Everitt*, for the official liquidator, were not called on.

Lord Justice GIFFARD said: The only question I have to determine on this appeal is, whether the order of the Vice-Chancellor is, upon the face of it, right or not. Well now, that order was obtained by the official liquidator of this company, who was appointed by the court, and it was obtained by him against Mr. Pulbrook, he having discharged Mr.

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Pulbrook from being the solicitor in the winding-up, and the order was in these terms: "That the said Anthony Pulbrook do, within four days after service on him of a copy of this order, deliver upon oath to the said official liquidator the file of proceedings in this matter, and all orders, exhibits, admissions, memorandums, and office copies of affidavits, examinations, depositions, and certificates, and all other documents relating to the winding-up of the above-named company, in the possession, custody, or control of him, the said Anthony Pulbrook, and which are required by the rules and orders of this honourable court to be kept on the said file of proceedings." It is manifest, therefore, that the production is confined to the documents included in the 58th rule, and that the production does not extend beyond those documents. Well, whatever the 170th section of the Act may or may not authorise, I am clearly of opinion that, where an official liquidator is appointed by the court, this 58th rule must be considered part and parcel of his appointment. Well, the 58th rule is this: "All orders, exhibits, admissions, memorandums, and office copies of affidavits, examinations, depositions, and certificates, and all other documents relating to the winding-up of any company, shall be filed by the official liquidator as far as may be in one continuous file, and such file shall be kept by him or otherwise, as the judge may from time to time direct." Therefore, any solicitor who acts for an official liquidator, must know what the extent of his powers is with reference to these documents; that his powers do not at all exceed his duties, and that he shall deal with these documents simply as the judge shall direct. Then when we come to the solicitor's lien, it is this: He can have no greater right than the client for whom he acts; and if a client for whom he acts has no lien, he can have no lien. On these grounds, I am clearly of opinion that no official liquidator can, by contract or otherwise, give any lien on documents coming within the 58th rule, because the 58th rule says "You are to keep them or as the judge may direct." That being so, I am of opinion that Mr. Pulbrook has no lien on those documents, any more than a solicitor for an ordinary client from whom he might have happened to have obtained deeds which that client had no right to give to him. On these grounds, I am clearly of opinion that the order of the Vice-Chancellor was right, and that this appeal must be dismissed with costs.

Solicitor for the appellant, *Pulbrook* in person.

Solicitor for the official liquidator, *Seale*.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

April 24 and May 31.

Re THE CORK AND YOUGHAL RAILWAY COMPANY, *ex parte* OVEREND, GURNEY, AND COMPANY, AND THE LONDON AND HAMBURGH AND CONTINENTAL EXCHANGE BANK.

Railway company—Exhaustion of capital and borrowing powers—Money advanced on bonds, and used for the undertaking.

A railway company having expended its whole capital and exhausted its borrowing powers, and given bills of exchange to contractors and tradesmen, issued bonds to a director and shareholder, who advanced money, whereby the railway was completed. A special Act was passed to wind-up the company, and sell it to another company; and that arrangement having been carried out, land owners settled with, and every liability discharged except that on the bonds, the balance of the purchase-money was brought into court in the winding-up. Claims being made by the bondholders:

Held, that the bonds were recoverable in equity, and the shareholders being cognizant of the whole transaction, and standing by, the claims must be allowed.

These were claims in the winding-up of this company (under a Special Act passed for that purpose), the first of which was by those representing the old firm of Overend, Gurney, and Company in respect of 191,000*l.* and interest secured by certain bonds issued by the railway company to David Leopold Lewis (now deceased), who was a director and shareholder in the company, and by him transferred to trustees for Overend, Gurney, and Company. The company was formed under four Acts of Parliament, being empowered to raise 365,000*l.* by shares and 131,000*l.* on mortgage and by debentures. The whole of these sums were raised and borrowed, and further powers were obtained, but were still insufficient to complete the railway, and in 1858 every source of means was exhausted, and the railway was still incomplete, in which condition it was useless. Under these circumstances application was made to David Leopold Lewis to assist the company, who were in the habit of giving bills of exchange to contractors, which they were now unable to pay, and David Leopold Lewis raised money on the bills, and other bills were given to tradesmen and others, and old ones retired. So matters continued until 1862, when the transaction occurred on which these claims were founded. A balance-sheet was then made out, showing the excess expenditure of 109,520*l.* 14*s.* 10*d.*, and this, with an account of the plant, materials, &c., was sent round to the shareholders prior to the meeting in August, by which it appeared that the company was indebted to David Leopold Lewis in certain sums expended on rolling stock for construction of the line, &c., and which, it was stated, had been applied for that purpose, and on the 18th Sept. a resolution was passed to issue bonds, some of which were now represented by those on which the claims were made.

On the first issue the amount was 165,000*l.*, made up of 120,000*l.*, 15,000*l.*, and 30,000*l.*, the whole of which were returned by the obligee, and were renewed by others from time to time. The bonds were all in this form, the following being a copy of one:

No. 298. 1000*l.*

Know all men by these presents that we, the Cork and Youghal Railway Company, are held firmly bound unto David Leopold Lewis, in the sum of 1000*l.*, to be paid to the said David Leopold Lewis, or his certain attorney, executors, administrators, or assigns, on the 30th Oct. 1864, with lawful interest thereon at 5*l.* per cent. per annum from the date hereof, until payment; for which payment we hereby bind ourselves and our successors, this 13th Oct. 1863, whereas the above boundsn company is justly and truly indebted to the above named David Leopold Lewis in the sum of 1000*l.* for mortgage debts and goods and materials supplied to the said company for the purposes of the undertaking, by the means, procurement, and at the cost of the said David Leopold Lewis, and at the request of the said company, as they hereby acknowledge. And whereas the said David Leopold Lewis hath applied to the said company for payment of the said sum of money, but hath at the request of the said company agreed to forbear payment of that sum until the 13th Oct. 1864, on the said company becoming bound by this obligation for securing payment of the said principal sum on the day last aforesaid, and interest thereon as aforesaid. Now, therefore, the condition of this obligation is such that if the said Cork and Youghal Railway Company, their successors, or assigns, do and shall pay to the said David Leopold Lewis, his executors, administrators, or assigns, the said sum of 1000*l.* on or before the said 13th Oct. 1864, and do and shall pay interest thereon at the rate of 5*l.* per cent. per annum until payment, such interest to be paid half-yearly, the first payment to be made at the expiration of six calendar months from the date hereof, and for every fraction of a half year, to be paid on the day of payment of the said principal sum, then the above obligation to be void, otherwise to remain in full force and effect.

Given under the common seal of the said company this 13th Oct. 1863.

—Registered. CUSACK P. ROBEY, Chairman.

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The circular sent to all the shareholders included a notice that the meeting was called to consider matters of finance, and the report of the directors was sent to each shareholder by post, and there was no contradiction of that fact, or attempt to show that it was not so. The resolution was adopted at the general meeting, the terms being, that "inasmuch as the board of directors had received moneys from the said David Leopold Lewis to enable them to pay for the land, rolling stock, construction of the line from Cork to Youghal and Queenstown, and that such sums had been applied for that purpose, it was resolved," &c. The Cork and Youghal Act passed in 1846, and the company obtained various other Acts subsequently varying the capital and extending the powers of the directors, the last Act in 1863 authorising a branch to Youghal and Queenstown, when the company became the Cork and Youghal Railway Company. The 109,520*l.* 14*s.* 10*d.* having been thus expended in excess, in 1866 an Act was obtained specially for the winding-up of the affairs, the dissolution of the company, and for other purposes. This Act recited the various former Acts of Parliament, and that by the Act of 1863 there was a provision for the conversion of perpetual into ordinary capital, and for the transfer of the railway to the Great Western and Southern Railway of Ireland. That whereas the company might have incurred debts beyond their mortgage debts, that they had not the means of paying, it would be extremely advantageous to the public that the undertaking should be sold to the Great Western and Southern Railway Company of Ireland, and that it was desirable that the affairs should be wound-up. That the purchase-money so to be paid was to be 310,000*l.*, and that the Great Western and Southern Railway Company were willing to purchase. The Act then specified the claims on the company of creditors, whose claims were alleged to be valid, and it was expedient that the question of their validity should be considered, and there was power given to sell the undertaking and works. Under this Act the railway was sold and the money received, landowners settled with, and the debenture holders paid, and every claim satisfied except that of the bondholders; and there was 180,000*l.* now in court. In this state of things the question was whether the shareholders could successfully refuse to recognise any obligation under the bonds, on the ground that the borrowing powers were exhausted, and that the giving the bonds was, under the circumstances, *ultra vires?*

The purchase-money, 310,000*l.*, was applicable under the Act, first to pay the costs of the Act; and secondly, to compound with creditors. The winding-up having been conducted under the direction of the court (by virtue of a clause in the Act which made all the provisions of the Companies Act 1862 applicable, except as to voluntary winding-up, and provided that the Court of Chancery in England should have full jurisdiction, and that the winding-up should commence in Jan. 1866) by orders in chambers, such application of the purchase-moneys had been sanctioned, and both landowners and other creditors settled with as above mentioned. The 12th section of the Act related to the application of the proceeds of the sale, and concluded in these words: "Subject to all the rights, equities, claims, and demands, whether of preference or ordinary shareholders and bondholders, to which the property of the company would be subject, in case this Act had not passed, and shall be applied accordingly." What took place in the inception was this: 365,000*l.* was raised by shares, and 131,000*l.* by borrowing, making 496,000*l.*; and in June 1862 the whole of that money was exhausted, being spent on that undertaking, the railway being unfinished; the money now partly represented by the present claims was obtained upon the bonds, and they had been discounted partly by Overend, Gurney, and Company, and were partly in the hands of the Hamburgh Bank, distinct claims being made on behalf of both firms.

Roxburgh, Q.C. and *Lindley*, for the representatives of Overend, Gurney, and Co.—Under the circumstances, every shareholder must have known or be taken to have known every part of this transaction; in fact, they did know it, and did not pretend that they did not, and could they now be heard to say that which they sanctioned and acquiesced in, and benefited by (inasmuch as the completion of the railway had enabled the company to sell, and the purchase-money had enabled them to pay), was *ultra vires*, and that the person who enabled the company to do all this should not be paid. The form of the resolution was alone sufficient, the language was that the board of directors should be authorised to issue bonds, and give them to David Leopold Lewis, "as security for the debt so due to him." There was no case which held such a security void. From 1862 until the sale of the railway Mr. Lewis drew cheques on his own bankers, and all the money to meet the liabilities of the company was found by him alone. The transfer of the bonds was simply from David Leopold Lewis to A. B. (stating the numbers of the bonds), the words being "for securing, &c., all my right and interest, &c.," and the interest was paid to the holder from time to time as it became due. Suppose there was no borrowing power, there is no authority for saying that a company cannot, under its seal, admit a debt to be due for work and labour done and goods or materials supplied, in the nature of an account stated, between the company and a creditor; and that amounted to an admission of the debt. It was, therefore, competent to give a bond, which, according to the decisions at law, if for present advance of money, is good, if it is a security for a debt due from the company at the time. In equity the holder is entitled to a claim on the bonds. But supposing it was not so, the claim was good in respect of this equity. The money which was in court was produced by the sale of an article for which the bondholder had paid, and to the extent of that payment such holder was entitled in equity and honesty to be repaid; otherwise there would be a right to keep the money and the article. This was consonant with the decisions. *Re the German Mining Company, ex parte Chippendale*, 4 De G. M. & G. 29, where there was no power to borrow, but the mine being in active operation, it was held at law that the directors could not recover money obtained for the mine; but in equity that they were entitled to stand as creditors. *Re The Electric Telegraph Company of Ireland; Troop's case*, 29 Beav. 353, where the other case was followed.

Hoare's case, 30 Beav. 225;
Re The Magdalena Steam Navigation Company Johns, 690.

Cotton, Q.C. and *Graham Hastings*, for the Hamburgh Bank, insisted that this was a parallel case to that of an infant or married woman who could contract: (*Vaughan* v. *Vanderstegan*, 2 Drew 165.) A bond or charge or mortgage on the undertaking to meet its liability was valid.

The Royal British Bank v. *Turquand*, 5 Ell. & Bl. 248, 259.
The South Essex Gas and Coke Company; *Hewlett's case*, 2 J. & H. 306, 313.

J. Pearson, Q.C. and *Waller*, for the official liquidator, representing creditors to the amount of 225,000*l.*—So far as the creditors are concerned, it must be assumed that the company has not exceeded its powers; but the directors, although having

general powers, had no power to issue bonds, indeed they were actually forbidden so to do. There was also this important distinction between the creditors and bondholders, viz., that the latter could not recover at law, whereas of course the creditors could.

The Worcester Corn Exchange Company, 3 De G. M. & G. 180;
The German Mining Company (*sup.*);
Hoare's case (*sup.*);
Chambers v. *The Manchester, &c., Railway Company*, 5 B. & Sm. 588; 10 L. T. Rep. N. S. 715;
Bryon v. *The Metropolitan Saloon Omnibus Company*, 3 De G. & J. 123;
Royal British Bank v. *Turquand* (*sup.*)

Jessel, Q.C. and *Higgins*, for the preference shareholders, contended that in fact this money was raised by bills previously to the passing of the resolution, although the bonds might have been issued after. The question was whether under the Lands Clauses Act the general power of procuring advances on security applied to individuals as well as to a company under that statute. The request to pay was not valid; a railway company could not request a third person to pay its debts and so create a liability against the company, that person knowing that they could not do it. It would be repealing the whole of the Acts of Parliament if there was in this way an unlimited power of borrowing. If there was a power of borrowing no money could be borrowed beyond that without Act of Parliament. The *German Mining Company's* case was quite distinct from this, and there it was held at law that there was no such power. *The Magdalena Steam Company's case* (*sup.*) proceeded on acquiescence. It was clear that any of the shareholders could have said that no more money should be spent, and have filed a bill against the directors.

Hewlett's case, 2 J. &. H. 230;
Bateman v. *The Mid-Wales Railway Company*, L. Rep. 1 C. P. 499;
Caledonian and Dumbartonshire Railway Company v. *The Helensburgh Harbour Trustees*, 4 W. R. 671;
The Peruvian Railway Company, L. Rep. 2 Ch. App. 617; 16 L. T. Rep. N. S. 315.

The VICE-CHANCELLOR (after stating the facts).—The question upon this summons is, whether the fund in court is to go to the shareholders or to the person who advanced money for the purpose of completing the railway and works. There is a recital in the Act of 1863, that "whereas the company might have incurred debts beyond their mortgage debts, that they had not the means of paying;" and that evidently contemplates that possibility, and the Legislature therefore contemplated that these debts should be beyond the amount of the capital and borrowing powers, and there is a recital of the advantage accruing to the public by the sale of the undertaking to the Great Western and Southern Railway Company of Ireland, and the desire to wind-up the affairs. The 12th section is that upon which the whole question mainly, if not entirely, depends. By orders in chambers, every demand has been satisfied except that now in question. The words of this clause are very important. They are these: "Subject to all the rights equities, claims, and demands, whether of preference or ordinary shareholders, bondholders, to which the property of the company would be subject, in case this Act had not been passed, and shall be applied accordingly." The result was that 365,000*l.* was raised by shares, and 131,000*l.* by borrowing, making 496,000*l.*, and it is the common case that in June 1862 the whole of that money was exhausted, being spent on the undertaking. There is no suggestion of any impropriety; the company was in possession of an unfinished railway, which everyone's experience knows to be one of the most useless and unprofitable things which can be imagined. No doubt, as Mr. Jessel and Mr. Higgins argued, the shareholders might have said: "We will have no more money spent, and rather than make the railway useful and profitable it shall remain useless and unprofitable;" and if they had filed a bill on that footing it might have succeeded. But, as every shareholder has paid up in full, the Legislature having constituted it a limited company, and no more could be called, no man could be found insane enough to institute such a suit, rather than acquiesce in obtaining some further capital, and so rendering that profitable which was otherwise a public nuisance. It is not surprising that no such attempt was made; but it is a matter of wonder that the principles of common sense were not applied to the case with at least the hope of profit. What sort of justice would it be to say that as between those whose money was supplied to complete the works, and was so applied, and those who acquiesced in the importance of that step when the question was who should take possession of the proceeds, that such proceeds shall go to the shareholders and not to the creditors? I am bound to assume that the shareholders knew something of their own affairs, and if they do not they are bound to do so; and I cannot listen to those who allow matters to go on, stand by and take no part or sufficient interest in the matter to inquire whether the capital is exhausted or not, if they say they are ignorant. I am, however, happy to find that not a single shareholder makes any affidavit saying he was not perfectly aware of what was going on. I assume, therefore, that every shareholder knew that the capital had been exhausted in 1862; and it appears by the evidence of the secretary that from 1859 to 1865 David Leopold Lewis, and the Hamburgh Bank, and others standing in the same position as Lewis, furnished funds to the company, which were applied by them to complete the undertaking, and paid to contractors, landowners, for rolling stock, debts, materials, and interest on the mortgages issued by the company, and for salaries and necessary expenses. When the case was opened I pressed counsel to tell me whether there was any contest as to the money being expended for the benefit of the company; and they very properly agreed to an admission that it was so expended. I was then strongly impressed in favour of the principle acted upon in *The German Mining Company* (*sup.*), that, although a company had no power to borrow further, and there was no remedy at law if they did, it was not the doctrine of a court of equity to allow shareholders to take possession of the property of the company without fulfilling their obligations. The question then being discussed on that admission of counsel, 191,000*l.* being claimed, and 180,000*l.* in court, it does not follow that the whole of that sum was so expended. Mr. Pearson for the general creditors treated their debts as 25,000*l.*; Mr. Roxburgh and Mr. Lindley, for Overend, Gurney, and Co., the transferees of some of the bonds, and Mr. Cotton and Mr. Graham Hastings for the Hamburgh Bank, representing other bondholders; if Mr. Pearson can exclude the bonds that will be sufficient for him. But the main contest is between the shareholders, the members of the company authorised by Act of Parliament to raise a capital of 496,000*l.* nearly exhausted in 1862; and the bondholders, it being said that there was no power to bind them (the shareholders) for anything more. In support of this contention, the case of *Chambers* v. *The Manchester, &c., Railway Company*, 10 L. T. Rep. N. S. 715, was cited. Before I refer to that case let me ask what sort of equity or justice would it be to say that shareholders who in 1862 knew that the capital was exhausted, and the railway being completed

with money supplied somehow, and who stood by and saw the concern thus turned into a profit, and sold under an Act of Parliament, were entitled to come and take possession of the whole proceeds? A court of equity does, and I hope always will, support principles of honesty and integrity; but to hand this money over to the shareholders, and leave the creditors unpaid, is a proposition so repugnant to principles of propriety that, if no authority had been found on the subject, I should myself have come to the conclusion that such a proposition was wholly unsustainable. The shareholders must be taken to have had notice of what took place, and, therefore, in fact, to have authorised the issuing of the bonds, as much as if every shareholder was present at the meeting when the accounts were explained and stated, and, therefore, they cannot be allowed to stay away and ignore what took place. The object of the meeting was specially stated in the circular, and everything appeared at the meeting, namely, that the money was obtained from Mr. Lewis, what it was expended for, that the bonds were to be issued, settled by counsel, as a temporary loan of 165,000*l.*, and the liabilities also were stated. Subsequent meetings took place, the debt always increasing until it reached 195,000*l.*, and then came the act to wind up the affairs and sell; under these circumstances, the creditors must be paid in full. Now, there is a material difference between cases at law and in equity. In the *German Mining Company* money was supplied to the company after the capital was exhausted, and it was decided at law that the amount could not be recovered; but it was decided by this court that every part was recoverable in equity against the shareholders. But in the case of *Chambers* v. *The Manchester and Milford Railway Company* the question was as to the excess expenditure, and a court of law only considered the question of the borrowing powers, and those powers being exhausted, it was decided that the amount could not be recovered in an action; but even there, as in the *German Mining* case, and in *Troop's* and *Hoare's* cases before the common law judges and the Master of the Rolls, it must have been apparent how monstrous an injustice it was; and Blackburn, J. said, "If the plaintiff is dissatisfied he must go to a court of equity;" assuming, therefore, that although there was no remedy at law there was in equity. The only other case is the *Worcester Corn Exchange* case, 3 De G. M. & G., 160, which was the case of a limited company; and I agree with the observations of Mr. Roxburgh hat there is no difference between the cases of companies, considered with reference to a particular or this general Act, the provisions of which apply while they remain unaltered. In the *Worcester Corn Exchange* case there was a call of 5*l.*, and the master (it is an old case) authorised an additional one of 5*l.*; and it was ordered that the members of the limited company who were liable only for 5*l.* should be liable for the other 5*l.* also; and it was asked here that the shareholders should be made personally to pay the money. I should have thought them liable, although, no doubt, Lord Cranworth thought the call unsustainable, and discharged it. In favour of it, counsel very properly relied on the *German Mining* case, where Lord Justice Knight-Bruce (then V.C.) sent the case to law, where the claim failed, and the directors paid it themselves; but afterwards, claiming it against the shareholders, the result was that every farthing was allowed against the company, which, being unlimited, it was, in fact, against the shareholders, and a call was made upon them to pay personally. Some passages in the judgment are peculiarly applicable to this case. [The Vice-Chancellor read passages from the judgment.] His Lordship there said that they had the benefit of the expenditure. They have it here. That was followed by two cases relied upon, *Troop's* case and *Hoare's* case, which may be considered identical with the present. Mr. Jessel felt the pressure of *Troop's* case, and boldly said it was contrary to law. I have considered his argument, and I am of opinion that it is not only consonant with principles of justice, but with the law of this court. It was a case in which the company had exhausted its means, and borrowed money which was applied for the benefit of the company, and the question was whether the persons supplying the money were creditors. The Master of the Rolls held that being laid out *bona fide* for the benefit of the company, and so spent, the party advancing it was entitled to be paid. That is quite applicable to this case, *Hoare's* case was a mere repetition of it, and the *Magdalena Steam Navigation Company's* case, before Lord Hatherley (when Vice-Chancellor) was, if possible, a stronger case still (Johns, 690, 694.) [The Vice-Chancellor read portions of the judgment.] The expressions of his Lordship refer to the very argument here used, and I say that where the shareholders had an opportunity of ascertaining the facts, and have taken the benefit of an irregular loan (which no doubt this was) it would be contrary to public morality, and the doctrines of this court to turn round and insist on that irregularity to get possession of the money which ought to go to the creditors. I do not suppose that the shareholders mean to act dishonestly, and I feel sure, if personally present they would not sanction it, but I suppose it could not be given up without argument. One other case (*Hewlett's case, sup.*) was precisely the same, where Turner, L. J. held that no shareholder could take possession of the property of the company without discharging such an obligation. Without, therefore, going into the question as to a joint-stock company being competent to bind themselves to pay bills of exchange, I decide this case on far higher grounds of equity, and I am of opinion that David Leopold Lewis having advanced money which has been expended, as it is properly admitted, for the benefit of the company, he must be paid out of the fund in court before anything can be paid to the shareholders.

Solicitors for Overend, Gurney, and Co., *Young, Jones,* and *Co.*

Solicitors for the official liquidator, *Stevens, Wilkinson, Harries,* and *Co.*

Solicitor for the preference shareholders, *A. Jones.*

Solicitors for the Hamburgh Bank, *Deane* and *Chubb.*

June 29 and 30.

RAMSHIRE *v.* BOLTON.

Practice—Jurisdiction—Demurrer—Obtaining money on false representations.

B. told R. that he was going to advance money to two persons on the security of a bill at three months, and represented them to be perfectly solvent and the bill a good security, knowing at the time that they were insolvent, and that the bill would be dishonoured, which it was. R. having advanced money on the faith of such representations, filed a bill alleging that he was induced to advance it on representations made by B., which he knew to be untrue, the transaction being part of a scheme to apply, as he had applied, the money for purposes of his own. A general demurrer to this bill overruled, on the ground that, although there was a legal remedy, there was concurrent jurisdiction in equity.

This was a general demurrer for want of equity

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to a bill filed to recover a sum of 237*l.* alleged to have been obtained from the plaintiff under false representations. The bill stated that in July 1867 the plaintiff, who was secretary of the Union Club, was introduced to the defendant by a wine merchant, being previously unacquainted with him, but having been informed that he was formerly a serjeant in the marines, and then secretary and manager of the Alexandra Hotel. That he had a family and was of expensive habits, and having little or no means of his own, in fact advanced nothing upon the bill of exchange after mentioned; that early in 1868 he called upon and showed the plaintiff a cheque for 1000*l.* from which, and from his spending money freely, the plaintiff might reasonably infer that he was a man with money at his command. That in 1868 the defendant hinted at borrowing 200*l.* or 300*l.* of the plaintiff, which he avoided doing, doubting his means; but up to the transaction thereafter mentioned, he had not any reason to believe that he would mislead him by misrepresentations as the plaintiff charged he afterwards did. That the defendant often introduced himself to, and became the companion of, persons staying at the hotel, and in 1867 and 1868 General Ripley and the Honourable F. Lawley, who had been in the Confederate States during the war, were staying there; that the defendant made their acquaintance, they being quite unknown to the plaintiff, having only met General Ripley in the defendant's company; that the plaintiff knew nothing of them and was ignorant that (as he since discovered) they were men of no means, but he was induced by the defendant to believe the contrary, and under this belief advanced the money thereinafter mentioned.

The bill then stated that in Sept. 1868 the plaintiff and defendant were at Margate, and the defendant, representing that he was about to advance money to Ripley and Lawley on security of a bill for 500*l.* at three months, drawn by Ripley and accepted by Lawley, he asked the plaintiff to find half the money; that the plaintiff hesitated, but the defendant said he had had similar transactions with them, which turned out all right, and that they were safe and responsible persons of ample means, and stated that Ripley was possessed of considerable property, and Lawley had had a legacy of a large amount left him, and, showing him the death of a person in the *Illustrated News*, represented that such person had left the legacy. That the plaintiff believed the statements, and that it was a *bonâ fide* advance, and gave a cheque on the Union Bank for 237*l.* 10*s.* (being half 500*l.* less interest) to the defendant on his order, and the defendant represented that he would apply it to advance it to Ripley and Lawley, and showed the plaintiff a bill for 500*l.*, dated the 9th Sept. 1868, purporting to be drawn by Ripley and accepted by Lawley at three months, the plaintiff being unacquainted with the signatures of either, and the defendant gave the plaintiff the following memorandum:

Margate, 15th Sept. 1868.

I acknowledge to hold in my possession an acceptance of the Honourable F. Lawley, one half of which belongs to Mr. James Ramshire and the other half to myself.

GEO. BOLTON.

That the cheque was duly paid, and the plaintiff, knowing nothing of the circumstances under which the bill was given beyond what was represented to him by the defendant, had never seen it since. That on the 8th Dec. 1868, the defendant wrote to say that in order to be prepared for the bill not being met he had handed it to his solicitor to arrange for an innocent holder to sue, and so keep their names clear. That the plaintiff replied, "Take any steps you think proper to recover the money," relying on the defendant's good faith, and believing it better not to interfere. That on the 15th the defendant informed him that the bill was not paid, and again on the 17th, stating that notice of dishonour had been given, and unless the amount was paid or arrangements made a writ would issue. That the plaintiff had obtained no part of the 250*l.*, the defendant pretending that a writ was out against Ripley, Lawley being in Italy. That Ripley was adjudicated bankrupt in March 1869, and circumstances had occurred satisfying the plaintiff that he had been induced by the defendant by means of untrue statements and representations as to the position and solvency of Ripley and Lawley, and the real circumstances under which the bill came into the defendant's possession, to advance the money, such statements being not only untrue, but known to the defendant to be so when he made the same, and that in fact the defendant had received the money and applied it, or the greater part, to his own use. That the defendant was well aware that the bill would not be met, and that Ripley and Lawley were without means to meet the bill if liable on it. The bill then charged that the plaintiff advanced the money on the representation that it was to be advanced to Ripley and Lawley, the defendant never intending so to advance it to them, knowing that Ripley was hopelessly insolvent, and heavily indebted to another hotel, Lawley also being heavily indebted, and the representations that they were persons of means being untrue. The whole transaction being a scheme to pay off debts and liabilities of the defendant's own, and concocted between him, Ripley, and Lawley, or some of them, to raise money to pay off gambling debts due from them to the defendant, who applied the 237*l.* 10*s.* to his own use. The bill then charged that the bill of exchange was for little or no consideration, not recoverable, and asking discovery as to it, charging that it was given without consideration, and was to the defendant's knowledge worthless and void. And the bill prayed a declaration that the plaintiff was induced to advance the money on misrepresentations, and prayed for payment.

Glasse, Q. C. and *Cottrell*, in support of the demurrer, contended that this was a pure question of law, and if such a bill could be sustained, a suit could be instituted in every case of obtaining money under false pretences. A demurrer for want of equity involved one, *ore tenus*, for want of jurisdiction and parties.

Barker v. *Barker*, 4 Drew, 666;
Cooper v. *Earl Powis*, 3 De G. & Sm. 688.

Everitt, for the plaintiff, insisted that, being a question of fraud entirely admitted for the purpose of the demurrer, although no doubt there might be a legal remedy, this court had concurrent jurisdiction.

Colt v. *Woolaston*, 2 P. W. 156;
Cridland v. *DeMorley*, 1 De G. & M. 59:
Burrows v. *Locke*, 10 Ves. 470;
Green v. *Barrett*, 1 Sim. N. S. 45;
Storey's Eq. Juris. 185, Ch. 6, part 2;
Slim v. *Croucher*, 1 De G. F. & J. 518;
St. Aubyn v. *Smart*, 17 L. T. Rep. N. S. 439, and the cases there cited.

Glasse, Q. C. was heard in reply.

The VICE-CHANCELLOR (after stating the substance of the bill).—It is clear that the plaintiff, according to the statements in the bill, did advance 237*l.* to the defendant, he (the defendant) declaring himself trustee as to one-half of 500*l.*, and representing that he had got sufficient security for the money to entitle him to recover. That was a bill which was a dishonoured one, and the defendant was well aware of that at the time when the plaintiff advanced the money, and that under such circumstances the bill would not be paid; that Ripley

and the Hon. F. Lawley were without property, and the defendant knew that they could not meet their engagements, and yet represented them to be solvent. Now, if the case stopped there it would amount to an allegation that the defendant having that knowledge committed a fraud on the plaintiff. But in the 13th paragraph of the bill it is more distinctly stated, namely in this way, that the defendant never did advance the money to Ripley and the Hon. F. Lawley, but the statement is that it was a part of a transaction whereby, on the representation that he was going to advance the money to them, he obtained it for his own purposes, and that it was part of a fraudulent scheme. [The Vice-Chancellor read passages from the bill.] It is then alleged that it was an untrue representation that Ripley and the Hon. F. Lawley were persons of property; and if there is an allegation that one party induces another to act on representations that are not true, that is a fraud of the grossest description, and of course the demurrer admits such allegation to be true. The charge is, that the whole transaction was a scheme of the defendant to obtain money for purposes of his own, and as between him and Ripley and Lawley to pay off the gambling debts of the defendant, the manager of a hotel. The 17th paragraph then charges that the bill was without consideration (the defendant having stated that it was for value), and to the knowledge of the defendant worthless and void, and could not be enforced against the drawer and acceptor. It therefore amounts to this, that the defendant, being desirous to obtain money from the plaintiff, made untrue representations, untrue to his knowledge, that a bill was given for value when he knew it was not; that the whole transaction was *bonâ fide* when he knew it was a concocted scheme; and the bill therefore alleges a case admitted by the demurrer to be true which entitles the plaintiff to recover from the defendant. It was argued, and I was at first under the impression that it was a case which must be carried to a court of law, for no one can say that the bill does not allege a case entitling the plaintiff to recover the money; but the question is, whether the remedy is not at law. No doubt the distinctions between the remedies at law and in this court are very refined, as to what cases can be sustained at law or in equity. If it were a simple case of borrowing money, although the borrower may say he shall be able to repay, that is still a fraud, because he knew that he could not do so. Yet the claim for that money is not sustainable in this court. But where he obtains money on a security which he knows to be bad, that is a different case. The leading authority on this subject is the case of *Pasley* v. *Freeman*, in which A. said to B., "I am about to deal with C., is he solvent?" and B. said that he was, and accordingly A. gave him credit; but it turned out that B. knew he could not be trusted, and that he would not have trusted him: that is, he made a representation which he knew to be untrue, and the Court of Queen's Bench held that he (A.) was entitled to recover the whole amount. Therefore it is clear that we have a case here in which the plaintiff, supposing his allegations to be true, is entitled to recover in a court of law; is he entitled to recover in equity also? Mr. Everitt cited a case of *Colt* v. *Woolaston* (*sup.*), in which a director of a company represented shares in the company to be good while he knew them to be bad, and it was decided that a court of equity had a concurrent jurisdiction. In *Burrowes* v. *Lock* (*sup.*), the remedy would have been at law, a trustee being asked as to the nature of incumbrances, and having answered that he had not incumbered, when in fact he had, but had forgotten it, that of course was not a simple fraud, but a misrepresentation, but it was held to be a constructive fraud, and Sir William Grant considered that there was concurrent jurisdiction, and he quotes the Lord Chancellor in *Pasley* v. *Freeman* (*sup.*), who says, "that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make it good if he knows it is false." Can anything be more conclusive. Here the plaintiff was told that the bill was given for value when he knew that it was not, and if *Pasley* v. *Freeman* is law, the defendant must have a decree against him, and it is clear that it is a question which is cognisable in this court. *Cridland* v. *DeMorley* (*sup.*) came on upon a demurrer before Sir Richard Kindersley, but that case and the cases cited went, it was said, on distinct grounds, and were not in point, but I think they are, and in *St. Aubyn* v. *Smart* (*sup.*), I held an innocent partner liable, and that was affirmed on appeal. There, there was a fraud on the part of one partner, and the other having been held liable was obliged to pay. *Slim* v. *Croucher* (*sup.*) was a case in which all the other cases were fully considered, and I think it will be found that the very passage was read and relied on in argument from *Burrowes* v. *Locke*, which I have just read. There, there was a fraud, that is a misrepresentation, but by innocent mistake. There an advance of money was obtained upon a lease from the defendant, and the plaintiff asked him whether he had previously demised. He had forgotten it, and the security turned out therefore to be worthless, and the plaintiff was misled, and Stuart, V. C. made a decree for payment, being a money demand, and that was confirmed on appeal. That case is very analagous to this, except that there it was an innocent mistake, whereas here, according to the allegations in the bill, there was a gross misrepresentation. Mr. Glasse argued that if the plaintiff succeeded here every case where money was obtained under false pretences might be brought by bill before this court. No doubt a party may in such a case be amenable to the criminal jurisdiction, but that will not exonerate him from having a bill filed against him in this court. The bill is rested on the ordinary, valuable, and well-established jurisdiction of this court, that where on representations which a man knows to be false another is induced to advance money, or do some other act, that is a fraud which will be taken cognizance of as within the jurisdiction of a court of equity. On these grounds the demurrer must be overruled.

Solicitors for the plaintiff, *Fitch* and *Fitch*.

Solicitors for the defendant, Messrs. *Brandon*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

July 6 and 7.

ATTORNEY-GENERAL *v.* THE CORPORATION OF HALIFAX.

Pollution of stream—Nuisance—Time given to abate same.

A corporation had erected certain works so that the sewage of the town flowed into an ancient brook, which passed the mills of a manufactory, and thereby the brook or stream was so far polluted as to affect the health of the workmen and others in the manufactories residing in the neighbourhood of the stream, and also affected the property of the manufacturers. The balance of the scientific evidence proving that what had been done by the corporation caused a nuisance and was injurious to the public health:

Held, that the relators were entitled to an immediate in-

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junction to restrain any further extension of the works by which the pollution of the stream had been caused, and a further injunction (to commence on the 1st June 1870, to allow time to the corporation to apply to Parliament for additional powers if so advised), against causing the sewage to pass by or through the present outfalls.

This was an information and bill filed by the Attorney-General on the relation of Messrs. Holdsworth, the proprietors of Shaw Lodge Mills, within the borough of Halifax, damask and worsted manufacturers, praying that the Corporation of Halifax might be restrained from causing the sewage of the borough to flow into a brook called the Hebble Brook, on the banks of which the mills of Messrs. Holdsworth are situated, so as to cause a nuisance and injury to the public health. It appeared by the evidence that prior to and for some years after the passing of the Halifax Improvement Act in 1853, the drainage of the borough of Halifax, then of comparatively small dimensions and of the neighbourhood, was effected partly by ash pits or dry cesspools, and partly by small sewers so constructed as to allow the liquid portion thereof to percolate through the sandstone rock upon which the town of Halifax is built, the solid portion being from time to time carted away by the corporation.

The Hebble Brook, the natural drain of Halifax, was a small stream, with a rough, rocky bed, which flowed through the trough-like valley on the steep western slope of which Halifax is built. At some remote period, possibly before the settlement of the Flemish traders in this valley and the acquisition of their privilege of summary justice on criminals on what was and is called "The Maiden or Gibbet Hill," the Hebble Brook may have been a clear unpolluted brook from the Yorkshire hills, but it has now become, and has so continued for some time past, a foul polluted watercourse, discoloured to the eye, and very offensive. This was admitted on all hands, and the issue raised in the cause between the plaintiffs and defendants and their witnesses was as to the cause of its present condition. The borough manufacturies of Halifax have for many years past been greatly on the increase, and after the passing of the Improvement Act in 1853, as before stated, the corporation caused plans to be prepared for making drains, and entering upon a general system of sewerage for the borough. This plan, which consisted in the construction of one main intercepting sewer, into which the branch sewers were led, was by degrees put into execution; and in 1858 the main sewer, which was termed outfall A., was completed. This sewer discharges itself into the Hebble Brook, at a point about 160 yards above the mills of Messrs. Holdsworth, and at what was then the boundary of the then borough. The information stated that, although there was a perceptible increase in the amount of sewage flowing down the Hebble Brook, there was for some time no reason to apprehend anything like a serious nuisance, as the dry cesspool system continued to prevail to a great extent, and the house drainage was only very gradually connected with outfall A. In the year 1865 "The Halifax Extension Improvement Act 1865" was passed, the effect of which had been to treble the size of the borough and the area to be drained by outfall sewer A. In the meantime, as new houses were built, the number of water-closets draining into outfall A. was increased, and in the older districts water-closets were by degrees substituted for the privies and cesspools. The proportion, however, was still small, as it appeared from the evidence that with a population in 1868 of about 62,500 persons (the population of the borough having then nearly doubled itself since 1861), there were only about 1700 water-closets, or a proportion, as stated by one of the witnesses, of about one to every twelve houses.

After the extension of the borough in 1865 the corporation had taken in hand the construction of another main sewer for the purpose of draining the outlying districts recenty added, and comparatively rural and unbuilt upon. This sewer, known as "outfall B," was opened in the course of last year, and empties itself into the Hebble at a point about eighty yards below the outfall A. In addition to this system of intercepting drains the corporation had put into force their Parliamentary powers for retaining and storing water, the effect of which the information stated had been to stop the periodical floodings of the Hebble, and reduce it frequently to the condition of a stagnant ditch, while from the rocky and irregular nature of its bed the filth was retained and exposed to the decomposing effects of the sun and air. The information furthur stated that by the end of 1867 the Hebble Brook below the outfalls had become constantly filled with foul and feculent matter, and was in fact nothing better than a common open sewer. The nuisance was also stated to be aggravated by the arrangements, of a very complicated character, of the Calder and Hebble navigation, the canal of which runs in immediate proximity to the Hebble, for damming up the brook and pumping the water into the canal, so that the same filthy water was again returned to the riparian inhabitants of the lower part of the valley. In Dec. 1867, Messrs. Holdsworths, who employ about 3000 hands in their mills, and are owners of several adjoining cottages overhanging the brook, wrote to the corporation to complain of the very serious nuisance occasioned by the discharge of the town sewage into the brook at a point so near to their works and cottages, and to protest against the increase of the nuisance and from the contemplated opening of outfall B, only about eighty yards above their mills. A correspondence followed, in which the corporation did not deny the existence of an evil, but urged the difficulties of the case, the exertions that had already been made, and the impossibility of partial local action in such a matter, insisting that time must be allowed for the adoption of some comprehensive scheme, based upon the expected report of the Rivers Pollution Commission, for dealing, not merely with the particular nuisance complained of, but for purifying the area of the Calder and Hebble basin generally above as well as below the outfalls.

The plaintiffs, on the other hand, finding, as they stated, that the nuisance had been steadily on the increase since their first complaint in Dec. 1867, and that the health of their workmen was seriously affected, and their cottages rendered almost uninhabitable by the stench and foul gases escaping from the brook, grew weary of waiting for the comprehensive scheme promised by the corporation, and in May last procured the signature of the Attorney-General to the information for the purpose in effect of trying the question whether the corporation were entitled to turn the Hebble Brook into a common sewer for the town of Halifax, and thereby injure the property of the plaintiffs, and the health of their workmen and the tenants of the cottages.

The evidence on both sides was very voluminous, and, as usual, showed a conflict of the scientific evidence given by the medical men and others. On the part of the corporation it was denied that the condition of the Hebble was foul, filthy, and poisonous; but it was asserted that this condition was—if it were so—occasioned by manufacturing refuse rather than by sewage pollution; that the present scheme had been adopted at a great expense, after long and anxious consideration, as the best means of dealing with the question of draining the

borough, and not without success; that from the immense volumes of water poured down the outfalls—nearly 3,000,000 gallons per day—the sewage was so diluted as to be innocuous; and that the condition of the brook at and immediately below the outfalls was far better than higher up in the town, where it was polluted by manufacturing refuse, dyestuff, and filth from privies, or than lower down the stream at Messrs. Holdsworth's works, where the stream at its shallowest point was poisoned by the drainage from their cottages, and especially by the liquor that escaped from their grease-extracting works, where the soapsuds used in washing the wool are treated with sulphuric acid for the purpose of extracting the grease, and is afterwards used in making candles, and for other similar purposes.

Several witnesses had been also examined *viva voce*, and cross-examined on their depositions before a special examiner at Halifax.

The cause now came on for a hearing.

E. E. Kay, Q.C. and *Ince*, for the plaintiffs, shortly stated the facts of the case, and the Vice-Chancellor called upon the defendants' counsel to argue the question on their behalf.

Grove, Q.C., *Amphlett*, Q.C., *H. Fox Bristowe*, Q.C., and *G. Williamson*, for the defendants, contended that that portion of the stream which was the main ground of complaint charged in the information; that which flowed between outfall A. and the plaintiff's works, was precisely that part where there was the least pollution; that the outfalls, so far from increasing the nuisance complained of as it existed in the Hebble, did in fact mitigate it by the great quantities of water discharged down these outfalls; that no complaint had been made for ten years after the opening of the outfall A in 1858, until the time when the plaintiffs began to bestir themselves in 1867, by any of the inhabitants of the neighbourhood or persons working in the manufactories on the banks of the steam. On the contrary, persons engaged at the Atlas works, between the two outfalls, had given evidence, and had not been cross-examined, that they had not suffered in health or felt any evil effects from the discharge of the sewage water by the outfalls. That the plaintiffs themselves, by their processes carried on upon their property, and by the drainage from their cottages, had greatly increased the bad condition of the brook, and the plaintiffs, and especially Mr. W. F. Holdsworth, who had been a member of the corporation since 1860 and was mayor for two years, could not now be heard to complain, as they, the plaintiffs, had acquiesced in the state of things which had existed. That Mr. W. J. Holdsworth, as a member also of the corporation, knew of, and assented to, what had been done, and had allowed great expenses to be incurred. He had been a most active member of the corporation, and was cognisant of all that had taken place. That the evidence did not warrant the allegations as to the unhealthiness of the stream stated in the information. That vast expense had been gone to already by the corporation in their endeavours to alleviate the inconvenience complained of; and that the plaintiffs should be left to their remedy at law.

No reply.

The VICE-CHANCELLOR, after having recapitulated the main facts, and commenting on the conflicting state of the scientific evidence, held that the plaintiffs were entitled to an injunction against the corporation from making any additions or any new communications with the existing outfalls and also from and after the 1st June 1870, so as to give the corporation time to apply to Parliament, if they should think proper, against causing the sewage of the borough to flow through or pass by the outfalls A and B, or making any new outfall, unless and until the same should be sufficiently purified and deodorised. It certainly appeared to him that it was utterly impossible that a sewer of the extent stated could be discharged into a brook of small dimensions, as the Hebble was stated to be, without its creating a nuisance, and the evidence had satisfied him that a nuisance of a very offensive character had been caused by the proceedings which had been had. The evidence afforded by Dr. Letheby's tables, which had been relied on by the corporation, was practically irrelevant, or if it proved anything it rather strengthened the case against the defendants themselves. He could not accede to the argument that had been urged as to any acquiescence on the part of the corporation; or that because one of the Messrs. Holdsworths had been a member of the town council, and twice chosen mayor since 1860, and acting as such that he thereby gave up his property and that of his partners to be dealt with by the corporation as they pleased, so as to preclude him or them from ever complaining if the acts of the corporation, from which no nuisance had been originally contemplated, ultimately resulted in such being the case. But again, this gentleman was only one of several relators, all of whom were not members of the corporation. The particular evil had gone increasing gradually, and had only become insufferable at the end of 1866. It was immaterial that the persons most affected by the nuisance were cottagers of the plaintiffs. Upon the whole he had no hesitation in granting an order for an immediate injunction to restrain any further extension of the system adopted by the corporation, and an injunction to take effect and commence on the 1st June 1870 against causing the sewage to be poured out by the present outfalls A and B in an unpurified state. The plaintiffs were entitled to their costs of the suit and information. The Vice-Chancellor added that he was convinced that the corporation would be able in time to remedy the evils complained of, so as to prevent them from being practically a nuisance, and so deprive the Messrs. Holdsworths of any real ground of complaint.

Solicitors: *Edwards*, *Layton*, and *Jaques*, agents for *Hobroyd* and *Co.*, Halifax; *Williamson* and *Co.*, for *Norris* and *Foster*, for the corporation.

Friday, July 23.

POTTS *v.* SMITH AND OTHERS.

Administration—Insufficient estate—Abatement and apportionment of annuities.

Where there are contingent annuities given by a testator's will, and his estate turns out to be insufficient for the due payment of them, and some of the annuitants have died, the amount of the several annuities is to be estimated at the value of the respective annuities at the death of the testator, and the sums subsequently paid to the annuitants on account of the annuities to be deducted from that amount.

The rule as adopted in Todd v. *Beilby*, 27 Beav. 353, *followed.*

This cause came on for further consideration on the chief clerk's certificate.

It was an administration suit.

The testator, Ralph Henry Potts, by his will dated the 18th June 1855, after directing payment of his debts, devised and bequeathed certain real and personal estate to his trustees and executors to convert same and upon trust to stand possessed of the proceeds and out of the yearly income arising therefrom to pay the following annuities by half-yearly payments: unto Mary Potts an annuity of 1000*l.* for

life, to his brother Radford Potts an annuity of 350*l.* for life, to his brother Benjamin Potts an annuity of 80*l.* for life, and to his sister Sarah an annuity of 50*l.* for life, and he bequeathed the residue of his property to the executors for the purposes therein mentioned, subject to the payment of the annuities.

By a codicil to his will the testator made certain alterations in the bequest as to the annuity to his brother Radford Potts, but did not alter his will so far as related to the question raised on the further consideration of the cause.

By the decree dated the 20th March 1868, the usual administration inquiries were directed.

The chief clerk, by his certificate, certified that the testator's estate was insufficient for the payment of the legacies and annuities, and the arrears given by his will. That some years had elapsed since the testator's death, and that the testator's brother Radford had died leaving a widow (the plaintiff in the cause) and some children surviving him.

The question now to be considered was, how the remaining fund of the testator's estate was to be apportioned amongst the legatees and annuitants.

Amphlett, Q. C. and *Jason Smith*, for the plaintiff, contended that in estimating the value of the annuities the court, being to be guided by the events which had happened, must decide that the fund could not be divisible in proportion to the value of the annuities at the death of the testator, as some of the annuitants had since died, but that the annuity to the brother Radford and wife must be considered as no longer reversionary, but as an annuity in possession. For this they cited

Todd v. *Beilby*, 27 Beav. 353;
Heath v. *Nugent*, 29 Beav. 226.

Kay, Q. C. and *J. P. Morris*, for the defendants, the executors, contended that the rule as applied in *Todd* v. *Beilby* did not govern the present case. They cited

Broughton v. *Colquhoun*, 1 De G. & Sm. 47;
Long v. *Hughes*, in note to ditto.

The Vice-Chancellor said he considered the case was governed by that of *Todd* v. *Beilby*, and that the apportionment must be made accordingly. The declaration of the court would therefore be: "That it appearing that the real and personal estate of the testator was insufficient to pay the annuities bequeathed by his will, declare that the values of the annuities of such annuitants as were now dead are respectively the amounts that actually became due to them respectively in their respective lifetimes in respect thereof, and that the values of the said annuities of such of the annuitants as are now living are respectively the amounts that have become due to them respectively in respect thereof, together with the present values of their respective annuities, such values to be verified by affidavit." The amount remaining of the testator's estate to be divided and paid to the surviving annuitants according to this principle.

Order accordingly.

Solicitors: *Hicks* and *Son*; *Cualiffe* and *Beaumont*.

In Parliament.

Reported by Frederick Clifford and Pembroke S. Stephens Esqrs., Barristers-at-Law.

THE COURT OF REFEREES ON PRIVATE BILLS.

Monday, April 12.

(Before Mr. Dodson, Chairman; Mr. Rickards, and Mr. Wynn.)

St. Helen's Borough Improvement Bill.

Objections to the *locus standi*: (1) of Sir R. T. Gerard, Bart.; (2) of Messrs. Robertson, Gladstone, and others; (3) of Thomas Dicconson, Esq.; (4) of The Rev. J. Abraham; (5) of The Marquis of Salisbury; (6) of the London and North-Western Railway Company; (7) Daniel Willis, Esq.; (8) Samuel Taylor, Esq.

Practice—Locus standi—Several petitions—Order of hearing.

Where petitions are numerous the court will by consent hear the arguments relating to them, some as a class, and some singly; and the right of reply will correspond to the order of hearing which is adopted.

Mundell, Q. C. (who appeared for Sir R. T. Gerard), asked the court to lay down some rule as to the order in which arguments as to these numerous petitions should be heard, the points raised in some of the petitions being practically identical, whilst others relying upon the same points introduced new matters, and others again were wholly distinct in their nature. The court, he presumed, would adopt the course which had been attended with convenience in other cases, that of dividing the petitions representing different interests into classes, and disposing of each class separately.

Cripps, Q.C. (who appeared for the Marquis of Salisbury) supported the application.

Pembroke Stephens, for the promoters, offered no objection, on the understanding that arguments against each class would also be heard separately, and that the promoters would not be confined to one general reply. He suggested that petitions 1 to 5 inclusive, emanating from landowners apprehensive of additional taxation under the Bill, should be treated as one class; and that these should be replied to and disposed of, before the remaining petitions, raising other and distinct questions, were entered upon.

Cripps, Q. C.—The petition of the Marquis of Salisbury raises other points besides that of the apprehended taxation on which we claim a *locus standi*. But I have no objection for the sake of convenience to its being included in that class.

Merewether, Q. C., *Webster*, Q. C., *Round*, and other counsel representing different petitioners, expressed their willingness to assent to the course proposed.

It was ultimately agreed that the first five petitions should be dealt with as a class, and that the other three petitions should be argued singly.

Mr. Rickards observed that the court did not bind themselves to give their decisions in any particular order, or, if necessary, till all the arguments had concluded.

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Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Friday, June 4.

SIMPSON *v.* YEEND.

Municipal election—Voter—Bribery—22 Vict. c. 35, ss. 11, 12 (17 & 18 Vict. c. 102, s. 2.)

By sect. 2 of the 17 & 18 Vict. c. 102, which by sect. 12 of the 22 Vict. c. 35 is made applicable to municipal elections, a person is to be deemed guilty of bribery "who shall directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter; or to or for any other person, in order to induce any voter to vote or refrain from voting," &c.

On the morning of a municipal election for the city of L., the defendant went to one M., who was a voter, and solicited his vote for his party. M. told him he did not intend to vote; the defendant said he would be remunerated for loss of time.

Held, that these facts brought the defendant within the operation of the above-mentioned section.

This was an appeal from a decision in the County Court of Staffordshire, holden at Lichfield, entered on the 30th April 1868.

The particulars of demand were as follows:—Thomas Simpson sues William Yeend for 40*s.*, forfeited by him by reason of having been guilty of bribery at the election of councillors in the north ward in the city of Lichfield, held on the 1st Nov. 1867, for that he, the said William Yeend, on that day did directly offer a sum of money to George Marshall, of Gay-lane, Lichfield, one of the citizens of the said city, to induce him as a voter in the said ward to vote at the said election.

The cause was heard by the judge on the 8th June 1868, when it was proved that on the 1st Nov. an election of councillors in the north ward of the said city was held there, and that the said George Marshall was enrolled in the list of citizens in the said north ward. That the said defendant called upon him on the 1st Nov. and urged him to vote for his (the said defendant's) party candidates for the office of councillor in the north ward, and that Marshall did not vote at all.

Marshall and his wife gave evidence that the defendant had, on several occasions called and offered various sums of money which had been refused; but the evidence of both, especially of Marshall, was so hesitating and unsatisfactory that the judge did not think it deserving of credit. Marshall also admitted, on cross-examination, that he had received 1*l.* from the other party.

The defendant was then examined as a witness in his own behalf, and stated as follows: I saw Marshall's wife. I told her I called to solicit a vote. She told me he did not intend to vote. If he did he would offend Mr. Mickleton and Mr. Playfer. She also said he had been offered something very handsome on the other side, and I am sure he will not vote; he also said he would lose much time by going to vote. I said he would be remunerated for what loss of time might occur. Never mentioned money, 7*s.* 6*d.* I saw Marshall next morning. I again said, "I solicit your vote." He told me he did not intend to vote. I did not offer him money, I said he would be remunerated for loss of time; I did not offer him a sovereign.

The defendant also stated that by remuneration he meant 3*s.* or 4*s.* or thereabouts, and that he solicited the vote for his party.

Judgment was given for defendant.

At a subsequent court the plaintiff moved to set aside the verdict, and to have it entered up for the plaintiff, on the ground that the evidence of the defendant himself was in point of law an admission of bribery under the statute.

The judge decided that under the circumstances the verdict should stand, and at the same time considered it reasonable and proper that an appeal should be allowed, and he allowed the same to the plaintiff on the said question, whether the transaction as described by the defendant amounted to bribery under the statute 17 & 18 Vict. c. 102.

By sect. 11 of the 22 Vict. c. 35 (An Act to Amend the Law Relating to Municipal Elections), it is enacted that

If any person at any election of mayor, councillors, auditors, or assessors for any borough shall be guilty of bribery, he shall for every such offence forfeit the sum of 40*s.* to any person who shall sue for the same in the County Court, &c.

By sect. 12 it enacted that

The word "bribery" shall include anything committed or done before, at, after, or with respect to, the election of any mayor, councillors, auditors, or assessors, which if committed or done before, at, after, or with respect to any election of any member to serve in Parliament, would render the person committing or doing the same liable to any pains, penalties, forfeitures, or conviction for bribery, treating, undue influence, corrupt practices, or other offence under any Act or Acts for the time being in force with respect to the election of members to serve in Parliament for boroughs in England and Wales.

By sect. 2 of 17 & 18 Vict. c. 102 (An Act to Consolidate and Amend the laws relating to Bribery, Treating, and undue Influence at Elections of Members of Parliament) it is enacted that—

The following persons shall be deemed guilty of bribery, and shall be punished accordingly: Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election, &c.

Gray, Q. C. and *R. H. Collins* for the plaintiff.—The decision of the County Court judge was erroneous, for the defendant had brought himself within the terms of the 2nd section of 17 & 18 Vict. c. 102, which, by 22 Vict. c. 35, is applicable to municipal elections. The first part of the section, which is that applicable to the present case, does not require that the act should be done corruptly. It is a simple question whether or not, according to the evidence, the defendant offered the plaintiff money to induce him to vote. *Cooper* v. *Slade*, 7 H. of L. Cas. 746, is in point. [COCKBURN, C. J.—This would seem to be a much stronger case than that.]

Manisty, Q. C. and *Bosanquet* for the defendant.—There was no evidence in support of the only act of bribery alleged in the particulars, which states that "the said William Yeend on that day did directly offer a sum of money to George Marshall, of Grove-lane, Lichfield, one of the citizens of the said city, to induce him as a voter in the said ward to vote at the said election." There was in fact neither an "offer" nor a "promise" to pay money. [COCKBURN, C. J.—Suppose I say, "If you vote you will have a 10*l.* note," there would be no pledging of his own responsibility, but would not that be within the Act?] I should say not; it would be no more than a passing remark. [COCKBURN, C. J.—He was soliciting a vote for a particular individual. The person solicited says, "I shall lose my time;" the other says he will not, for he will be remunerated.] There was no contract or bargain, and the

offer was never acted upon. [MELLOR, J.—Had he been a mere bystander, and had used the observation, it may have been otherwise, but here the conversation is with a voter, whose vote is solicited. COCKBURN, C. J.—What is the meaning intended to be conveyed when it is said the voter will lose a lot of time, and it is replied, "Oh, no, you will be remunerated?"] Still there must be some offer or promise, of which there is no evidence. [COCKBURN, C. J.—It can scarcely be said that there was not some evidence of a promise.] There was no offering of money, only a suggestion which was not accepted. [COCKBURN, C. J.—Then it would only be to alter the phraseology and so evade the penalty.] It is only a vague remark. No authority was shown for making any offer, nor was the offer accepted; it was merely a passing remark which had no effect. [COCKBURN, C. J.—Really if the statute does not embrace this case, it ought to be amended.] Had any actual promise been made, though it had not been accepted, it would have been sufficient. The election judges, I believe, have put a construction upon these words, though I cannot now refer to it. [COCKBURN, C. J.—We will consult the other judges.]

Cur. adv. vult.

COCKBURN, C. J.—This was a case stated by the judge of the County Court of Staffordshire by way of appeal from his own decision whereby judgment was given for the defendant. The plaintiff in the County Court, Thomas Simpson, sued the defendant, William Yeend, for 40*s.* forfeited by him by reason of having been guilty of bribery at the election of councillors in the north ward of the city of Lichfield held on the 1st Nov. 1867, "for that he the defendant did on that day directly offer a sum of money to one George Marshall, one of the citizens of the said city, to induce him as a voter in the said ward to vote at the said election." The evidence on which the plaint was tried is set out by the judge of the County Court, and the question proposed to us is, "whether the transaction as described by the defendant is bribery under the stat. 17 & 18 Vict. c. 102?" The evidence as stated by the judge of the County Court is as follows: "I saw Marshall's wife. I told her I had called to solicit a vote. She told me he did not intend to vote; if he did, he would offend Mr. Mickleton. She also said he had been offered something handsome on the other side, and I am sure he will not vote. She also said he would lose much time by going to vote, and I said he would be remunerated for what loss of time might occur. Never mentioned money—7*s.* 6*d.* I saw Marshall next morning. I again said, 'I solicit your vote.' He told me he did not intend to vote. I did not offer him money. I said he could be remunerated for loss of time. I did not offer him a sovereign." The statute referred to by the judge of the County Court, 17 & 18 Vict. c. 102, s. 2, makes it bribery "in every person who shall directly or indirectly by himself or by any other person in his behalf give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter in, to, or for any other person, in order to induce any voter to vote or refrain from voting, or shall corruptly, do any such act as aforesaid on account of such voter having voted or refrained from voting at any election." In answer to the question proposed to us by the judge of the County Court, we are of opinion that "the transaction as described by the defendant is bribery under the statute." We delayed giving our judgment at the close of the argument, not because of any doubt in our minds as to the answer we ought to return to the question put to us by the judge of the County Court, but because we were assured by the counsel for the defendant that the election judges had in their decision upon this section taken a view different from that which we were disposed to take. Had the fact been as suggested we should not have felt ourselves bound by the opinion of the election judges, unless upon consideration we had agreed with it; but we thought it desirable to ascertain what opinion had in fact been expressed by them with reference to a subject with which their duties had necessarily made them familiar. Upon inquiry we find, as we had anticipated, that those learned judges had expressed no opinion adverse to the conclusion at which we have arrived. In the present case we are relieved from considering the truth of the evidence, as it is the statement of the defendant himself, which is submitted to us for consideration. We cannot doubt the words admitted to have been used by the defendant, viz., that the voter would be remunerated for what loss of time might occur—did, under the circumstances, amount to an "offer" or "promise" to "procure" or "endeavour" to procure money or valuable consideration of a voter in order to induce him to vote at the election in question. The expression, "remuneration for loss of time," would necessarily convey to the apprehension of the voter that if he would vote for a particular candidate he should name, he would receive, either directly from the person offering or by his procurement, money or valuable consideration which he would not otherwise obtain; and any expression of that kind which can be so understood is calculated to operate upon the mind of the elector as a direct inducement to vote for such candidate. If any authority were required to induce us to adopt that view of the transaction in the present case it is supplied in that of *Cooper* v. *Slade*, 27 L. J. 449, Q. B., which upon this point is not distinguishable in principle from the present case. It is so important to the public interest that at elections voters should be left to vote without any disturbing influence of any kind that we feel ourselves bound, in construing the statute in question, to give full effect to the plain meaning of the words used, and to apply them to the substantial parts of the case without raising subtle refinements as to the precise word or expression in which the promise or offer may be conveyed. The case will be remitted to the judge of the County Court who will set aside the verdict for the defendant, and enter it for the plaintiff for 40*s.*, being the penalty provided by the Municipal Act for the offence in question.

Case to be remitted, and judgment to be entered for the plaintiff.

Attorney for the plaintiff, *J. Cole.*

Attorney for the defendant, *W. Wilson.*

MIDDLESEX SESSIONS.

Tuesday, Aug. 31,

(Before Mr. Serjt. COX, Deputy Assistant Judge.)

REG. v. HARRINGTON AND OTHERS.

Practice—Counsel.

Where two prisoners on the same indictment are separately defended by counsel, one of whom only has called witnesses, the convenient course of proceeding is for the prisoner's counsel who calls witnesses to open his defence and sum up; then for the counsel for the prosecution to reply upon the whole case, and then for the

counsel for the prisoner who has called no witnesses to address the jury in his defence.

Prisoners were indicted for assaulting a police officer in the execution of his duty.

Cooper for the prosecution.

Brindley defended Harrington and another.

Moody defended O'Keefe.

Brindley called no witnesses.

Moody called witnesses, and opened the defence and summed up.

Brindley claimed to address the jury after *Cooper* had replied.

Cooper objected; he claimed the right to reply on the whole case after his learned friends had completed their defences.

Keble, amicus curiæ, said that at the last session of the Central Criminal Court a similar question had come before M. Smith, J., who adopted the course proposed by Mr. Brindley.

Mr. Serjeant Cox.—The counsel for the prosecution has the right of reply, but in practice it is not exercised unless witnesses are called for the defence. If there be an advantage in last addressing the jury, it is hard that one prisoner should be deprived of it because another prisoner calls witnesses. The course adopted by M. Smith, J., is obviously the fairest. I adopted it in a similar case last week. The question is new to me. I shall observe the practice until corrected by a higher authority.

COURT OF EXCHEQUER.

Reported by H. Leigh and E. Lumley, Esqrs., Barristers at-Law.

June 4 and 5, and July 2.

Re De Lancey's Succession.

Revenue—Succession Duty Act 1853 (16 & 17 *Vict. c.* 51), *sects.* 2, 18, 30—*Legacy Duty Act* (36 *Geo.* 3, *c.* 52), *sect.* 19—*Bequest of money in trust to be laid out in land—Equitable conversion—Duty payable thereon—Whether as succession or legacy duty—Amount of—Petition of appeal against assessment—Right to begin—Practice.*

A testator by will in 1799 *bequeathed* 10,000*l. Consols to trustees upon trust, to lay out the principal and the interest moneys arising therefrom in the purchase of real estate, to be settled and assured to the use of his eldest son, Charles, for life, with remainder to the first and other sons of Charles successively in tail male; and, in default of such issue to the use of testator's son James for life, with remainder to the first and other sons of James successively in tail male; and in default of such issue, then to his own right heirs for ever.*

Testator died in 1800, *leaving his two sons, Charles and James, Charles being the eldest and the heir-at-law. Charles died in* 1840, *and James in* 1857, *each of them dying a bachelor, and intestate. The* 10,000*l. was never laid out in the purchase of real estate, but the dividends arising therefrom were paid to Charles and James successively during their respective lives. At James's death the testator's only lineal descendant was his daughter and only surviving child, Susan, who then became his heir-at-law, and died in* 1866, *a spinster and intestate, having always refused to receive either dividends or principal of the* 10,000*l. left under her father's (the testator's) will. Shortly after her death the principal and interest moneys representing the real estate fund were paid into the Court of Chancery, and a suit was instituted for administering the same, in which suit the following facts were found: That at testator's death his heir-at-law was his eldest son Charles; that the person now such heir-at-law, and entitled to any real estate of which the testator might have died intestate, was Edward F. De L., a grandson of the testator's brother. That at Charles's death his heir-at-law was his brother James; and that at James' death his heir-at-law was his sister Susan; and that at Susan's death her heir-at-law was the said Edward F. De L., who was the heir-at-law of the said Charles, James, and Susan respectively, and the person entitled to any real estate of which they respectively might have died intestate. It was also found that "none of the persons for the time being entitled to any real estate of which the testator had died intestate did, while so entitled, any act with reference to the money so directed to be laid out in the purchase of land amounting to or having the effect of an election to take it as money or land, or as might have the effect of constituting such person or persons a new root or roots of descent with regard to such money."*

The Commissioners of Inland Revenue having assessed the said Edward F. de L. in succession duty at the rate of 5 *per cent. on the principal and interest moneys constituting the above mentioned real estate fund, on the ground of its being a "succession to him derived from Susan the predecessor (of a brother of the father of whom he was a descendant)", he appealed against such assessment on the grounds, first, that legacy duty and not succession duty was payable by him thereon as a descendant of a brother of the deceased testator at the rate of* 2½ *per cent. under* 36 *Geo.* 3, *c.* 52; *or, secondly, that if succession duty was payable thereon, it was payable by him as the descendant of a brother of the testator, under the Succession Duty Act, at the rate of* 3 *per cent. only as being a succession derived by him (not from the said Susan but) from the said testator the predecessor, and on a case stated for the opinion of the Court of Exchequer, it was*

Held by Kelly, C. B. and Channell, B., that the fund in question, not having been laid out in land, was liable to legacy duty under sect. 19 *of the Legacy Duty Act* (36 *Geo.* 3, *c.* 52), *and therefore that succession duty did not attach.*

And, per Kelly, C. B., the principle or equitable fiction on which courts of equity have so long held that money to be laid out on land is for certain purposes to be treated as land, is inapplicable to the interpretation of the statute imposing duties upon personal estate.

Also, per Kelly, C. B., that if the case were governed by the Succession Duty Act, the daughter Susan and not the testator must be deemed the "predecessor" of the petitioner.

But, contra, by Bramwell and Cleasby, BB., that duty was payable upon the fund under the Succession Duty Act (16 & 17 *Vict. c.* 51), *at* 5 *per cent. as upon a succession from "Susan" as the "predecessor," and not under the Legacy Duty Act.*

And, per Bramwell, B., that sect. 19 *of* 36 *Geo.* 3 *was not applicable, and that whether under the one Act or the other, the duty payable on the fund was properly assessed at the rate of* 5 *per cent.*

Held also, by Bramwell, Channell, and Cleasby, BB., that the practice laid down by the court in The Marquis of Chandos *v.* The Commissioners of Inland Revenue, 6 *Ex.* 461; 20 *L. J.* 269, *Ex., and followed in subsequent cases, should be adhered to, and that the counsel for the appellant should begin. Kelly, C. B. expressing his opinion that the more convenient course would be that, in every case where the Crown desires or seeks to impose a tax, the counsel for the Crown should begin (a).*

(a) But see *Re Greenwood, ante* p. 25.

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This was an appeal under sect. 50 of the Succession Duty Act 1853 (16 & 17 Vict. c. 51), against an assessment of succession duty, made by the Commissioners of Inland Revenue under the Act, upon Edward Floyd De Lancey, of New York, in the United States of America, Esq., a legatee of or successor to personal estate directed to be laid out in the purchase of real estate, under the will of James De Lancey, late of Alfred-street, Bath, Esq., deceased, which came before the court in the shape of a petition by the said E. F. De Lancey to the Chancellor of the Exchequer, and to the Lord Chief Baron and the rest of the Barons of the Court of Exchequer, and which petition set forth the case as follows:

1. That the above-named James De Lancey, by his will dated the 15th Nov. 1799, gave and bequeathed unto trustees, and to the survivors and survivor of them his heirs, executors, administrators, and assigns, the capital sum of 10,000*l.* Three per cent. Consolidated Bank Annuities, and also all such several sum and sums of money which might be due to him at the time of his decease in exchequer bills, navy bills, India bonds, or any other public floating securities, upon trust that they his said trustees, and the survivors or survivor of them, his executors, administrators, or assigns, should lay out and invest both principal and interest moneys therefrom arising in the purchase of lands, tenements, and hereditaments situate, lying, and being in that part of Great Britain called England, the same to be of the nature of freehold or copyhold, convenient to be held therewith, and of no other estate or tenure whatsoever, and convey, settle, and assure the said lands, tenements, and hereditaments so to be purchased as aforesaid, or cause and procure the same to be conveyed, settled, and assured, to the uses and subject to the provisoes following, that is to say, to the use of his eldest son Charles Stephen De Lancey and his assigns for life, without impeachment of waste, remainder to his said trustees and their heirs, to preserve contingent remainders, remainder to the first and other sons of the said Charles Stephen De Lancey, and the heirs male of his and their body and bodies lawfully to be begotten, successively in tail male, and in default of such issue, to the use of testator's son James De Lancey, and his assigns for life, without impeachment of waste, remainder to his said trustees and their heirs, to preserve contingent remainders, remainder to the first and other sons of the said James De Lancey, and the heirs male of his and their body and bodies lawfully to be begotten, successively in tail male, and in default of such issue then to his own right heirs for ever.

2. That the said testator died on the 8th April 1800, without having revoked or altered his said will, and the same will was on the 7th May 1800 duly proved in the Prerogative Court of the Archbishop of Canterbury.

3. That the testator left two sons, of whom the said Charles Stephen De Lancey was the eldest, and he was the testator's heir-at-law.

4. That the said sum of 10,000*l.* Consols and the other securities directed to be laid out in the purchase of real estate (represented by 3047*l.* 8*s.* 1*d.* Consols) were never so laid out.

5. That the said Charles Stephen De Lancey died a bachelor and intestate on the 6th May 1840. The dividends on the two funds representing the real estate fund were paid to him during his life.

6. That he left his brother, the said James De Lancey, him surviving; and he the said James De Lancey died, also a bachelor and intestate, on the 26th May 1857. The dividends on the real estate funds were paid to him during his life.

7. That at the death of James De Lancey (the son), the only lineal descendant of the testator was Susan, otherwise called Susanna De Lancey, his only surviving child, and who then became his heir-at-law.

8. That she died on the 7th April 1866 a spinster and intestate.

9. That the said Susan, otherwise Susanna De Lancey, did not receive, but on the contrary refused to receive either dividends or principal of the money left under her father's will.

10. That shortly after her death the two sums representing the real estate fund and the dividends thereon from and including the July dividend in 1857 (the next dividend that accrued after the death of James De Lancey the son) were (with other property belonging to the testator) transferred and paid into the Court of Chancery, and two suits, *Hammond* v. *Allen*, 1867, H. No. 65, and *De Lancey* v. *Hammond*, 1867, D. No. 27, were instituted for the purpose of administering these funds.

11. That the Master of the Rolls made one decree in both suits, dated the 25th April 1867, and by this decree the usual inquiries and accounts were directed.

12. That the chief clerk of the Master of the Rolls to whom the suits were allotted found by his certificate, dated the 18th, and approved by the judge and filed the 25th March 1868, the following facts:—The heir-at-law of the testator at the time of his death was the said Charles Stephen De Lancey, his eldest son. The person now such heir-at-law, and entitled to any real estate of which the testator might have died intestate, was your petitioner, Edward Floyd de Lancey. The heir-at-law of the said Charles Stephen De Lancey at the time of his death was his brother, the said James De Lancey. The heir-at-law of the said James De Lancey at the time of his death was his sister, the said Susanna, otherwise called Susan De Lancey. The heir-at-law of the said Susanna, otherwise called Susan De Lancey, at the time of her death, was and is your petitioner, Edward Floyd De Lancey. The person now entitled to any real estate of which the said Charles Stephen De Lancey, James De Lancey (the son), and Susanna, otherwise Susan De Lancey, respectively might have died intestate, and the heir-at-law of them respectively was your petitioner, the said Edward Floyd De Lancey, a grandson of John Peter De Lancey, a brother of the testator. The chief clerk also found that "none of the persons who would for the time being have been entitled to any real estate of which the testator had died intestate did, while so entitled, any act with reference to the 10,000*l.* Consols, or any other money by the testator's will directed to be laid out in the purchase of land, which might amount to or have the effect of an election to take that sum or any such other money as money or as land, or might have the effect of constituting such person or persons a new root or new roots of descent with regard to that sum or any such other money." The chief clerk then certified that the dividends which accrued on the said 10,000*l.* Consols from the death of the said James De Lancey (the son), including July 1857 to and including Jan. 1866, amounting to 2617*l.* 10*s.* were payable to the legal personal representative of the said Susan De Lancey, and that the said 10,000*l.* Consols, with the dividends thereon, from and including July 1866, amounting to 588*l.* 15*s.*, were transferable and payable to your petitioner, the said Edward Floyd De Lancey. The chief clerk found that the 3047*l.* 8*s.* 1*d.* Consols were no part of the fund directed to be laid out in the purchase of real estate; but this finding was reversed and altered on appeal to the Lords Justices of Appeal, as after mentioned.

13. That by the order on further consideration dated the 2nd June 1868, the said 2617*l.* 10*s.* were

directed to be paid to the legal personal representative of the said Susan De Lancey, and (subject to duty) the 10,000*l.* Consols and the said 588*l.* 15*s.* cash were ordered to be transferred and paid to your petitioner, the said Edward Floyd De Lancey, and the 3047*l.* 8*s.* 1*d.* Consols were directed to be dealt with as part of Charles Stephen De Lancey's personal estate; but this direction was reversed and altered by the order of the Lords Justices of Appeal hereinafter mentioned.

14. That by an order of the Right Honourable the Lords Justices of Appeal, dated the 23rd July 1868, the said 3047*l.* 8*s.* 1*d.* Consols were declared to form part of the real estate fund, and it was ordered that they (subject to duty) should be transferred to your petitioner, the said Edward Floyd De Lancey, and the dividends thereon, from and including July 1857 to and including Jan. 1866, were (subject to duty) directed to be paid to the legal personal representative of the said Susan De Lancy, and the dividends thereon from and including July 1866 were (subject to duty) directed to be paid to your petitioner, the said Edward Floyd De Lancey.

15. That the commissioners of Inland Revenue, on the 3rd Aug. 1868, made an assessment against your petitioner, the said Edward Floyd De Lancey, whereby he was required to pay succession duty on the said aggregate sum of 13,047*l.* 8*s.* 1*d.* Consols, and certain dividends thereon at the rate of 5 per cent., on the ground of the same being a succession to him derived from the said Susan De Lancy, the predecessor (of a brother of the father of whom he was a descendant.)

16. That your petitioner, by his solicitors, delivered to the said commissioners, within twenty-one days after the date of the said assessment, notice in writing of his intention to appeal against such assessment, and afterwards your petitioner, by his solicitors, duly delivered a statement of the grounds of such appeal to the said commissioners.

That the grounds of appeal contained in the said statement are; first, that legacy duty and not succession duty was payable by him in respect of the aforesaid 13,047*l.* 8*s.* 1*d.* Consols, and the dividends thereon, and that such legacy duty was properly payable by him as being a descendant of a brother of the deceased (the said James De Lancey the testator), at the rate of 2½ per cent., under or by virtue of the Act 36 Geo. 3, c. 52; or secondly, that if succession duty, and not legacy duty, was payable by your petitioner, the said Edward Floyd De Lancey, in respect of the said 13,047*l.* 8*s.* 1*d.* Consols and dividends, such succession duty was payable by him as being the descendant of a brother of the said James De Lancey, the testator, under the Succession Duty Act 1853, at the rate of 3 per cent. only (and not at the rate of 5 per cent.) in respect of the same sum of Consols and the dividends thereon, as being a succession derived by him (not from the said Susan De Lancey, but) from the said James De Lancey (the testator) the predecessor.

That your petitioner is dissatisfied with the assessment of the said commissioners, and aggrieved thereby, and submits to your Lordships that the same ought to be altered or varied; and he therefore humbly prays your Lordships that the assessment of the said commissioners may be altered or varied so far as the same makes your petitioner liable to a duty of 5 per cent.; or that your Lordships will be pleased to make such other order in the premises as to your Lordships shall seem fit.

The following Acts of Parliament, and the several sections thereof respectively, were referred to and relied on by counsel in the argument, and by the court as material to the case:—

The Legacy Duty Act (36 Geo. 3, c. 52), sect. 19, enacts that—

Any sum of money, or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate for so much thereof as shall have been so applied, *provided*, nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the duty which ought to be paid by such person or persons if absolutely entitled thereto as personal estate, by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.

The Succession Duty Act 1853 (16 & 17 Vict. c. 51), by the several sections which are material, enacts as follows:—

Sect. 2:

Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by any substitutive limitation; and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession, or in expectancy, shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition or devolution a "succession," and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the "successor" is or shall be derived.

Sect. 10 enacts that,

There shall be levied and paid to Her Majesty, in respect of every such succession as aforesaid, according to the value thereof, the following duties, that is to say,

The several rates of duty, according to consanguinity are then set forth, and are shortly as follows:

Parents and lineal issue	1	per cent.
Brothers or sisters, and their descendants	3	"
Uncles or aunts, and their descendants	5	"
Granduncles or grandaunts, and their descendants	6	"
More remote relations, and strangers in blood	10	"

Sect. 30 enacts that,

The interest of any successor in personal property, subject to any trusts for the investment thereof in the purchase of real property to which the successor would be absolutely entitled, shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts, be chargeable with duty under this Act as personal property; and personal property subject to any trust for the investment thereof in the purchase of real property, to which the successor would not be absolutely entitled, shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts, be chargeable with duty under this Act, as real property; and for the purpose of this Act each successor's interest therein shall be considered to be of the value of an annuity payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall be the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase.

By sect. 50 the right of appeal against the assessment of duty is given to the accountable party.

Sir *J. B. Karslake*, Q. C. (with him was *Townsend* of the Chancery Bar) appeared to argue the case on the part of the appellant, and claimed the right to begin. The only question, he said, here was, as to the amount of duty payable, and it lay on the petitioner to show that it was less than the Crown demanded. The practice in this court in such cases as the present was for the appellant to begin; counsel for the Crown were then heard, after which the appellant replied, and the Crown had the right

of general final reply. That was so laid down and settled in *The Marquis of Chandos* v. *The Commissioners of Inland Revenue*, 6 Ex. 464; 20 L. J. 269, Ex., which was a case stated under sect. 15 of 13 & 14 Vict. c. 97, to enable the marquis to appeal from the decision of the commissioners assessing the stamp duty payable on a certain deed, wherein the majority of the Court of Exchequer, Parke, Platt, and Martin, BB. were of opinion (Pollock, C.B. *dissentiente*) that the appellant had the right to begin; and the court were unanimous that the Crown had the right to a general reply. This course has been followed in several subsequent cases, amongst others in the case of *Re Stamp Duty on Gills' Conveyance*, 8 Ex. 376 (reported also *nom*, *The Plymouth Great Western Dock Company* v. *The Commissioners of Inland Revenue*, 22 L. J. 188, Ex.;) *Re Micklethwaite and The Commissioners of Inland Revenue*, 11 Ex. 452, which was a petition against the decision of the commissioners under the Succession Duty Act 1853, in which the Crown claimed the right to begin as supporting the argument for the assessment, but this court, then consisting of Parke, Alderson, and Platt, BB., held that the petitioner was entitled to begin; and in the recent case, under the Stamp Act, of *Lord Foley and others* v. *The Commissioners of Inland Revenue*, 18 L. T. Rep. N. S. 725; L. Rep. 3 Ex. 263; 37 L. J. 109 Ex. The same course also was followed in the case of *Re Earl Cowley's Succession*, 14 L. T. Rep. N. S. 663; 35 L. J. 177, Ex; L. Rep. 1, Ex. 288, and the petitioner was first heard in accordance with the practice as settled in *Micklethwaite's* case.

KELLY, C.B.—I own that it appears to me that in every case where the Crown claims a tax, or seeks to impose a tax upon the subject, it would be convenient that the Crown should begin.

BRAMWELL, B.—Is not this case in the nature of an appeal from a decision?

KELLY, C.B. (their Lordships having consulted together.)—My learned brothers are of opinion that in this case the course of practice which was laid down by the court in *The Marquis of Chandos case*, in the 6th Exchequer, and has been followed in *Re Micklethwaite* and the subsequent cases, had better be adhered to; although I confess that I individually am still of opinion that the contrary course would be more convenient. We will therefore hear you, Sir John, for the appellant in the first instance. (*a*)

Sir *J. B. Karslake*, Q.C. then proceeded to argue for the appellant.—Two propositions will be contended for on the appellant's behalf as far as the question of duty is concerned under this will: First, that legacy duty, and not succession duty, is payable by the appellant; and, secondly, that if succession duty is payable it is payable as upon a succession, not from the testator, but as heir of Susan De Lancy, who was the last person entitled. The question turns on sect. 10 of the Succession Duty Act 1853 (16 & 17 Vict. c. 51). If *Susan* were the "predecessor," the duty would be 5 per cent., but if the *testator* were such, then only 3 per cent. No application of any part of this money has ever been made in the purchase of land, and there has been no election on the part of anyone entitled to it to take it as personal estate. Under the trusts of the will it became land in equity, and so remained until such application or election. Any person becoming entitled to it might have declared an intention to take it as money, but nobody did so. *Susan* became entitled under the terms of the will to an estate in fee as heir to the testator, and having made no election the money at her death remained in the trustees' hands as money to be laid out in land. That being so, then by sects. 18 and 30 of the Succession Duty Act, legacy duty and not succession duty is payable upon it, and being money not laid out in land it is liable under sect. 19 of the Legacy Duty Act (36 Geo. 3, c. 52) to a duty of 2½ per cent. Then comes the question, who was the predecessor of the appellant? (He here read sects. 1 and 2 of the Succession Duty Act.) On the testator's death his son Charles took an estate as right heir, and might have disposed of the fee of the whole property. It was the same also with the second son James, and so also with the daughter Susan. Upon her death, inasmuch as she took not by purchase, the last purchaser must be found. The law of inheritance or the mode of tracing descent having been altered by the 3 & 4 Will. 4, c. 106, the person now to be traced back to is not the person who was last seised, but the one who was the last purchaser. Susan de Lancey, took by descent or inheritance and not by purchase, and therefore as the petitioner must take as heir to the last purchaser, it is needful to go back behind Susan, James, and Charles, to the testator for that purpose: (sects. 2 and 11 of the 3 & 4 Will. 4, c. 106.) Though the two characters of heir to Susan and heir also to the last purchaser, may co-exist in the person of the appellant, he must nevertheless take in the latter character. True it is he takes a succession on Susan's death, but he takes no *interest* from her. Were he only heir to her and not the last purchaser, he would not be entitled to this property at all. The Crown say that Susan is the predecessor. The appellant, on the contrary, contends that the only person who can possibly answer the description of "predecessor" to this "successor," is the testator, who by his will made this sum of money what may be called "money land," and imposed on the trustees the obligation to lay it out in land. But for the limitations of that will, the appellant could not take at all, or have any right to call on the trustees to invest the money. If that be so, then he is entitled, if succession duty be payable, to be assessed at the lower rate of 3 per cent. as on a succession from the testator. But it is submitted that, under sect. 30 of the Succession Duty Act, he is not liable to such duty at all; but that a legacy duty of 2½ per cent under sect. 19 of the Legacy Duty Act is the proper duty.

The *Attorney-General* (Sir *R. P. Collier*, Q.C., with him the *Solicitor-General*, Sir *J. D. Coleridge*, Q.C., and *Crompton Hutton*) contra, for the Crown.—This was not a legacy but a succession, and the predecessor was Susan or her elder brother, it was immaterial, as regarded the duty, which. It could not be a legacy except it were taken under a will, and here the whole operation of the will was completed before it came to view. On the testator's death the elder brother, Charles, took an immediate vested life interest in the whole property, with a remainder in fee, and the will at that moment had complete operation, the ultimate remainder vesting in the elder son with an interest in the second son, James; and upon Charles's death James took. [KELLY, C. B.—You say that Charles took a remainder in fee under the will; then why did not Susan?] I agree with Sir John Karslake, that Susan took by descent. All the provisions of the will were exhausted in the two sons. The cases and authorities show that the ultimate devise took complete effect on the testator's death: (2 Jarm. Wills. 77, 3rd edit., and the several cases there cited.) One of these cases, *Wrightson* v. *Macaulay*, 14 M. & W. 214; 15 L. J., N. S., 121 Ex., is much in point, and very similar to the present case.

(*a*) See the case of *Re the Estate and Effects of Greenwood, deceased*, *ante* p. 25, argued on the same day, in which the counsel for the Crown was directed by the court to begin.

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Both the sons took as purchasers, and whether one of them or Susan be the "predecessor" is immaterial. The appellant relies on sect. 19 of 36 Geo. 3, c. 52, but that statute cannot extend the operation of a will of which the provisions are already exhausted. [KELLY, C. B.—My difficulty is to see how you get out of the 19th section.] I do not feel pressed by it. This is no legacy. The succession was at an end on the death of the second son. The words in sect. 19, "so given as to be enjoyed by different persons in succession," mean persons named *in a will.* [BRAMWELL, B.—Then, but for the Succession Duty Act you say there would be no duty payable here at all.] None. It falls within the latter part of sect. 2 of the Succession Duty Act: (*Lord Saltoun* v. *The Advocate-General of Scotland*, in the House of Lords, 3 Macq. H. of L. Cas. 659. [BRAMWELL, B.—Is it possible that legacy duty may be due from Charles under sect. 19, and also succession duty from the petitioner?] Susan did not take under the will at all, and the appellant put himself out of court when he said she took by descent, for clearly she cannot take in both ways. [CHANNELL, B.—Would she not have taken precisely the same interest if there had been no will? If so, that would seem to show that she did not take under the will.] The estate in tail never came into operation at all. James, the second son, took a life estate and a remainder in fee, subject to the possibility of his having issue, who would have taken in estate tail. He had no issue, and so had the whole fee, which on his death, passed to Susan by descent as his heir. The effect of the will was to impress on this personal property the character of land, so that it became land for the purposes of the will as well as for the purposes of inheritance, and though the operation of the will was at an end, and exhausted it would go on *ad infinitum* as land. It went to Susan by succession, and to the claimant by "devolution," and so it would go on *in secula seculorum.* [BRAMWELL, B.—It is clear to me that the appellant has no title under this will, and for this reason: it appears doubtful whether Charles or James or Susan took under the will, but if either of them did, he or she might have devised away the whole fee. Why then did this claimant take? Because the others did not dispose of the estate in fee, and so he takes not under the will, but by descent from them.] The effect of the argument on the other side would be to impose legacy duty for ever on this fund, and sect. 30 of the Succession Duty Act would be needless. The object of the Act of Parliament was to treat certain dispositions as legacies which otherwise would not be such; but it would be beyond the scope and object of the Act to tax them as land. [CHANNELL, B.—You have argued that the trusts of the will were exhausted on the death of the second brother, and so far I am inclined to agree with you. CLEASBY, B. refers to *East* v. *Twyford*, 9 Ha. 713. BRAMWELL, B.—I cannot but think that Susan is liable to pay duty upon the latter part of sect. 19; and though, as Sir John Karslake contends, she is not liable to pay legacy duty as a daughter, it shows that the appellant is not that person. It seems to me there is an inevitable dilemma for the appellant in this first point; either the will was operative or it was not, and if it was then either Charles or James or Susan was the person pointed out by the latter part of sect 19.] And now as to the second point, I contend, first, that *Susan* was the "predecessor," and, secondly, if not, then that *James* was, and either is sufficient for the Crown's purpose. Sir J. Karslake has confounded together two Acts, which were passed *diverso intuitu*, and has treated the Inheritance Act (3 & 4 Will 4, c. 106), as governing this question which I contend arises solely on the Succession Duty Act. In *Lord Saltoun* v. *The Advocate-General*, in the House of Lords (*ubi sup.*), the point decided was as to the distinction between property taken by disposition and devolution, and between what lawyers call taking by purchase and by descent. Here it is admitted by the appellant even, that Susan was the last possessor. But sect. 2 of the Inheritance Act, relied on *contra*, does not apply to the Succession Duty Act. But assuming that we must show claimant's descent from the last purchaser, then either Susan or James was such I say that James was, and that Susan took, not as devisee, but as his heir, and took therefore from the last purchaser, and was the person last in possession. I say that Charles was a purchaser, but it is enough to say that James was, and that Susan took by inheritance from him.

Sir *J. Karslake*, Q. C., in reply.—The authorities at Somerset House treat Susan as the predecessor, but the Attorney-General sets up a different case, and says it was Charles or James. If this money-land went as personalty, then *cadit questio;* but if the Lords Justices are right, there was clearly an estate of inheritance in it. Let it once be taken to be land, then it is immaterial what the will says if it gets into the hands of the heir. The proposition of the exhaustion of the will is denied altogether. It is solely in consequence of the will being in existence and treating the money as land that the appellant now takes. Had this been land simply at the date of the will there might possibly have been no legacy duty. Sect. 19 of the 36 Geo. 3 was passed to prevent the frauds on the revenue which might otherwise have been perpetrated by a testator leaving money with a direction to lay it out in land, and the parties entitled discharging the trustees from the obligation. There are distinct words of charge in the section, and anybody taking that money pays the duty, and considering what the doctrine of equity is, and that anyone taking this property may elect to take it as money, it is only reasonable that he should pay the duty. Neither of the two sons nor the daughter here did aught to alter the state of things, and it went not as money to the next of kin, but as land or money-land to the heir. [BRAMWELL, B.—Suppose Susan had been liable and had paid duty under sect. 19, would the appellant also be?] Certainly. [BRAMWELL, B.—I say certainly not. I have no doubt about it.] Had this been money, every person to whom it came would have had to pay, and the Legislature says you shall not escape duty by making it land in equity. [CLEASBY, B.—The Act applies only to *personal* estate, and only gives duties on *personal* estate. BRAMWELL, B. — Probably enough the Legislature may have intended to guard against the fraud you have alluded to, and so made provision for the duty being paid once for all, as upon any other legacy. It might also, had it so chosen to do, have guarded against it for a series of years; but what is the language of the Act? His Lordship read the section.] With submission, if that argument is correct, would not the Act have gone on to say, and from and after the time when duty had been paid on the whole or on any such part, &c., all further duty shall cease? But we find no such words. Then as to the other point. The 3 & 4 Will. 4, c. 106, is not immaterial:

> *Hayford and others* v. *Benlows and another*, 2 Ambl. 580;
>
> *Tregonwell* v. *Sydenham and another*, 3 Dow. H. L. Cas. 210.

The doctrine of equity is that money directed to be laid out in land *is* land at the testator's death, and if there be no disposition of it, the heir takes by inheritance; and it can make no difference that there

are specific uses declared in the land. If it be given to A. and B., and afterwards to the right heirs, there must be some person who, *ex concessus*, must be treated as the last purchaser. *Lord Saltoun's* case, as cited *contra*, does not apply, but there are parts of the judgment, pp. 672–673, which do. Then as to the exhaustion of the will. This is money-land, with the character of land impressed on it by the terms of the testator's will. The moment anyone elects to alter its character, the title of the right heir to it would cease, and it is only because its character remains that the present claimant takes, and not the next of kin. He takes by virtue of the will and by that alone. If he takes by disposition, he takes from the testator, and if by descent, he takes from the heir of the testator. [Cleasby, B., refers to sect. 5 of the 3 & 4 Will. 4, c. 106, enacting that every descent from a brother or sister shall be traced through the parent.]

The Attorney-General replied generally on the whole case.

Cur. adv. vult.

July 2.—The court being divided in opinion, their Lordships now delivered judgment, *seriatim*, as follows:—

Cleasby, B.—I have to deliver the judgment of my brother Bramwell and myself. In this case the petitioner Edward Floyd De Lancey succeeded as heir-at-law of one Susan De Lancey to a large sum of money, which had by the will of one James De Lancey, dated 15th Nov. 1799, been directed to be laid out in land, and to which the said Susan De Lancey had, under the provisions of that will, become absolutely entitled. The question is, with what succession duty, if any, the petitioner is chargeable under the 16 & 17 Vict. c. 51. In the view which I take of the case, the particular limitations of the will are not of importance. It is sufficient to say that the testator bequeathed 10,000*l.* Consols, and all moneys due to him at his death upon certain securities, to trustees upon trust to lay out the same, and interest thereupon, in the purchase of lands, and directed the lands to be conveyed and settled to the use of his eldest son Charles Stephen for life, with remainder to the first and other sons of Charles Stephen successively in tail male; and in default of issue to his son James for life, with remainder to the first and other sons of James successively in tail male; and in default of such issue then to his own right heirs. The money was not in fact laid out in land by the trustees, and Charles Stephen De Lancey died a bachelor and intestate in 1840, having received the dividends during his life. James De Lancey survived, and also received the dividends during his life, and died a bachelor intestate in 1857. Susan De Lancey was the only surviving lineal descendant of the testator, and upon the death of James became absolutely entitled to the fund, but she refused to receive any part of the principal or interest. No act was done at any time to prevent the fund from being impressed with the character of land given to it by the will, and there is no question that, upon the death of Susan, it descended, as land would descend, to the petitioner, her heir-at-law. If this fund had been really land then, as Susan was absolutely entitled or seised in fee, it would not matter how she became so, and the succession to the petitioner would be by devolution, and not by disposition. That being so I adopt the rule laid down by Lord Campbell in the case of *Lord Saltoun* v. *The Advocate-General*, 3 McQ. App. Cas. 659. His words at page 673 are, "This object, I think, will be best obtained by holding that, when the succession is by disposition, the *settlor* is the 'predecessor,' and when by devolution the last *possessor* is the 'predecessor.'" So that, in the present case, Susan would be the *predecessor*, and the duty, as upon a succession from her would be 5 per cent. But it was strongly urged at the bar, on behalf of the petitioner, that though this might have been the case if the fund had been actually *land*, yet as it was actually money and only land by the operation and effect of the will of the testator, the above rule cannot properly be applied. The concluding words of sect. 2 of the Succession Duty Act were referred to, by which the "predecessor" is to denote "the settlor, disponer, testator, obligor, ancestor, or other person from whom the *interest* of the successor is or shall be derived," and it was said that the interest of the successor, as heir-at-law to the fund in question, was necessarily derived from the testator, who had impressed the fund with the character of land, and so made it go to the petitioner as heir-at-law. This argument, though well deserving of attention, is not sufficient to satisfy me that the interest of the petitioner is derived from any other person but Susan, who was absolutely entitled to the fund, and whom the petitioner succeeded as heir-at-law, and when well examined is open to the objection that it confounds together two things which are properly distinct, viz., the person from whom the interest is immediately derived, and the person who remotely caused it to be so derived. In the present case the whole interest is derived from Susan, no one would say it was partly derived from her and partly from the testator; still less that it was wholly derived from the testator, since Susan might have at any time changed its character and prevented it from descending as it did, or have disposed of it in any manner she thought proper. Supposing, then, that the succession duty is payable, I am of opinion that it is payable as upon a succession from Susan, that is at the rate of 5 per cent. But it was also argued on behalf of the petitioner that he was not liable to succession duty at all, because he was properly liable for legacy duty in respect of the property which he had succeeded to as heir of Susan; and by the 18th section of the Succession Duty Act 1853, there was no liability for succession duty when there was a liability under the Legacy Duty Acts. I should have thought it a sufficient answer to this argument that the succession of the petitioner was a succession to real estate as heir at law, and not to personal estate through the executors or administrators; that Susan died entitled to real estate and not personal estate; that the fund in question is, throughout the case, called real estate and not personal estate, and that the Legacy Duty Acts only apply in terms, and can only apply to personal estate. But, as I understand that two of my learned brothers are of a different opinion, I am probably mistaken in supposing the above reasons to be sufficient. It is necessary, therefore, to examine the matter a little more fully. The testator, by his will, disposed of personal estate, and that personal estate ought, of course, to pay legacy duty through all the limitations. Charles Stephen was, therefore, liable to legacy duty in respect of his life estate, as what he took was part of the personal estate of the testator; and in the same manner James, and afterwards Susan, who then became absolutely entitled. But as soon as she became absolutely entitled, it became her real estate absolutely, and the will, of course would operate no further. Ever since the case of *Fletcher* v. *Ashburner*, reported in 1 Brown's Ch. Cas. 497, it has been considered that after a direction in a will to trustees to apply money in the purchase of land, the money in the hands of the trustees is for all purposes regarded as land. It was said there by Sir Thomas Sewell, Master of the Rolls, that the cases established universally that a man may in this and the converse case, "make land money, and money land," and this, as a correct statement of

the law, has been repeatedly upheld: (See *Wheldale v. Partridge*, 5 Ves. 774.) The money becomes impressed with the character of land so completely that it becomes subject to tenancy by the courtesy. *Sweetapple v. Bindon*, 2 Ver. 536, and was not, until the passing of 3 & 4 Will. 4, c. 104, liable to simple contract debts of the devisor though it would be bound as real assets by a judgment: (*Frederick v. Aynsomb*, 1 Atk. 792.) That being so, the fund being stamped with the character of realty, descends to the heir without the intervention of an executor or administrator, and there can hardly, as it appears to me, be a question that but for the 19th section of the 36 Geo. 3, c. 52, no legacy duty would be payable. But it is contended that under that section the fund is also liable to legacy duty until it is actually laid out in land. If, however, that section is examined, it will, I think, appear that it can have no such effect. That fixed the legacy duty payable in respect of the personal estate of a testator, who directs it to be laid out in land. It provides that so long as the fund is administered and distributed as the personal estate of the testator it shall pay legacy duty. The persons who take successive interests in it would, therefore, have to pay legacy duty, and the ultimate devisee who became absolutely entitled would pay legacy duty, but as soon as it has vested in him the will of the testator has no longer any operation, and it becomes his real estate, and descends to his heir, at heir-at-law, or devisee. There is, in fact, no executor or administrator to make any return of the person or persons entitled to this real estate, or of the scale upon which legacy duty would be payable, except under the Succession Duty Act. It must be borne in mind that, although the effect of the will is to convert the money into land, and so to make it in the hands of the devisee real estate, yet it was, at the death of the testator, his personal estate, and so continued until the will was fully administered; although the clause in question, after the money or any part of it has actually been laid out in land, exempts it *pro tanto* from the payment of legacy duty so far as regards the devisees subsequently taking it under the will. One argument resorted to on behalf of the petitioner was, that unless the fund continued always liable to legacy duty, until actually laid out in land, a testator would have the power, by such a direction, to exempt his estate for all time from legacy duty. But we have seen that, so far as the limitations of his will extend, the case is properly provided for; and, except in the case of minority, and of the person entitled dying a minor, or of some eccentric person, like Susan de Lancey, who refused to take the interest or principal, as soon as a person becomes absolutely entitled, the fund, would be handed over to him, and so "get home" (as the phrase is), and resume the character of personal estate. The case of a person becoming entitled to the fund under the will is provided for, but the case of the same person dying entitled to, as real estate, what he took as personal estate, was not contemplated, and therefore was not provided for, and there was, as far as I can see, no machinery for getting the legacy duty, or indeed of fixing the amount, as there is no executor or administrator to administer it. It seems to me, therefore, that the duty is payable in this case under the Succession Duty Act, and not under the Legacy Duty Act, and that the Crown is entitled to judgment at the rate of 5 per cent.

Bramwell, B.—I am sorry that there should be a difference on the bench in this case, because I think it will be found that we arrive at the same conclusion, only by different paths. The petitioner here prays that the assessment of the commissioners may be altered or varied, so far as the same makes your petitioner liable to a duty at 5 per cent. Now it strikes me that, on the view which I know is taken by my Lord Chief Baron and my brother Channell, the petitioner will be liable to a duty of 5 per cent. as upon an intestacy, as I understand, of the person under whom he took. However, I think that this sect. 19 of the 36 Geo. 3, c. 52 is not applicable. It begins by saying "Any sum of money or personal estate directed to be applied to the purchase of real estate shall be charged and pay duty as personal estate." If the enactment stood there it seems manifest that the same money so applied would pay duty once for all; but it goes on and says, "unless it shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereunto in succession shall pay duty for the same, in the same manner as if the same had not been directed to be applied in the purchase of real estate." And then it proceeds, "Provided nevertheless that in case before the same, or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be applied to each person or persons." Therefore it seems to me the scheme of the Act is this,—the money so left shall pay legacy duty; if there are life interests in it short of an estate of inheritance, the legatees shall pay in respect of them, and when there comes to be an estate of inheritance, then the duty shall be paid as if there had been no such life interests interposed; but it seems to me that duty on the estate of inheritance is to be paid once and once only, and is not to be paid *toties quoties;* and it seems to me impossible that it can be so, because, suppose money is left to be laid out in the purchase of an estate for the benefit of a stranger in blood to the testator, and that man dies before the money is laid out, his son would take; surely it cannot be intended that the son should pay another rate of duty as a stranger in blood to the testator. What in truth he ought to pay would be under the will of his father if the father had left a will, or as next of kin if the father had not left a will. It seems to me, therefore, that this sect. 19, or the latter part of it, cannot be read as though the words *toties quoties* were there; that is to say, so often as there is an estate of inheritance that money shall pay as upon a legacy left by the original testator. I think that cannot possibly be. Then I understand the Lord Chief Baron and my brother Channell to be of opinion, whether that be so or not, that at all events the money, inasmuch as it remained in the condition of money *de facto* must have paid, on the death of the person entitled to the estate of inheritance, in some sense a new duty. If that be so, then in this case the money would pay the duty as upon an intestacy, either by the Aunt Susan, or an intestacy of one of the two uncles; but all these three are dead after the coming into force of the statute of 1815, I think it is, which regulates the present amount of legacy duty, and duty on intestates' estates, and then it would be found that a duty of 5 per cent. would be payable. If, therefore, this sum of money is subject to a legacy duty, or to a duty as part of an intestacy on coming to the next of kin, it is subject to legacy duty as under the Legacy Duty Act, not under sect. 19, certainly, of the 36 Geo. 3, but is subject to a duty as upon a sum of money coming to the defendant as next of kin of his aunt, or either of his uncles, and as such it is subject to a duty of 5 per cent. On the other hand, if it is subject to a succession duty, then it appears to me, for the reasons given by my brother Cleasby, it is also

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subject to a duty of 5 per cent. Therefore, whether we treat this as a sum of money liable to a duty as a portion of an intestate's estate coming to the defendant, a nephew of the intestate, or whether we treat it as a sum of money subject to a succession duty under the Succession Duty Act, we must in either case say that it is subject to a duty of 5 per cent., and that therefore the prayer of the petition must be refused.

Kelly, C. B.—The first question raised in this case is whether the money to which the petitioner has become entitled upon the death of Susan, the daughter of the testator, is liable to the succession duty at all. By the 30th section of the 16 & 17 Vict. c. 51, the interest of any successor in personal property, and subject to any trust for investment thereof in the purchase of real property, to which the successor would be absolutely entitled, is made chargeable with duty under that Act as personal property, but so far only as it is not chargeable with duty under the Legacy Duty Acts. We must, therefore, consider whether this money is liable to duty under the Legacy Duty Act (36 Geo. 3, c. 52.) By the first section of this statute the duty is imposed upon the clear residue of the personal estate when devolving on one person, when the title to such residue shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy. This money then, devolving upon the petitioner, either by the testamentary disposition of the testator, or upon the intestacy of his daughter, would be liable to the duty, unless it be exempt by reason of the direction to lay it out in land; and by the 19th section, the duty attaches by express enactment upon money directed to be so applied. The question, therefore, is, whether this section imposes the duty upon the money to which the petitioner is entitled in the present case? Now the enactment is, that "any sum of money or personal estate *directed* to be so applied in the purchase of real estate *shall* be charged with and pay duty as personal estate." If it stopped here it is clear that it would charge all money to whose hands soever it might come, and under whatever circumstances directed to be applied; but it proceeds, "unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate (unless it shall actually have been invested)." Now, supposing this to apply to the two sons only, as they alone take in succession under the limitations of this will, they would be liable under the 8th, 12th, and 18th sections to the duty imposed in respect to a temporary and limited, and not an absolute, interest in personal estate. If, however, the words be extended to the daughter, and the petitioner, as taking in succession under the will in another sense, namely, by virtue of the provision in the will that the money is to be laid out in land, and to pass to the heir and not to the next of kin, it equally becomes liable to the duty upon personal estate under this Act. But if otherwise, and if the words attach only to the succession of the sons, we come next to the proviso that "in case, before the money is actually laid out, any person shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof, shall be paid by such person or persons." I cannot ascribe any other meaning to these words than such as they naturally import, and that is, that where money is given, as here, to be laid out in land, and any person or persons before it is actually so laid out shall become entitled to an estate of inheritance in possession in the land to be purchased, he or they shall pay the same duty as ought to be paid by him or them if absolutely entitled thereto as personal estate. The petitioner is strictly and literally within the words of this provision, for before the money is laid out in land, he may become entitled to an estate of inheritance in possession in the land to be purchased. Why then shall he not pay, in the express language of the Act, "the same duty which ought to be paid by such person if absolutely entitled thereto as personal estate by virtue of any bequest thereof?" It has been suggested that this proviso applies only to the first of such persons or successors becoming entitled to an estate of inheritance in possession in the land, but what is there to authorise this limited construction? The words are not "the *first* person or persons becoming entitled," but "*any person* or persons becoming entitled to an estate of inheritance." The petitioner is clearly a person becoming entitled to an estate of inheritance in the lands to be purchased, and comes therefore within the very words of the proviso. And why should it be otherwise? The Legislature plainly intended to impose this duty upon all money devised to be laid out in land, until it should actually be so laid out, and I am at a loss to imagine a reason why, if, as has occurred in this case, two persons successively, of whom the petitioner is one, have successively become entitled to one estate of inheritance in the land to be purchased, either of the two more than the other should be exempted from the liability to this duty. I think, therefore, the fund in question is clearly liable to duty under the 36 Geo. 3, and that therefore the succession duty does not attach; but I am by no means prepared to say that if this 19th section had been omitted altogether from the Act, the duty would not have been payable by virtue of its general provisions upon any money to be laid out in land until actually so laid out. The doctrine that money is to be treated as land, though long established in courts of equity, is in truth a mere fiction and no more, and founded upon what Lord Thurlow in *Pulteney* v. *The Earl of Darlington*, called "the cant expression that in equity what is to be done is considered as done:" (1 Brown's Ch. Cas. 238; 7 Bro. Parl. Cas. 530, H. of L.) This fiction is indeed reasonable and just when applied to the succession of persons entitled under the limitations of a will or settlement, because it is necessary, in order to give effect to the intention of the testator or settlor that the property should pass in the same line of succession as if it was land, and therefore, in case of intestacy, to the heir and not to the next of kin. But here the necessity for the fiction ends; and why should it be extended when no such necessity or reason exists? Why should the Crown be precluded from claiming in respect of any money whatever, while it is in fact money, duties imposed upon all personal estate by Act of Parliament, merely because its deceased owner may have directed it to be laid out in land, when it is remembered that, as this very case shows, property clothed with the trust may pass not only through a long succession of persons entitled to limited interests, but from generation to generation, or a succession of heirs entitled to an absolute interest in the whole property? It cannot be supposed that the Legislature intended to confer a power upon anyone who might think fit to execute such a trust to exempt his personal estate from duties to which it is liable by law for an indefinite period of time. I am of opinion, that the principle or equitable fiction upon which courts of equity have so long held that money so to be laid out in land is for certain purposes to be treated as land, is inapplicable to the interpretation of the statute imposing duties upon personal

estate; that these statutes must be read according to the plain and ordinary meaning of the language which the Legislature has used, and consequently that this money, not having been actually laid out in land, is liable to duty as personal estate under the Legacy Duty Acts. Virtually the equitable rule ceases to apply where anyone becomes entitled to an absolute interest in money to be laid out in land, and has himself the power to put an end to the trust by treating it as money, and requiring it to be paid over to himself, or doing any other act testifying his election to treat it as personal estate. This was determined in *Chichester* v. *Bickerstaffe*, 2 Ver. 295; that decision was indeed questioned by Lord Talbot in *Lechmere* v. *Lechmere*, Ca. temp. Talb. 90, and by Sir Joseph Jeykyll, in *Lechmere* v. *The Earl of Carlisle*, 3 Peere Williams, 221, but confirmed by Lord Thurlow in *Pulteney* v. *The Earl of Darlington*, 1 Brown's Chan. Cas. 238, and by the determination of the House of Lords in the same case, 7 Bro. Parl. Cases, 530 (Tomlin's edit.) See, also, 2 Powell on Devises, Jarman on Wills, and 1 Will. Exors., 585. Lord Eldon, in *Wheldale* v. *Partridge*, on appeal from the Master of the Rolls, 8 Ves. 227, observes, at p. 235, upon money impressed with the character of land, that "to put an end to that impression it must be shown, either that the money was in the possession of a person who had in himself the rights of both heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either." The result of these decisions, thus supported by the authority of Lord Eldon, who entirely approved of *Pulteney* v. *The Earl of Darlington* (*ubi sup.*), is to show that, in the words of Lord Thurlow, "where a sum of money is in the hands of one without any other use but for himself, it will be money:" (1 Brown's Chan. Cas. 238.) Here, the money at the death of the daughter, when the petitioner became entitled and the duty attached, was in the hands of the trustees and not of the petitioner, but I am of opinion that neither the letter nor the spirit of the Legacy Duty Acts admits of any distinction in the liability to duty between a legal and an equitable right to a sum of money, and that therefore the money in question was liable to duty under the 36 Geo. 3, and consequently was exempt from duty under the 16 & 17 Vict. I must here observe that no question was raised at the bar as to the amount or rate of legacy duty payable in respect of this money, supposing it liable to duty under the Legacy Duty Acts. On a question put by myself to one of the learned counsel during the argument of the case, an answer was given importing that the rate or amount of duty was not in question, and would easily be settled on assessment by the commissioners when the determination of this court should be made known. I have not therefore looked into the Legacy Duty Acts with a view to consider what would be the rate or amount of duty to which the petitioner would become liable, supposing him to be assessed under the Legacy Duty Act, and not under the Succession Duty Act. It may be that the amount of duty would be the same, so that he has the same interest, and is under the same liability whichever way this case shall be decided. But our object of course is to determine what is the law of the case on the question submitted to us, and I have therefore confined myself to that question. In this view of the case it may be unnecessary to express any opinion upon the question whether the testator or the daughter Susan is to be deemed the "predecessor" of the petitioner under the Succession Duty Act; but as a court of appeal may hold that this case is governed, not by the Legacy Duty Acts, but by the Succession Duty Act, I must state my opinion to be that, inasmuch as the petitioner became entitled to that money, not by reason of any "disposition" in the will of the testator, but by a "devolution by law," that is by the rule in equity which operated on the transmission or "devolution" of the money at law, the daughter Susan, and not the testator, must be deemed the "predecessor" of the petitioner, from whom his interest was derived, under the 16 & 17 Vict. c. 51, s. 2. As this is an appeal against the assessment of the petitioner to a duty under the Succession Duty Act, no question arises upon the rate or amount of duty to which he may be liable under the Legacy Duty Act, and I therefore express no opinion on that point. My brother Channell requests me to state that he is of opinion that this case falls within the 19th section of the 36th Geo. 3, c. 52, and on this ground concurs in thinking that the judgment of the court should be that the succession duty does not attach. The petitioner prays that the assessment of the said commissioners may be altered or varied so far as the same makes the petitioner liable to the duty of 5 per cent., and it does not, therefore, make the petitioner liable to the duty of 5 per cent. under the Succession Duty Act, but it means that because he is made liable to the duty under the Succession Duty Act, and it is the assessment under the Succession Duty Act which is appealed against, as appears by the 15th and 16th paragraphs of the case, because the 15th paragraph states "That the Commissioners of Inland Revenue on the 3rd Aug. 1868, made an assessment against your petitioner, the said Edward Floyd De Lancey, whereby he was required to pay succession duty upon the said aggregate sum of 13,047*l.* 8*s.* 1*d.* Consols, and certain dividends thereon, at the rate of 5 per cent. on the ground of the same being a succession to him derived from the said Susan de Lancey the 'predecessor' (of a brother of the father of whom he was a descendant). That the petitioner by his solicitor delivered to the said commissioners within twenty-one days after the date of the said assessment, notice in writing of his intention to appeal against such assessment." The judgment of the court will therefore be that the assessment of the petitioners to the succession duty at all is illegal, and must be set aside.

[As the court were equally divided, a question arose as to the way in which the judgment should be entered, and in the course of a discussion on the point between their Lordships and counsel, it was suggested that the Crown was entitled to maintain the assessment, Bramwell, B. being of opinion that, as the duty in any case, whether as legacy or succession duty, was payable at the rate of 5 per cent., the prayer of the petition must be refused. The result, however, was that it was decided that the course usual in such cases should be adopted, namely, that the junior baron should withdraw his judgment in order to facilitate an appeal if desired, and that judgment should be given for the petitioner or appellant. The decision of the court therefore was]

Judgment for the appellant. (*a*)

Attorneys for the appellant, *Townsend, Lee, and Houseman*, 3, Princes-street, Westminster, S.W.

Attorney for the Crown, *The Solicitor of Inland Revenue*, Somerset-house, W.C.

(*a*) It is understood that the Crown intends to carry the case to the Court of Exchequer Chamber on appeal from this decision.

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Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Tuesday, April 20.

(Before the LORDS JUSTICES.)

Re THE WHEAL LUDCOTT AND WREY CONSOLS MINES COMPANY; *ex parte* JACKSON.

Company—Winding-up—Mining company on the cost-book principle—Debt due by the company—Calls due by a shareholder—Action by the creditor at the instigation of the company against the defaulting shareholder—Verdict by consent for the amount of calls only—Payments subsequently made by the company to the creditor—Further debt incurred by the company after the action—Appropriation of payments—Admission of proof.

A mining company was formed upon the cost-book principle. In Dec. 1865 *calls were made on the shareholders, which H. and J., two of the shareholders, failed to pay. In Feb.* 1866, *G., who was a creditor of the company for a considerable sum, at the instigation of the company commenced an action against H. for the debt due by the company. The company were desirous by means of this action to compel H. to pay his calls. When the action came on for trial, and a jury had been sworn, it was arranged that a verdict should be found against H. for the amount of calls due from him and costs, and this having been done, judgment was entered up against H. for the amount of the verdict. In May* 1866, *G., at the instigation of the company, brought a similar action against J. The sum claimed in this action included a part of the debt claimed in the action against H. as well as a debt subsequently incurred by the company. At the trial of this second action the jury found a verdict for the plaintiff for a sum which was afterwards raised by the court to* 787*l. Before judgment could be entered up J. petitioned to wind-up the company, and a winding-up order was made, and also an order to stay proceedings in the action by G. against J. After the action against J. various sums were paid by the company to G. These sums exceeded the* 787*l., but the evidence showed that the intention of the company in paying them was to apply them in discharge of the debt due to G. before the action against H. On the footing of such an appropriation a balance remained due from the company to G., and he carried in a claim in the winding-up for that balance, and that claim was admitted by the Vice-Warden of the Stannaries Court:*

Upon appeal by J.,

Held, that the claim was properly admitted, the company having a right to attribute the payments made by them to H. to the earlier debt.

This was an appeal by Jackson, a shareholder in the above company, from a decision of the Vice-warden of the Stannaries Court, whereby a claim carried in by one Geake against the estate of the company, which was in liquidation, was admitted for the sum of 460*l.* The company was a mining company formed upon the cost book principle. In Dec. 1865, two separate calls respectively of 1*l.* per share were made on the shareholders. Jackson, the present appellant, and Hiscock, another shareholder, failed to pay these calls at the time when they were due. The company, with the view of compelling Hiscock to pay his calls, instigated Mr. Geake, to whom the company owed a considerable sum for goods supplied, to bring an action against Hiscock for the debt due to him (Geake) from the company. This action was commenced in Feb. 1866, and in it the sum of 2436*l.* 18*s.* 8*d.* was claimed by the plaintiff. This action was set down for trial at the spring assizes held at Bodmin in 1866. The cause having been called on, a jury was sworn, and the solicitors for the parties then agreed that a verdict should be found for 24*l.*, which was the amount of the calls due by Hiscock, and the costs of the action, and that no further proceedings should be taken. This was done, and judgment was entered up for the amount of the verdict.

In May 1866 a similar action was, also at the instigation of the company, commenced by Geake against Jackson, the present appellant, for the sum of 2935*l.* 9*s.* 4*d.* then owing from the company to Geake. In this sum was comprised a part of the debt claimed in the action against Hiscock, as well as a further debt for goods subsequently supplied by Geake to the company. Jackson called on the company either to pay the debt or to indemnify him against the action, and they in reply informed him that if he paid the calls which he owed the action would be abandoned. This he did not do, and accordingly the action went on, and was set down for trial at the Bodmin summer assizes in 1866. A verdict was found for 400*l.*, and upon a rule obtained by the plaintiff this amount was afterwards increased to 787*l.* Before judgment was entered up Jackson presented a petition to wind-up the company, and on the 28th Feb. 1868 a winding-up order was made. Another order was also made to stay all further proceeding in Geake's action against Jackson. After the action against Jackson had been tried the company made various payments to Geake, which altogether exceeded the sum of 787*l.* The evidence and the accounts showed that the payments so made were intended to be made in respect of the debt due by the company to Geake before the action against Hiscock. Geake made a claim in the winding-up for an alleged balance due to him of 516*l.* 2*s.* 5*d.* Jackson opposed the admission of this claim, but it was allowed by the Vice-Warden to the extent of 460*l.* Jackson appealed from this decision.

Roxburgh, Q. C., and *E. S. Ford*, on behalf of Jackson, urged that the judgment in the action against Hiscock extinguished the debt due from the company before that action, and substituted the amount of the verdict. Then the result of the second action was conclusive that 787*l.* and no more was then due from the company to Geake, and the evidence showed that the payments since made to him by the company exceeded that sum. Geake must stand in the same position as if there had been no winding-up order made, and he had brought an action now against the company as a going concern. In such action he must have failed. A creditor who allowed the company to make use of him as a means of compelling a shareholder to pay up calls in arrear must take the consequences of what he did, and this court would not aid him to escape from any injury resulting from such a proceeding. They cited

King v. *Hoare*, 13 M. & W. 494;
Gaple v. *Higgins*, 3 De G. & J. 33; 31 L. T. Rep. 47;
Sibley v. *Minton*, 5 W. R. 675;
Lindley on Partnership (2nd edit.) 150.

De Gex, Q. C., *Rowcliffe*, and *Begg*, for Geake, and for the official liquidator, were not called upon.

Lord Justice SELWYN said that he had no doubt that the Vice-Warden was right in admitting the claim. The facts of the case were not in dispute. [His Lordship stated the facts.] The result of this was that the matter must be treated just as if no action had ever been brought, inasmuch as the proceedings in the action were

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put an end to by means of what was done by Jackson himself. The only other question to be considered was, what was the effect of the judgment obtained against Hiscock in the first action. If that judgment operated to extinguish the debt of 2436*l.* 13*s.* 8*d.* as between Geake and Hiscock, it did not so operate as between Geake and the company. The sum of 2436*l.* 13*s.* 8*d.* remained unpaid, and the judgment did not amount to a satisfaction of the debt. His Lordship was of opinion that after that judgment the company still had it in their power to attribute the payments which they afterwards made to Geake to the debt due to him before the action against Hiscock, and the evidence showed clearly that they in fact intended to attribute those payments in that way. This was shown by Geake's evidence as well as by the accounts themselves. The result was, that the balance now claimed had not been paid, and the claim of Geake was properly admitted. The appeal must therefore be refused with costs.

Lord Justice GIFFARD agreed with the Vice-Warden in disapproving the practice adopted by these companies of setting creditors in motion against defaulting shareholders. His Lordship had no desire to weaken the authority of *King* v. *Hoare* or *Ex parte Huggins*; but he was of opinion that the Vice-Warden's decision was quite consistent with those cases, because the claim now made by Geake was for a debt incurred by the company after the action brought by Geake against Hiscock. Judgment was never entered up in the action against Jackson, and the proceedings in that action were stayed in consequence of Jackson's own acts. Matters were now in the same position as if that action had never been brought. Then the evidence clearly showed that Geake had never in fact been paid the sum which he now claimed. The action against Hiscock was, in truth, the company's action, and after they had made use of Geake in this way it would be most unjust for them now to refuse to pay him his debt. The evidence satisfied his Lordship that the payments afterwards made were intended to be made in satisfaction of the prior debt, and that being so, the debt now claimed was clearly still due to Geake, and his claim was properly admitted. The appeal must be refused, with costs.

Solicitors: *Hooke* and *Street*; *Gregory, Rowcliffe,* and *Co.*

Monday, May 3.

(Before the LORDS JUSTICES.)

HEARD *v.* PILLEY.

Specific performance—Allegation of contract—What is sufficient—Agreement made by an agent—Appointment of agent not alleged to be in writing—Statute of Frauds.

A bill for specific performance of an agreement to grant a lease, which was made by the plaintiff, through an agent, did not state the letter which constituted the agreement, or that there was such a letter; but only that the agent informed the plaintiff that the lessors had written and sent a letter agreeing to let the premises; but, as a later paragraph of the bill alleged that the agent had entered into the said agreement as agent of the plaintiff, the passages coupled together were

Held to constitute a sufficient statement that there was an agreement in writing.

Held, also, that it was not necessary that the bill should state that the appointment of the agent by the plaintiff was by writing.

Demurrers on both these grounds were, confirming the decision of Malins, V.C., overruled.

This was an appeal by the two defendants in the suit, William Pilley and Samuel Sugden, against a decision of Malins, V.C., overruling two demurrers for want of equity, which they had filed to the bill of the plaintiff.

The object of the suit was to have it declared that the defendant Pilley had entered into a certain agreement with the defendant Sugden for a lease of a house and premises, No. 91, Fore-street, in the City of London, as the agent for, and on behalf of, the plaintiff, and that Sugden might be decreed to grant a lease to the plaintiff accordingly; and that Pilley might be restrained from all dealings with the premises otherwise than by the plaintiff's directions.

The bill alleged that on the 22nd Sept. 1868, Pilley called on the plaintiff and told him that one Brown, the late tenant of the house, had died insolvent; that the unexpired lease (a year and a half only) would be sold for a very trifling sum, and that he had ascertained from Sugden, the owner of the premises, that they would be let for 200*l.* a year; that the premises would let at an advanced rent; and that in consequence of the illness of the plaintiff at the time, he (Pilley) would obtain an agreement for a lease from Sugden, and for the sale of the interest of Brown, as agent for the plaintiff; and the plaintiff then authorised him to offer to Sugden 150*l.* a year as rent, for twenty-one years, and to offer 100*l.* for the interest of Brown.

That the plaintiff subsequently authorised Pilley to offer to Sugden a rent of 200*l.*, and "on or about the 20th Oct. 1868 the said William Pilley informed the plaintiff that Sugden had written and sent a letter dated on or about the 19th Oct." to Pilley, accepting the offer, and agreeing to let the premises to him for twenty-one years, to commence at the termination of Brown's term, at the rent of 200*l.* per annum. On the 21st Oct. 1868 an agreement in writing was entered into and signed by and between Brown's father and Pilley, that Brown's father should sell, and Pilley should purchase, Brown's interest; and that Brown's father would take out administration to his son, and execute a legal assignment to Pilley.

The 5th paragraph of the bill was in these words:

> The said Wm. Pilley entered into the said agreement with the said Samuel Sugden and Robert Brown (the father) respectively, as the agent for and on behalf of the plaintiff, and he afterwards paid the said sum of 100*l.* to the said Robert Brown, on the understanding that the same would be repaid to him by the plaintiff.

That the plaintiff promised to Pilley a gratuity for acting as his agent, but that Pilley, after the agreements, became dissatisfied with the amount and required a larger sum; that the plaintiff refused to comply, and subsequently Pilley claimed to have entered into the agreements with Sugden and Brown for his own benefit, and not as agent for the plaintiff; that before the agreements the plaintiff asked Pilley why he did not himself take a lease, to which Pilley replied that he had not capital to speculate with, and the bill charged (paragraph 13) that Pilley intended and threatened to sell or dispose of, or let, the premises, and deal with them as his own; that in Nov. 1868 the plaintiff's solicitor wrote to Sugden, giving him notice that the plaintiff was entitled to the benefit of the agreement, which was entered into by Pilley as his agent, but in reply Sugden wrote stating that the plaintiff was a complete stranger to him. The prayer of the bill was to the effect stated.

Both defendants demurred for want of equity, and now appealed against the order of Malins, V.C. overruling their demurrers.

Glasse, Q.C., *Jolliffe*, and *Lawrence* supported the

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appeals, and argued that the demurrers ought to have been allowed, first, because there was in the bill no sufficient allegation of any written agreement with Sugden, but only a statement (sect. 4 of the bill) that "Pilley had informed the plaintiff that Sugden had written," &c.; and secondly, that there was no allegation that Pilley's appointment to act as the plaintiff's agent was by writing, and that an appointment by writing was necessary under the Statute of Frauds. On this point they referred to

Bartlett v. *Pickersgill*, 4 East. 577, note b; 1 Cox, 15;
Lord St. Leonards' V. & P. 11th edit. 912;
Dale v. *Hamilton*, 5 Hare, 369;
Taylor v. *Salmon*, 4 My. & Cr. 134.

Cotton, Q. C. and *Berkeley*, in support of the Vice-Chancellor's order, were directed to confine their argument to the second point. They accordingly contended that *Bartlett* v. *Pickersgill* had no application, for here the vendor had not assigned, but in that case he had executed a conveyance to the alleged agent, and the bill was by the alleged principal against that agent alone. They also referred to

Willis v. *Willis*, 2 Atk. 71;
Lees v. *Nuttall*, 2 Russ. & My. 53.

Jolliffe having replied,

Lord Justice SELWYN said: In this case two questions have been raised; first, whether there is any sufficient allegation in the bill that an agreement was in fact entered into by the defendant Pilley in writing, so as to constitute it an agreement which could be enforced, having regard to the provisions of the Statute of Frauds; and, secondly, as between the plaintiff and the defendant Pilley, whether there is such allegation of agency as is consistent with the provisions of that statute, and which can be enforced.

With regard to the first point, we did not think it necessary to hear the respondent's counsel; but it appears to me that, although there has been an unfortunate departure from the common forms of pleading in this bill, still there is a statement in the 4th paragraph relating to a letter which is proved, which is so stated as not to amount to a positive allegation. Then in the 5th paragraph it is stated, "The said Wm. Pilley entered into the said agreement with the said Samuel Sugden and Robert Brown respectively as the agent for and on behalf of the said James Rowe Heard." And coupling that statement with what is afterwards stated in the bill, I think there is sufficient allegation of an agreement, and an agreement constituted by the letter written and signed by the defendant Sugden, so as to render it impossible for him to set up a case that there is no contract in writing relating to this property.

Then with regard to the agency of Pilley—In the first place the fact of the agency of Pilley is distinctly stated: "The said Wm. Pilley entered into the said agreement with the said Samuel Sugden and Robert Brown respectively as the agent for and on behalf of the said James Rowe Heard, and afterwards paid the sum of 100*l.* to the said Robert Brown, on the understanding that the same would be repaid to him by the said James Rowe Heard." Now although it may be true that he afterwards disputed or questioned that agency, the fact must be taken as clear and indisputable. Then this bill is brought into the category of those very common bills—a bill alleging a contract entered into by the owner of the property, a contract by letter or agreement in writing, but that the person with whom he entered into it was the agent of the plaintiff; and before that contract had been performed, a bill for specific performance is filed by the principal against the agent, and against the person with whom that agent has entered into the contract. That is a bill of a very ordinary description, and it is a startling proposition to say that, unless the bill alleges that the agency was constituted by writing to the agent, such a bill cannot be sustained.

The only authority which has been cited in support of that proposition is *Bartlett* v. *Pickersgill*. It appears to me that that case does not govern the present one, because that is a case in which the conveyance was executed, and in which it appears, from the short statement of the case in a note in 4 East, that the bill was a bill by the plaintiff asking for a conveyance to the plaintiff as against the defendant, to whom that conveyance had already been made. The statement is, "That the defendant bought an estate for the plaintiff, but there was no written agreement between them, nor was any part of the purchase-money paid by the plaintiff. The defendant articled for the estate in his own name, and refused to convey to the plaintiff, so this bill was brought to compel a conveyance." That is, after the conveyance had been executed, the bill was filed by the plaintiff, by one person on one side, and only one, and the defendant on the other, seeking for a conveyance of that estate from the defendant to whom the conveyance was made. That entirely distinguishes that case from the present, which is an ordinary suit by a principal bringing before the court an agent and the person with whom the contract had been entered into. Assuming the case of *Bartlett* v. *Pickersgill* to be good law, it cannot, I think, be considered as laying down any such general proposition as is contended for by the defendants. At all events, it would be subject to qualifications, especially to those which are mentioned by Lord St. Leonards; and it is also subject to the qualification established by Lord Hardwicke in the case referred to of *Willis* v. *Willis* in 2 Atk., where his Lordship says, "There is another way of taking a case out of the statute, and that is by admitting parol evidence within the rules laid down in this court to show the trust from the mean circumstances of the pretended owner of the real estate or inheritance, which make it impossible for him to be the purchaser." It is not altogether unworthy of remark that the very passage Mr. Jolliffe referred to in his reply tends to show something like a state of circumstances existing in the present case, for he says the bill shows in the eighth paragraph that Mr. Pilley said "that he had not capital to speculate with, as the said J. R. Heard well knew." I think, therefore, in this case we must take it that there is a clear and express allegation of the agency of Pilley. I cannot at all accede to the argument urged in reply, that under those circumstances, when the agent goes to the principal and says, "I will go and buy an estate for you," it is not a fraudulent act on his part afterwards to buy the estate for himself, and then deny the agency. I think that would be an attempt to make the Statute of Frauds an instrument of fraud; therefore I agree with the judgment of the Vice-Chancellor, and I think that both of these demurrers were properly overruled, and both petitions of appeal must be dismissed with costs.

Lord Justice GIFFARD said:—In this case, although the fourth paragraph would not amount to a sufficient allegation of agreement between the plaintiff and the defendant, I am satisfied that when you take in connection with that the fifth, eighth, and ninth paragraphs, there is a clear allegation of agreement in writing signed by Sugden.

That being so, the only other question is that which is raised by the case of *Bartlett* v. *Pickersgill*,

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and certainly I must say there has been no conveyance from Sugden to Pilley, and the whole object in point of fact is a bill to enforce specific performance between Heard, the plaintiff, and Sugden; and Pilley is brought here simply to be bound, and nothing else, and no conveyance is sought from him. I cannot help saying, as regards the case of *Bartlett* v. *Pickersgill*, that it seems to be quite inconsistent with all the authorities of this court, which proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud. Therefore the appeal must be dismissed with costs.

Solicitors for the demurring defendants, *W. T. Bateson; Alfred Watson.*

Solicitor for the plaintiff, *George Edward East.*

Wednesday, May 26.

(Before The LORDS JUSTICES)

TAYLOR *v.* DOWLEN.

Practice—Appeal for costs only.

A bill was filed against trustees to compel them to assign and transfer to the plaintiffs certain trust funds and premises. The bill prayed that the trustees might be ordered to pay the costs of the suit. Malins, V.C., made a decree as prayed for, and, being of opinion that the conduct of the trustees had been improper, ordered them to pay the costs of the suit. The trustees appealed from this decree so far as it ordered them to pay the costs of the suit.

Held, that this being an appeal for costs only could not be entertained.

The circumstance that, if the costs had been ordered to be paid out of the trust funds, the plaintiffs might have appealed from the decree so far as it directed payment of the costs out of those funds, was no reason why the trustees should be allowed to appeal from the decree actually made on the ground that the costs ought to have been ordered to come out of the trust funds.

Bagot *v.* Bagot, *Dan. Chan. Prac.* (*4th edit.*) *p.* 1849, *explained.*

This was an appeal by the defendants from a decree of Malins, V.C., in so far as it ordered the defendants to pay the costs of the suit.

The bill was filed by the plaintiffs, who were *cestuis que trustent* against the defendants, who were trustees, and it prayed that the defendants might be ordered to assign to the plaintiffs certain leasehold premises, and to transfer to them certain stock the subject of the trust, and also that the defendants might be ordered to pay the costs of the suit. The Vice-Chancellor, by his decree, ordered the leaseholds to be assigned, and the stock transferred as prayed, and, being of opinion that the defendants, by their improper conduct, had rendered the suit necessary, he ordered them to pay the costs of the suit up to and including the hearing.

The defendants appealed, and by their petition of appeal asked to have the decree varied only so far as it ordered them to pay the costs. They insisted that the costs ought to have been directed to be paid out of the trust funds.

Montague Cookson opened the appeal.

Glasse, Q. C. and *Graham Hastings*, on behalf of respondents, took the preliminary objection that the appeal was one for costs only and could not, therefore, consistently with the established rule of the court, be entertained.

Montague Cookson, for the appellants, then contended that the case fell within one or other of the exceptions to the general rule, that an appeal for costs only could not be entertained. In the first place, there was the authority of Lord Cottenham in *Angell* v. *Davis*, 4 My. & Cr. 360, for saying that in a case where the bill prayed, by way of special relief, that the defendant might be ordered to pay the costs of the suit, there an appeal for costs only could be entertained. Some doubt was however thrown upon this ground of distinction by what was said by Lord Cottenham in the later case of *Lancashire* v. *Lancashire*, 2 Ph. 657. But at least there ought to be a mutuality in the right of appeal, and in the present case, if the costs of the appellants had been ordered to be paid out of the trust estate, the plaintiffs could then have appealed as to costs only, it being well settled that such an appeal could be entertained when costs had been ordered to come out of a particular fund. On this ground of mutuality, if on no other, the present appeal ought to be entertained. He relied also upon *Bagot* v. *Bagot*, mentioned in Daniell's Chancery Practice (4th edit.), p. 1349. In that case a married woman claimed against her husband a trust-fund which was in court, on the ground that it was settled to her separate use. Shadwell, V. C. ordered the fund to be paid to her, and directed the costs of the suit to be paid personally by the husband and the trustees of the settlement. From this decree separate petitions of appeal were presented by the husband and the trustees. The result of this was that the trustees' appeal was really one for costs only, inasmuch as the question who was entitled to the trust-fund could have been decided upon the husband's appeal alone. This objection was taken to the competency of the trustees' appeal, and, notwithstanding this, Lord Cottenham allowed the appeal to be heard.

Without calling upon the respondents,

Lord Justice SELWYN said that the petition of appeal possessed at least the merit of candour, inasmuch as it professed to be an appeal for costs only, and this circumstance threw upon the appellants the *onus* of showing that the case was within one of the admitted exceptions to the established rule of the court, that an appeal for costs alone could not be entertained. In the case of *Angell* v. *Davis*, which had been referred to, the exceptions enumerated by Lord Cottenham to the rule that an appeal for costs only could not be entertained were three in number (4 My. & Cr. 362)—(1) Where the bill prayed by way of special relief that the costs of the suit might be paid by the defendant; (2) Where the case was one in which the proceedings themselves, without going into the details of the transaction, furnished all the information necessary for the purpose of determining the question; (3) Where it was not a case of personal costs, but a case in which the court had directed them to be paid out of a particular fund. In the later case of *Lancashire* v. *Lancashire*, Lord Cottenham reconsidered the first of those exceptions to the general rule, and then expressed his opinion (2 Ph. 662) that it ought not to be allowed, for the consequence would be that every bill would pray expressly for costs in order to enable the plaintiff to raise that question on appeal. Moreover Hatherley, L. C., when Vice-Chancellor, in the case of *Umpleby* v. *The Waveney Valley Railway Company*, 1 Joh. & H. 254; 3 L. T. Rep. N. S. 404, considered Lord Cottenham's opinion, as expressed in *Lancashire* v. *Lancashire*, to be sounder than the opinion which he expressed in *Angell* v. *Davis* on this point. As to the second exception from the general rule mentioned by Lord Cottenham in *Angell* v. *Davis*, in that case there was on the face of the decree appealed from an obvious

error, because it allowed a trustee who had been guilty of a breach of trust to have his costs paid out of the trust fund. The question, however, in the present case was whether the conduct of the appellants had been so improper that they ought personally to pay the costs of the suit up to the hearing; and the Vice-Chancellor, in the exercise of his discretion, had decided that they ought. The third exception mentioned by Lord Cottenham had no application to the present case, for the costs had not been ordered to be paid out of a particular fund. In the case of *Bagot* v. *Bagot*, which had been so much relied upon, it appeared that the trustees' petition of appeal raised the whole question of the right to the trust fund, and was not limited to the question of the payment of the costs of the suit, and the trustees, as representing all the persons entitled to the fund, had an interest in the subject-matter of the suit. That case, therefore, had no application to the present case. If in every case where a trustee or a creditor or a legatee asserted that he was entitled to have his costs paid out of a particular fund, he were to be allowed to appeal upon the question of costs alone, the exceptions to the general rule, that there could be no appeal for costs only, would be very much increased in number. His Lordship had very recently, in *Hope* v. *Carnegie*, 20 L. T. Rep. N. S. 5, said that he considered this rule a very wholesome one, and to that opinion he still adhered. The present appeal did not come within any of the admitted exceptions to the rule, and must therefore be dismissed with costs.

Lord Justice GIFFARD was of opinion that the rule prohibiting an appeal for costs alone was an important and wholesome rule, and that it had been quite enough broken through by the exceptions which had been already admitted to it. In the present case no question of forfeiture was involved, the appellants having been ordered to pay costs merely on the ground of their improper conduct, and if in such case they were allowed to appeal for costs only his Lordship could see no reason why an appeal for costs only should not be entertained in every case. It was argued that if the costs had been ordered to be paid out of the trust fund the plaintiffs might have appealed, and that there ought to be a mutuality in the right of appeal, but his Lordship could not accede to this argument. He was not at all disposed to extend the exceptions established by *Angell* v. *Davis*. In *Bagot* v. *Bagot* the merits of the case were discussed, and as an incidental result of that discussion the trustees were put in a better position as to costs than by the original decree. That had no application to the present appeal, which must be dismissed with costs.

Solicitors for the appellants, *Price*, *Bolton*, and *Filden*.

Solicitor for the respondent, *F. Rolt*.

Friday, July 16.

(Before Lord Justice GIFFARD.)

BROWN *v.* ADAMS.

Trustee and cestui que trust—Breach of trust—Following trust money—Solicitor—Money given by client to be invested on mortgage paid by solicitor to his own banking account—Death of solicitor without investing the money on mortgage—Whether balance at bankers can be claimed in specie by the client—Banker and customer—Appropriation of drawings by customer.

Though it is a general rule that trust-money misapplied by a trustee can, if it can be traced, be followed by the cestui que trust, it is also a settled rule that in a bankers' account the drawings by the customer are to be attributed to the payments made to the credit of his account in the order of their date, unless there be any specific appropriation of any sum when paid to his credit.

Therefore, where a solicitor paid to his own general account current (without making any specific appropriation), a sum of 5000l. received by him from a client for the purpose of being invested by him upon a mortgage, and died without having made the investment, it appearing that his drawing upon his account after the 5000l. was paid in, exceeded the amount of that sum and the balance then standing to his credit, it was

Held (reversing James, V.C.), that the client was not entitled to an injunction to restrain the administrator of the solicitors from dealing with the balance to his credit at his banker's at the time of his death.

This was an appeal by the defendant Adams from an order made by James, V.C., granting an injunction to restrain the appellant from drawing upon, or in any way dealing with, the balance standing to the credit of William Hale, a solicitor, at the time of his death, with Messrs. Drummond, his bankers.

Adams was the administrator of Hale, who died on the 13th May 1869. The plaintiff, Sarah Brown, was a client of Hale, and she, in Oct. 1868 gave him a cheque on her bankers for 5000*l.*, for the purpose of his investing the amount for her upon a mortgage. He never made the investment. It appeared that he kept a banking account with Messrs. Drummond, that he paid the 5000*l.* to his credit with them, without directing any specific appropriation to be made, and that it was placed to the credit of his account in the ordinary way.

At the time the balance to his credit was about 4000*l.* Before he died he made other payments to his credit, to the amount of about 12,500*l.*, and his drawings after the 5000*l.* was paid down to the time of his death amounted to about 18,800*l.* The balance to his credit at the time of his death was 2700*l.* or thereabouts.

The bill in this suit was filed against Adams and the members of Messrs. Drummond's firm, and it prayed that it might be declared that the balance which at the time of Hale's death stood to his credit with Messrs. Drummond was a trust fund appropriated to the plaintiff, and for an injunction, to restrain Messrs. Drummond from parting with that balance to anyone but the plaintiff, and to restrain Adams from in any way dealing with the balance. The Vice-Chancellor having granted an injunction as above mentioned, Adams appealed.

Kay, Q. C., and *T. A. Roberts*, in support of the appeal, contended that by the authority of *Clayton's case*, 1 Mer. 572, as between banker and customer, the drawings on the customer's account were to be attributed to the payments made to his credit in the order of their date, in the absence of any specific appropriation of any sum paid in. And it could make no difference that any sum paid in to the general account was in fact trust money. This was clear from *Pennell* v. *Deffell*, 4 D. M. & G. 372. In the present case it was clear from the evidence that no specific appropriation was made of the 5000*l.*, but that it was paid to the general credit of the account in the ordinary way, and that being so, the account showed that it was all drawn out by Hale before his death. The plaintiff in the present suit could, therefore, have no specific claim to the balance, and the injunction ought not to have been granted. They referred also to

Frith v. *Cartland*, 2 H. & M. 417; 12 L. T. Rep. N. S. 175.

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Willcock, Q. C., and *Charles Browne*, for the plain-

tiff, urged that it was the duty of Hale to have kept the 5000*l.* distinct from his own moneys, and that he must be taken, therefore, to have intended to draw in the first instance upon the moneys which were his own, and not upon the trust money. The injunction, at any rate, was only granted to protect the money until the hearing of the cause. They endeavoured to distinguish *Pennell* v. *Deffell*, and they cited

Lord Chedworth v. *Edwards*, 8 Ves. 46;
Lupton v. *White*, 15 Ves. 432;
Taylor v. *Plumer*, 3 M. & S. 562.

Without calling for a reply,

Lord Justice GIFFARD said that if there were any reason to suppose that the plaintiff at the hearing of the cause would be able to establish a better case than she could now, he would continue the injunction. But it was clear that the plaintiff had made the best case she could. The facts of the case were very simple, and it was plain from the evidence that, if the 5000*l.* were not trust money, it must be treated as having been drawn out by Hale before his death. It had been argued that *Pennell* v. *Deffell* was not an authority for saying that trust-money paid by a trustee to his general banking account must be treated in the same way as any other money so paid. There could be no question that at law the 5000*l.* was extinguished as a debt, and it would be rather a strange thing if, being extinguished at law, it could be kept alive in equity. It was a different case from that of trust-money placed by a trustee in a box with money of his own, the case to which many of the observations of Knight Bruce, L.J., in *Pennell* v. *Deffell* referred. Now, at p. 383 of 4 D. M. & G., Knight Bruce, L.J. said, "When a trustee pays trust-money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done had it specifically been placed by a trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent*, it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on the one hand, and the trust on the other." That would be the case here if no part of the 5000*l.* had been drawn out. But then at p. 384 Knight Bruce, L. J. went on to say, "This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him money in every sense his own. It may be, however, and, as I think, is true, that cheques drawn by a trustee in a general manner upon the bank, would for every purpose be ascribed to and affect the account in the manner explained and laid down by Sir W. Grant in *Clayton's* case. The principles there stated would, I conceive, be applicable notwithstanding the different nature and character of the sums forming together the balance due from the bank to the trustee, whatever the purposes and objects of the cheques. Supposing, however, the bank to apprise the customer, or the customer to apprise the bank, contemporaneously or with due dispatch, of an intention to ascribe and apply a cheque in a manner out of the ordinary course, that possibly might make a difference or raise a question." Then in the same case. Turner, L. J., at p. 391, said: "We must see, however, whether the law does not furnish the means of meeting even the difficulty arising from such a continued series of moneys paid in and drawn out. I think that it does. I take it to be now well settled that moneys drawn out on a banking account are to be applied to the earlier items on the opposite side of the account. By every payment which he makes the banker discharges so much of the debt which he first contracted. If that debt arose from trust moneys paid in by the customer, so much of those moneys is paid off, and unless otherwise invested on account of the trust, falls into the customer's general estate, and is lost to the trust, because it cannot be distinguished from the general estate of which it has been part. If, on the other hand, the earliest debt due from the banker arose from the customer's own moneys paid in by him, that debt is *pro tanto* discharged, and the trust moneys subsequently paid in remain unaffected. The same principle runs through the whole account; each sum drawn out goes to discharge the earliest debt due from the banker which is remaining unpaid; and thus, when it is ascertained what moneys have been paid in belonging to the trust, it becomes clear to what portion of the balance which remains the trust estate is entitled." Then further, at p. 393, his Lordship said: "The master's opinion appears by his report to be founded upon this principle—that the sums drawn out by Green on his private account ought to be attributed to the sums paid in by him on that account, without reference to the order in which the sums were paid in or drawn out, and the case of *Pinkett* v. *Wright*, 2 Ha. 120, was cited in support of that principle; but the case of *Pinkett* v. *Wright*, in which I fully concur, is, I think, materially distinguishable from the present. *Pinkett* v. *Wright* was the simple case of a person having shares in his own right and also as a trustee, and selling some of the shares, and the court held that the shares which were sold must be taken to be those to which the party was entitled in his own right. There was no course of dealing, no bankers' account to be considered in *Pinkett* v. *Wright*. Now Green opened and kept the banking accounts upon the usual footing, and the plaintiff taking the benefit of the accounts cannot, as I think, be entitled to alter their character. Adopting them for the purpose of establishing his demand against Green's estate, he must, I think, adopt them with all their incidents, one of which is that the moneys drawn out are to be applied to the moneys first paid in. Upon any other footing this consequence would follow: that a debt which had been extinguished at law by the course of payment would be revived in equity by an alteration in that course. Indeed it would follow that in all cases where trust moneys were paid by a trustee into a bank to his own private account, they must be held to have remained there so long as the trustee may have had moneys of his own in the bank to answer his drafts, whatever may have been the dealings upon the account, and however long it may have continued. To apply the principle of *Pinkett* v. *Wright* to such a case as the present was, in my opinion, an unwarrantable extension of that principle, and certainly it would be attended with the greatest inconvenience." That case was a plain authority for the present as directly in point as it was possible to conceive. Then, again, in *Frith* v. *Cartland*, 2 H. & M. 422, Hatherley, L. C., when Vice-Chancellor, said, "In *Pennell* v. *Deffell* part of the trust-fund had been paid into a bank, but it was not ear-marked, and was wiped out by subsequent drawings, and the whole ultimate balance could not be fixed with the trust, any more than a second 1000*l.* of stock which a trustee might happen to acquire after selling 1000*l.* of trust-stock and spending the proceeds. So long, however, as the fund can be traced the trustee cannot assert his own title to it." Both those authorities were applicable to the present case, and if authorities ever were to be binding those must be taken to be so; and

even without authority his Lordship could not have hesitated in coming to the same conclusion. If the injunction were continued the only result would be to remit the parties to a very useless litigation. The order of the Vice-Chancellor must be discharged, and an order made refusing, with costs, the motion for an injunction; but there would be no costs of the appeal.

Solicitors for the appellant, *W. Hitchcock.*

Solicitors for the plaintiff, *Surr* and *Gribble.*

July 14 *and* 28.

(Before the LORD CHANCELLOR (Hatherley).

OVEREND, GURNEY, AND COMPANY (LIMITED) *v.* GURNEY AND OTHERS.

Demurrer—Bill by company against its directors—Breach of trust by directors—Companies Act 1862.

A bill was filed on behalf of O. G. and Co., a limited company in course of being wound-up, against its directors, seeking to render them liable for neglect of duty and breach of trust in having carried out the powers given them by the company in purchasing the business of the old firm of O. G. and Co., when they knew that that firm was insolvent; and also for having neglected to obtain a sufficient guarantee by that firm, or a mortgage of the private estates of the partners, to secure or make good the difference between what they knew to be the actual and the nominal value of the assets of the old firm.

Demurrer, on the ground that it was incompetent for a company to sue its own directors for breach of trust; that the proper remedy was by action at law for damages, and that if the Court of Chancery could give any relief it was under the machinery of the Companies Act 1862, *allowed;*

Reversing the order of Malins, V.C.

This was an appeal by the defendants from an order of Vice-Chancellor Malins, overruling a demurrer to a bill filed in the name of the company, Overend, Gurney, and Co. (Limited), against the first directors of the company. Thomas Augustus Gibb, one of those directors had however died, prior to the institution of the suit, and his executors were accordingly made defendants. The main ground of complaint alleged by the bill was that the directors had exceeded their authority in completing the purchase of the business without due communication with the shareholders, and that they were aware at the time of the insolvency of the old firm. The four surviving directors had submitted to answer the bill, but the executors of Gibb had put in a general demurrer, to the effect that the company was not competent to sue its own directors; that the remedy, if any, for the negligence charged, which was in the nature of a common tort, was by an action at law; and that even if the Court of Chancery could give relief, the application should have been by summons under the Companies Act, and not by bill. The facts and arguments are fully set forth in the proceedings before the Vice-Chancellor (reported 20 L. T. Rep. N. S. 652).

Sir *R. Palmer*, Q.C., *Glasse*, Q.C., and *H. M. Jackson*, for the appellants.

Cotton, Q.C., and *Ferrers* for the plaintiffs.

The following authorities were cited:—

Oakes v. *Turquand*, 16 L. T. Rep. N. S. 808;
Turquand v. *Marshall*, 18 L. T. Rep. N. S. 385; L. Rep. 6 Eq. 112;
Rawlins v. *Wickham*, 3 De G. & J. 304;
Croskey v. *Bank of Wales*, 4 Giff. 314;
Powell v. *Aiken*, 4 K. & J. 343;
Charitable Corporation v. *Sutton*, 2 Atk. 400;
Lansdowne v. *Lansdowne*, 1 Madd. 116;
Sawyer v. *Goodwin*, 15 M. & W. 1008;
Society of Practical Knowledge v. *Abbott*, 2 Beav. 559—67.

Without calling for a reply,

The LORD CHANCELLOR (Hatherley) said:—I have very carefully considered the case, and it does not appear to me that the bill can be sustained as against the demurring defendants. The bill is one of a very singular character. It endeavours to raise, and I have no doubt does raise properly and fairly, the case that is in dispute between the two parties, not over-colouring or over-stating any of the matters, but simply, I presume, from the mode in which it is framed, stating the exact facts, and those exact facts being so stated, it comes in substance to this—that the gentleman, Mr. Gibb, whom the demurring defendants represent as his personal representatives, was a person who, acting as a director of a company which had been formed, and who now are in truth the plaintiffs in the present proceedings, bought for them that which they formed themselves into a company to buy, namely, a certain business of Overend, Gurney, and Company; yet that buying that business, though fully authorised to buy it on such terms as might seem to him and his co-directors to be just and proper, buying it also with certain guarantees which they were authorised to take and accept, and in no way, therefore, exceeding the power, at all events, literally, it is said that Mr. Gibb so exercised this function of purchasing on behalf of the company which was to be formed, as their agent and on their behalf, that he has, by his imprudence (for it is not put any higher—the Vice-Chancellor himself says so, and I think that is truly the result of the bill), made a very burdensome purchase, and has fixed the company in consequence with a very heavy loss, and the bill seeks solely on that ground—want of wisdom and want of judgment in the proceedings which he has taken with reference to the purchase of the property — to fix the defendants with the consequences of that want of wisdom and that error of judgment. It does not aver, from the beginning to the end, that there was any fraud on his part; and indeed, from the averments in the bill, it must be almost taken to be impossible that it should be so, because he himself is a purchaser, he has an interest in the concern; and I cannot put the case in that respect either more high in favour of the demurring parties, or more adversely to the bill, than by stating the conclusion to which the Vice-Chancellor came, and in which I entirely concur. He says, "There is no charge of anything involving personal misconduct in the conduct of the directors in making the purchase of this business, or that they intended to do otherwise than discharge that which they thought their duty to the shareholders who had joined, or who were likely to join, the company." Therefore, it is to be taken that this gentleman at all events, Mr. Gibb, who was not one of the original partners in Overend, Gurney, and Company's concern, has done nothing more than that which he believed to be the proper discharge of his duty. The bill, however, contains averments which tend to show that in so discharging his duty, he has acted in a manner which has entailed great loss, owing (as the bill puts it) to circumstances and facts which were brought to his knowledge, and which ought to have deterred him and his co-directors from entering into this purchase which they had been authorised to make on behalf of the company. Accordingly, the bill charges that very heavy losses had been sustained, and seeks to make responsible

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Mr. Gibb and his co-directors jointly and severally, "to make good and pay to the plaintiff company the amount of the loss which they had sustained, and to indemnify them against all such further loss as they may sustain by reason of their having purchased the said good-will and assets, and having undertaken the liabilities of the said firm of Overend, Gurney, and Company." Now, it seems to me that the case here divides itself into two branches, and, with respect to one branch of the case, I confess I think it is quite impossible for a bill to be sustained in this court; and that whatever remedy there may be, would be by an action for negligence for such loss as has accrued in consequence of the debts and liabilities which have fallen upon the new company irrespective of the loss of their capital, because it appears to me that those two matters are entirely distinct. It may be said, and I am not prepared at present to say that I should not require a good deal more consideration if the case had rested upon that alone, that, to the extent of the capital placed in the directors' hands, Mr. Gibb and his co-directors are responsible to the shareholders for that sum of money so placed in their hands, following the case before Lord Hardwicke, *The Charitable Corporation* v. *Sutton*, by which it would be possible for this Court to hold, that if a certain body of people placed a given sum of money in the hands of another to be laid out, and he lays out that money in such a manner that he can be said to be guilty of a breach of trust towards them, he may be answerable for the amount of money so placed in his hands, and which has been so wasted. That is one view of the case. But how can it possibly be held in this court that they are further to be pursued by the plaintiff in respect of all liabilities that have been occasioned by the property in which the money was invested being a *damnosa hæreditas* beyond the amount of the property lost, namely, occasioning other losses, other debts, and other liabilities, to those who so entrusted the money to him? To say that he can be pursued in this court for that default or negligence is, it seems to me, in the absence of any fraud of course, a proposition extremely difficult to sustain. All the loss in the shape of liability beyond the 250,000*l.* which they may be supposed in this case to have had in their hands, I apprehend would form the proper subject of an action for negligence, if they thought they could maintain such an action in the absence of any fraud being charged; and the consequence of that would be that the present gentlemen, the executors of Mr. Gibb, could not be pursued either at law or in equity. It certainly seems to me not in equity, with reference to any such loss as that which I have last mentioned. However, I have now to consider the case (which is the most favourable view in which I can put it to the plaintiffs) as so much money placed at the disposal of Mr. Gibb and the others, to be laid out on behalf of the Company. Then I have to consider whether or not the charges in the bill, in that point of view, amount to such a breach of trust as should induce me to say that Mr. Gibb, or his personal representatives, are liable in respect of that breach of trust for this waste that has taken place in the Company's assets. Now, here the case is one, I may almost say, of first impression; because all the cases which we have hitherto had have not been cases of parties having full power to do all they have done, and being held to have done it imprudently or unadvisedly; but they have been cases in which fraud has been alleged. They have been cases, not of suits by the company to get back the assets of the company, but cases of suits by individual shareholders, who say that they have been induced by the fraud, by the misrepresentation, and misconduct of the directors to become shareholders in the company. And one of two things they have tried—either to make the directors personally responsible for the moneys that have been so obtained from them, as they say, by fraudulent misrepresentation; or, what is more common, they have tried, as in the case of *Oakes* v. *Turquand*, and cases of that kind, to escape from the contract altogether, and to be liberated from their position in the company, and have their names struck out from the company's list as having been brought into the company by fraudulent acts on the part of those who were, for that purpose, to be taken as the agents of the company. But such a ca e as this, namely, a bill by the company, saying, "We have employed our agents to purchase for us a certain property, and they have not misconducted themselves in any way with reference to fraud, but they have misconducted themselves in purchasing that which it was unwise and imprudent for them to purchase," is, under the circumstances of the case, to my mind, one of first impression. Now just look at it as regards the character of the purchase which these gentlemen are empowered to make. They are not to buy an estate where they might, no doubt, be held guilty of such an amount of gross negligence which, if not actually amounting to fraud, would be such as this court might make them responsible for, in their character of trustees, to their *cestuis que trust*. But this is the case of the purchase of that which must of itself be extremely speculative. Everybody knows that all classes of trade are very speculative, and the trade of a bill broker cannot be considered as the least so. That being so, the authority they receive is to be found in the articles of association and the memorandum of association, which are set forth and which I therefore deal with in the first instance. The memorandum of association is this: There is a joint stock company to be formed, and the persons to form it are to be certain persons who are the old partners in the bank, together with certain new persons, among whom is Mr. Gibb, who was never a partner in the old bank, and the name of the Company is to be "Overend, Gurney, and Company, Limited." It is for the purchase of that business, or at all events, that is the principal object, for which the company is formed. Its registered office is to be situate in England. Then it says, "The objects for which the company is established are, the receiving of money on deposit or by re-discount of bills, and the employment and investment of such money, and of the paid-up capital of the Company in the discounting of bills of exchange, promissory notes, and other negotiable securities, and in making advances on loan and investing in securities, and generally the carrying on of the business of bill-brokers and money dealers as heretofore carried on by Messrs. Overend, Gurney, and Co., at No. 65, Lombard-street, in the city of London; and with a view to the above objects the acquisition of such business upon terms to be agreed upon by the directors, and the acquisition, whether by way of purchase or amalgamation or otherwise, of such other business or businesses of a like character, and upon such terms as the directors shall think expedient, and the doing of all acts and things incidental or conducive to the attainment of the above objects." There they say, we are about to embark in that which must always be a hazardous business, a business entirely dependent on the prudence and dexterity of those who manage it, namely, the business of discounting bills and advancing money upon securities, those securities not being such securities as we generally have to deal with in this court, namely, mortgages, and so on, but shares and bills, and other securities of that description. That is the thing which is to be bought. Then by the Articles of Association "The directors are also authorised to purchase

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or acquire upon such terms, and under such stipulations as to guarantee or otherwise, as may be agreed upon, the business and goodwill of the said Messrs. Overend, Gurney, and Co., as the same now stands, and any other business of a like character which they may hereafter think it expedient to acquire for the benefit of the company." There is the largest possible power given to these gentlemen to buy this, which was, in itself, a speculative business, and they are to do it entirely in such manner as they may think expedient. Now let us see what are the errors of judgment of which this gentleman and his co-directors are accused. It is stated in the beginning of the paragraph that Overend, Gurney, and Co. had at the time this company was formed, or about that time, attained the highest commercial reputation, and its business was universally supposed to be most successful and profitable. Then they say further, "In or about the year 1861, certain accounts upon which very large amounts were due to the firm, and which were wholly unsecured, or insufficiently secured, and also certain investments, were regarded with alarm by the partners. They then give a list of those debts, which seem to be very considerable, amounting to 2,782,000*l.*; and without knowing much of mercantile affairs, one may take judicial notice, regard being had to the enormous amount due from some of the parties, that they were not very eligible investments in the way of carrying on business. That was in 1861. Then it is said that in consequence of the position of affairs, Mr. John Henry Gurney, who was one of the partners, and who took no part, previously to 1861, in the London business beyond attending annual meetings, and occasionally looking in at the London office, "commenced in 1861, and continued from that time, until the transfer of the business in 1865 to the plaintiff's company, to attend regularly at the office of the firm in Lombard-street, for the purpose of superintending generally the business, but nevertheless by the end of June, 1865, the said firm was insolvent to the extent of at least two millions sterling." That probably is the strongest averment in the whole bill. But there is one observation to be made upon that. Of course it must be taken to be stated in the bill, that the firm was in June, 1865, insolvent to the extent of two millions sterling; but at the same time, I think it must be taken to mean exactly what it says, namely that if the firm had stopped on that day, they would not have had assets, to the extent of two millions, sufficient to meet their liabilities. Still it does not follow from that, that there might not have been some of these outstanding debts very imprudently contracted, having long time to run and the like, which, not being capable of immediate realisation, would leave this enormous deficit. But one must not assume more on behalf of the pleader than is averred, and certainly not more than the facts will justify, for I apprehend it is the case in all large concerns of this kind, that there are a number of matters which are of no value on a given day, but which nevertheless may be of considerable value as time goes on and if time be allowed; time being the essence of everything of this description with regard to mercantile affairs. However, we must take it that they, according to the averments in the bill, upon that day in June, owed more than two millions exceeding their assets. Then it says, "in the month of June 1865, the partners" (not including Mr. Gibb) "were aware of the state of the firm." It goes on, "under these circumstances a project was, in the said month of June 1865, devised by the said then partners in the firm" (again not including Mr. Gibb), "for the formation of a joint-stock company which should purchase the name, goodwill, and business of the said firm, and it was in the result arranged that the said company should be formed," by these partners (who are the six defendants) and Mr. Gibb, "and that they should be the directors of it, and that the said company should take over all the liabilities of the said firm, and also its assets, except those referred to in the next paragraph of this bill." There, again, the arrangement is said to be made by the partners, who were at that time perfectly cognisant of the state of things, but it is not alleged that at that time there was any preconceived plot, plan, arrangement, or scheme by Mr. Gibb, beyond their arranging with him, and he is to join them in the concern. He is afterwards said to be cognisant of the state of affairs, but not to be cognisant of any scheme being contrived. [His Lordship then examined in detail the arrangement between the partners and other parties to the project, and said:] No doubt, to one not accustomed to be engaged in hazardous transactions of this kind, this does seem to be a most hazardous speculation, and one which few persons in this court would be disposed to enter into, but I must take it upon the bill as stated by the Vice-Chancellor himself, that those who entered into this concern believed themselves, that they were discharging their duty; that is to say, that having power to buy the business upon the best terms they could make, and having power to take a guarantee, which implies that they might possibly find a necessity for a guarantee in respect of the liabilities, they entered into this arrangement, and they have bought a business which, although a speculation, under all the circumstances which I have detailed, has turned out to be not so profitable as was anticipated. However, it was evidently a speculation, because, although there were these two millions on the one hand at this instant, yet on the other we have four millions of debt in hand, which is to be worked off by the suspense account. It is stated in the bill that in a great measure they were bad investments. But then, how are we to tell what portion was expected to be worked off? It is more than double the amount of debts in question. But in this state of things, how can I say that this man, with his power of dealing with this concern, who has not exceeded in a single word the letter of his power, has committed a breach of trust towards those who employed him as their agent, for which he is to be answerable? They employ him to buy this concern, believing it to be, although a hazardous, yet a flourishing one. The view which I must take is, that he bought it, believing it to be a flourishing concern, and the only averment which I find that seems to have pressed on the mind of the Vice-Chancellor is, that having this authority given, no meeting was called. It is said, "When you found how things were, the public believing that this was a very good concern, and a prosperous concern, you, coming in as our director to deal for us, finding that things were so far from prosperous, because it had been badly managed to a certain extent, and finding it so badly managed that if things were wound-up at that moment there would be a deficiency, were content to go on without calling a general meeting, thinking it would be beneficial (for I think we must take that to be the opinion of the Vice-Chancellor), and therefore you are to be taken as being liable for not coming to us and telling us what sort of a thing it was you were drawing us into, without coming to us for further power." I apprehend that I cannot hold such a doctrine as that. Mr. Gibb, being quite willing to enter into the speculation, how was it possible that he should know that the others were not as willing to enter into it as himself? How could these people dive into all the minds of the shareholders? How

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could he know anything as to the feeling of security which might exist in the minds of others with regard to the affairs of Overend, Gurney, and Company, and how was he to know that it was not the same as that which he himself felt? If I were to hold any such doctrine as that, it would involve in extreme peril numbers of transactions which we all know were going on some few years ago. At that time business after business was being bought, and other speculative companies of all sorts were being bought, for instance, such as Masterman's Bank; and if I were to hold that persons entering into a treaty to sell to others their business are liable to this, that the external directors with whom they treat on behalf of the company—I mean those who are not partners—are to be informed fairly and fully of the state of the concern, and then are to lay the whole of the affairs of the concern before a public meeting of shareholders before the affair could be dealt with, it would of course at once put a stop to the buying and selling of businesses of this description. One would suppose that they would desire their affairs to be kept private, and not desire to have them ransacked; and, unless they had persons with whom they were authorised to deal, and whom the Company had entrusted with their affairs, and were content to rely upon their acts, it would be impossible that transactions of this description could be carried out. Then, if I do not find that they have acted in breach of their duty, if I do not find that they have done anything more than make a bad bargain—it appears to me that I cannot assume that the company are thereupon entitled to say that this gentleman is responsible for a breach of trust, he only having done that which they sent him to do, having bought this business, but with an amount of knowledge, which he must necessarily as a director acquire, exceeding the amount of knowledge which was acquired by them. Then, after that, a prospectus is issued, and I cannot help thinking that there has been some confusion in that part of the argument in this case between the case of those who were misled by the prospectus, which was the case relied upon in *Oakes* v. *Turquand*, and the case of those who relied upon an agent, and gave him full confidence as an agent, and who has not acted as a wise or prudent agent. We are told that the company was registered, and the arrangement had been made immediately after the registration of the memorandum of association. They say that the prospectus was prepared and intended to be issued, but then, in the meantime, the company had been formed. The prospectus says this: "The company is formed for the purpose of carrying into effect an arrangement which has been made" (therefore that shows that it is done) "for the purchase from Messrs. Overend, Gurney, and Co. of their long established business as bill brokers and money dealers, and of the premises in which the business is conducted, the consideration for the good will being 500,000*l.*, one half being paid in cash, and the remainder in shares of the company, with 15*l.* per share credited thereon; terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the shareholders." I cannot say that was not their opinion, however sanguine it may have been, and nobody can doubt at this moment, now that we know the full extent of the disaster, that the good-will of the business of Overend, Gurney, and Co. was enormous. Therefore, it is impossible for me to say that, looking at these advances, these gentlemen might not well have said, "You have been very imprudent, you have got a splendid business, but when you have money at call you should not have these large investments of money which are not at call; we will conduct the business on a new footing; we have got your four millions of debts to work upon to make the best we can of; we shall be able to work off the concern by that means, and having your goodwill, and the enormous extent of business which you have at your command, we shall be able to make that again a flourishing business which had evidently been in former times a flourishing business, for it is alleged that in 1861 there was no doubt whatever upon the subject. There is one other point which I ought to notice. I said that I would not deal with the two deeds. I should mention that one is an ordinary deed with reference to the arrangement with the company; and in that deed there is contained also the arrangement about the 500,000*l.*—the 250,000*l.* in shares, and the 250,000*l.* to be paid by the company. The other is a separate deed as to the suspense account, and the suspense period containing the arrangement as to the 4,000,000*l.* to be worked off in the way I have described, and in respect of which the guarantee is to be given at the end of the suspense period of two and a half years. Then the prospectus says, "Copies of the company's memorandum and articles of association as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company." Great stress was laid, as was laid in the case of *Oakes* v. *Turquand*, by the Vice-Chancellor in this case, upon the second deed not being brought forward, and it was said that if the second deed had been produced many persons would not have subscribed. How far an averment of that kind is to be taken as an averment of fact I think is a very doubtful matter. To say that any particular person would or would not have subscribed, if this or that had or had not been done, is predicting the future, and cannot be taken as an averment of fact. However, whatever may have been done, I apprehend what I have to consider is whether the deed is *ultra vires*. It seems to me that it is not *ultra vires* at all. They had the power to buy under such terms as they thought fit; and taking such guarantee as they thought fit. This second deed is the guarantee which they think fit to take; and I must say that, there being no fraud, but a total absence of anything like fraud, it would be impossible for me to say, that taking such guarantee as they think fit means that they are to take mortgages. No one ever heard that in buying a company's business there is to be also a mortgage security. We must look to the contract and construe the contract to see whether the averments in the bill be accurate or not. There is nothing whatever in the contract to show that in taking these guarantees they were bound to take guarantees in the shape of substantial guarantees by way of security on the real property of the several partners. The partners were all thought to be men of wealth, and there is nothing to show, in truth, that the bulk of them were not men of wealth, subject of course to this question of the two millions, which if they had broken up at that moment might have been demanded of them. Then the case is reduced to this. As regards one half of the bill, I hold it to be utterly untenable, namely, as to the damage accruing *ultra* the 250,000*l.* That I hold to be simply a case of negligence for which no proceedings can now be had against the executors of Mr. Gibb. But as to the other 250,000*l.*, and as to whether or not there has not been a waste of the assets put into this gentleman's hands, looking to the terms of the agreement, the authority which was given to him, the circumstance that he is not alleged to have acted *malâ fide* in any part of it; but all that is alleged against him is that he has not made a profitable and sound bargain under the circumstances of the case, it being said by the Vice-Chancellor that in all which he has done he conceived himself to be doing his duty; if I find nothing

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to restrain him from doing that which he has done, I think that people must take the consequences of the manner in which their business is conducted by others whom they have trusted to act as their agents. If the question were simply whether they had, or had not, made a bad or imprudent bargain, that is not a question which could be dealt with in this court as a breach of trust; or, if it were in respect of having failed to secure a bargain for persons who intrusted the moneys to them for that purpose, which is not the case we have here, the company must take the consequences of having intrusted their moneys to persons of sanguine temperament who have made a purchase which turns out to be a bad one; but I do not find enough in this case to show me that it is so ridiculous or absurd, or that there is such *crassa negligentia* as would amount to fraud, as to induce me to hold that the gentleman, whose executors are now sought to be impeached, has made himself responsible for a breach of trust for which I can hold them liable. With reference to the prospectus, it seems to me to have little or no bearing, and I should not have referred to it, if it had not been for the reliance placed on Lord Chelmsford's observations in *Oakes* v. *Turquand*, in which he considered that the directors were not justified in keeping back the second instrument with reference to the four millions, when they were inviting persons in the prospectus to join the company. I have nothing more to say about that part of the case. That may or may not justify a particular creditor saying "You have mislead me by the misrepresentations of your prospectus, and therefore I ought to be released from the company altogether." That appears to me to be a totally different question from the company itself having armed these gentlemen with an authority, which authority they have exercised, which does not depend upon what was said or done in the prospectus, but upon the terms of the articles and memorandum of association; and then I must look to see what the contract with the company and the whole body of the directors is. We can look to nothing else but the articles of association and the memorandum of association, and I find that the directors are armed with such powers by that instrument as justify them, as it appears to me in this court, in saying that they have acted to the best of their judgment, however erroneously, and are, therefore, not liable to answer to those who have entrusted them with such large powers for a breach of trust. I hold, therefore, that in this case I ought to reverse the decision of the Vice-Chancellor, and hold that the demurrer ought to have been allowed, and ought to have been allowed with the usual consequences.

Uptons, Johnson, and Upton, solicitors for the appellants.

Maynard and Son, solicitors for the respondents.

ROLLS COURT.

Reported by HENRY PEAT and HENRY GODEFROI, Esqrs., Barristers-at-Law.

April 23 and 26.

GRAHAM v. JOHNSON.

Voluntary bond—Assignee for valuable consideration—Subsisting equities—Forbearance to sue—Promise to pay made in ignorance of right to relief.

G., an officer in the Indian army, and J., a barrister practising in India, having been in the habit of accepting accommodation bills for each other, J. one day asked G. to give him further assistance by signing a document, which G. did sign. This document was a bond for 1000l., but G. alleged that he believed it to be a negotiable security like the accommodation bills, which he had accepted. At the same time G. wrote a letter to J., in which he said that he owed a good deal of money to J., and wished to give him a promise to pay 1000l., adding, "I mean so that you can raise the wind on it." There was no consideration for the bond. J. assigned it to B. for valuable consideration. B.'s solicitors applied to G. for payment of the amount secured; whereupon G. promised to pay, if B. would wait till he received some money to which he was entitled under his father's will. B.'s solicitors consented, and deferred taking proceedings.

On a bill by G. to have the bond cancelled, and to restrain J. and B. from taking proceedings on it,

Held, that G. was entitled to have the bond set aside as against J., and also as against B., who took it, subject to the equities subsisting between G. and J., there being nothing on the face of the bond to show the intention that it should be used as a negotiable instrument, and G.'s promise to pay B. having been made in ignorance of his right to relief.

Forbearance to sue is a good consideration for a promise to pay only when the right to sue exists.

Re Agra and Masterman's Bank; Ex parte Asiatic Banking Corporation, 16 *L. T. Rep. N. S.* 162; *L. R.* 2 *Ch. App.* 391, *examined and distinguished.*

This was a suit instituted by the plaintiff to procure the cancellation of, and to restrain the prosecution of any action upon, a bond which had come into the possession of the defendants to the suit under the following circumstances:—

The plaintiff, Thomas Chadwick Graham, a captain in Her Majesty's 4th Regiment of Bengal European Light Cavalry, became acquainted with the defendant Henry Charles Ross Johnson, who was a barrister practising at Calcutta, during a visit of both parties to this country. On his return to India in Feb. 1862 Graham renewed his acquaintance with Johnson, and they became intimate friends, and accepted accommodation bills for each other.

After Graham had accepted several bills in this manner, Johnson on the morning of the 6th March 1862 requested Graham to give him a little further assistance with his signature. Graham, according to his own account, went accordingly to Johnson's chambers, where Johnson produced a document for his signature, which he (Graham) signed in the presence of a witness whom Johnson fetched for the purpose, and who was, Graham alleged, an utter stranger to him. This document was in the following terms:

Calcutta, 6th March 1862.

Know all men by these presents that I, Thomas Chadwick Graham, at present of Calcutta, a captain in Her Majesty's Bengal Light Cavalry, am held and firmly bound unto Henry Charles Ross Johnson, now of Calcutta, Esq., barrister-at-law, or his assigns, or heirs, or administrators, or executors, for the payment on demand of the sum of company's rupees 10,000 of lawful money of Bengal, or its equivalent, in lawful money of Great Britain. And further, for such payment to be well and truly paid unto the said Henry Charles Ross Johnson, or his assigns, executors, administrators, or heirs, I hereby bind, as well as myself, my heirs, executors, administrators, and assigns, also firmly by these presents. In witness whereof my hand and seal delivered this 6th March in the year of our Lord 1862.

T. C. GRAHAM (L.S.),
Capt. H.M. Bengal Lt. Cavalry.

Signed, sealed, and delivered in the presence of us together,

G. S. Thompson,
Grish Chunder Chatterjee,
Clerk to Mr. Bell, barrister-at-law.

The plaintiff alleged that this document was never read over by him, nor by Johnson to him, that the contents or effect of it were not explained to him by Johnson before he signed it, or at any time; and that Johnson excused himself from doing so on the ground that it would be "of no use," and

that he having perfect confidence in Johnson asked no questions concerning it. The plaintiff further alleged that he did not know that the document was a bond, and was ignorant of the legal nature or effect of a bond, and that he understood it to be a means to enable Johnson to raise money as in the case of the bills of exchange which he had previously accepted for Johnson, and that he signed the document under that impression.

The plaintiff also alleged that immediately after he had signed the bond, Johnson dictated to him the contents of a letter which he at Johnson's request wrote and delivered to him, and which was in the following terms:

Wilson's Hotel, March 6th, 1862.

My dear Johnson,—As you have been my security for some thousands, and as by rights I should owe you a good deal of money, not only for money paid, but for services performed, and also for our many long and confidential consultations, never forgetting our last, and your extricating me from the payment of the 1000*l.* to Col. Harvey, and perhaps the bother of a court of inquiry; I repeat that for these reasons I am anxious to give you a promise in writing to pay you, say company's rupees 10,000, on demand, or 1000*l.* I don't know much about business, so you draw it up in the way you may think most pucka (*i. e.*, binding) on me, or, if I go out, my representatives. I am sorry to hear your business gets on so slowly. When do you think Mr. Public Works will stump up? Yours sincerely, T. C. GRAHAM.

P.S.—Of course you can, or promise in any way you like —I mean so that you can raise the wind on it.

In his answer, Johnson gave the following version of the transaction:—"On the 6th March 1862 the plaintiff, who was then staying at Wilson's Hotel, Calcutta, came to my chambers and said that he felt very grateful to me for assistance which I had rendered to him in various ways, and that he desired to make me a substantial recompense for what I had done for him, but that, inasmuch as he would not come into possession of his property until he was thirty-five years old, he could not then pay me the sum which he desired to pay me. In order, however, to prevent my losing it in the event of his death, he would, he said, give me such a security for it as would enable me to raise the money. The plaintiff then sat down and wrote a letter to me, which was as follows": (the letter of the 6th March 1862, set forth above).

The plaintiff alleged that the only sum for which Johnson had become security for him, and that only jointly with another person, was 9000 rupees, or 900*l.*, and that the only money which Johnson had ever paid on his account consisted of trifling sums paid by him for the stamps on the bills of exchange.

Johnson, in his answer, admitted that the plaintiff received no pecuniary consideration for the bond, but that it was voluntarily executed by the plaintiff as above stated.

In May 1862 one of the plaintiff's friends wrote a letter on behalf of the plaintiff to Johnson, asking for an account of the liabilities which the plaintiff was under for him, and Johnson, in his reply, mentioned several bills, but made no mention of the bond.

In Feb. 1864, when the plaintiff was about to set out for England, he visited Johnson at Meerut, in order to obtain some information about his liabilities on Johnson's account. He then asked Johnson, "What was it I signed for you in presence of the witness?" and was assured that it was only a transaction between themselves, and that Johnson was the proper person to be "come down upon," or that it was nothing that he (the plaintiff) could be "come down upon for." For the plaintiff's further satisfaction, Johnson, on the occasion of that visit, wrote a letter to the plaintiff in the following words:—

My dear Graham,—In answer to your queries of this day's date I have paid off all the bills bearing our joint names but one for 6000 rupees, now overdue nearly two years, and towards liquidation of which I have paid some 2000 or 3000 rupees, and signed an agreement to pay 12 per cent. till liquidation of the balance. . . . . There is nothing more you can become liable for me for. Yours sincerely, H. C. ROSS JOHNSON.

Meerut, the 6th Feb. 1864.

By an indenture dated 28th Dec. 1864, and made between Johnson of the one part, and Charles Grant Barlow (also a defendant to this suit) of the other part, in consideration of 10,000 rupees in accepted bills granted to Johnson by Barlow, Johnson assigned the bond to Barlow. When Johnson applied to Barlow to accept the bills, and proposed to assign the bond to him, it was alleged that he produced Graham's letter of the 6th March 1862, and assured Barlow that valuable consideration had been given for the bond.

In Aug. 1865 the plaintiff received a letter from Barlow's solicitors, inquiring what arrangement he was prepared to make for the liquidation of the bond, or for giving security for its payment.

The plaintiff was in Paris when he received this letter, and being, as he alleged, without professional advice and ignorant of Johnson's address, and believing that, although he had received no consideration for the bond, he was liable thereupon to Barlow, wrote a letter to Barlow's solicitors in reply to their letter, in the following words:—

Poste restante, Paris.

Aug. 17th, 1865.

Dear Sir,—I am in receipt of your letter of the 8th, forwarded from the Isle of Wight, and beg to say in reference to my bond for 10,000 rupees, in favour of Mr. H. C. Ross Johnson, that at the expiration of the present vacation I expect to obtain the property I am entitled to by my late father's will, when I shall have the means to and will settle the same. I therefore hope this proposed arrangement will be satisfactory, and remain, yours faithfully, T. C. GRAHAM.

In reply, Barlow's solicitors said that they would advise their client to defer his proceedings if there was a prospect of the plaintiff obtaining the property referred to within a reasonable time, and accordingly no proceedings were then taken in the matter.

In Jan. 1866 the plaintiff, having been informed of his right to relief in equity from payment of the bond, instituted the present suit to obtain cancellation of the bond, and thereupon Barlow at once commenced an action in the name of Johnson against the plaintiff upon the bond. In Dec. 1866 an order was made in the suit that Graham should allow judgment to be entered against him in the action, and that execution should be stayed until the hearing of the cause.

The cause now came on for hearing on motion for decree.

Southgate, Q.C. and *Cates*, for the plaintiff, argued that he was clearly entitled to have the bond set aside as against Johnson, as it had been executed without any pecuniary consideration, and the services referred to in Graham's letter of the 6th March 1862, being those of a barrister, it was settled that they could not be the consideration for such a document: (*Brown* v. *Kennedy*, 9 L. T. Rep. N. S. 302, 736; 33 Beav. 133.) Moreover the plaintiff executed the bond in ignorance of its effect and legal nature. He was also, they submitted, entitled to have it set aside as against Barlow, who being the assignee of a *chose in action*, could only have taken it subject to the equities subsisting between the plaintiff and Johnson. Barlow must take the consequences of not having ascertained whether the bond was tainted with fraud or irregularity before buying it, for the purchaser of a *chose in action* was bound to make such inquiries; this was clearly settled by *The Athenæum Life Insurance Company* v. *Pooley*, 3 De G. & J. 294; 28 L. J. 119, Ch.; and *Cockle* v. *Taylor*, 15 Beav. 103.

The forbearance of Barlow to sue was not a good consideration for the plaintiff's promise to redeem the bond, for the plaintiff made the promise in ignorance of his rights. They cited

Bell v. *Gardiner*, 4 Man. & Gr. 11;
Chitty on Contracts, p. 25.

Jessel, Q.C. and *Hemming*, for the defendant Barlow, contended that the plaintiff's letter of the 6th March 1862, having clearly been written for the purpose of inducing third parties to advance money on the bond, precluded him from setting up against a *bona fide* purchaser of it the equity which he had against Johnson. On this point they cited

Re Agra and Masterman's Bank; Ex parte Asiatic Banking Corporation, 16 L. T. Rep. N.S. 162; L. Rep. 2 Ch. App. 391;
Re Blakely Ordnance Company; Ex parte New Zealand Banking Corporation, 18 L. T. Rep. N.S. 132; L. Rep. 3 Ch. App. 154;
Re General Estates Company; Ex parte City Bank, 18 L. T. Rep. N.S. 894; L. Rep. 3 Ch. App. 758.

They contended moreover that the plaintiff was bound by his promise to Barlow's solicitors, upon the faith of which promise they had forborne to sue him till after he had filed his bill in the present suit. They cited

Forth v. *Stanton*, 1 Wms. Saund. 210, note;
Lee v. *Muggeridge*, 5 Taunt. 36.

Cracknall, for the defendant Johnson, contended that upon the evidence the bond was intended by the plaintiff as a gift to Johnson, and that it had not been obtained by undue influence. Johnson's services to the plaintiff formed a consideration on which the bond might be supported. He cited

Hunter v. *Atkins*, 3 My. & Kee. 113;
Kennedy v. *Brown*, 13 C. B. 677.

Lord ROMILLY, without calling for a reply, said: I think the plaintiff is entitled to a decree against both defendants. The cases against the two defendants are distinct, and I will take them separately. First as regards Johnson, the plaintiff and he were intimate friends, and were in the habit of accepting accommodation bills for each other. In that state of things the plaintiff, at Johnson's invitation, comes to Johnson's chambers; Johnson produces a bond prepared and engrossed, by which the plaintiff binds himself to pay Johnson 1000*l.*, and the plaintiff executes the bond and sits down and writes this letter. [His Lordship read the letter of the 6th March 1862.] The plaintiff says that this letter was dictated to him by Johnson; this Johnson denies, and I think that probably it was not actually dictated by him, but I think it is clear that it was written at his instance. The letter is dated from Wilson's Hotel, where the plaintiff was living; it is quite unintelligible why this should have been done and why the plaintiff should have stated all the circumstances mentioned in the letter, if he was only making Johnson a present of 1000*l.* But the plaintiff says that he thought he was only doing what he had done before, putting his name to a bill or negotiable instrument upon which Johnson could raise money, but which he (the plaintiff) would never be called upon to pay. Afterwards, being alarmed at the circumstance of a witness having been present when he signed the bond, the plaintiff asks Johnson about his liabilities, and Johnson gives him a letter, in which he does not mention the bond, and in which he says, "There is nothing more you can become liable for me for." I am satisfied that the plaintiff's is the true account of the transaction, and that Johnson has failed to make out that the bond was intended as a *bona fide* present of 1000*l.* to him. There was nothing whatever to induce the plaintiff to make him such a present, and if he had done so, I think that he might have insisted on having it back the next day. After Johnson's letter of Feb. 1864, the plaintiff naturally thought no more about the matter until a claim was made upon him by the assignee of the bond, and thereupon he wrote to Johnson asking to be kept harmless, which is quite consistent with his own account of the transaction. Under these circumstances, I am clearly of opinion that, as against Johnson, the plaintiff is entitled to have the bond cancelled. The plaintiff was twenty-six years old, Johnson was thirty-two; they met together after a month's familiar association, and one gave the other a bond, believing it to be a bill of exchange. I think Johnson was bound to give up the bond, if the plaintiff required it, and that this is a case in which the right to have the bond given up is not affected by delay. The case against Barlow is different; he is the *bonâ fide* assignee of the bond, and has given valuable consideration for it. Now the general rule is well settled, that the assignee of a *chose in action* takes it subject to all the equities affecting the original holder, and the question is whether there is anything in the circumstances of this case to take it out of the general rule. The first defence put forward by Barlow is, that this bond was given by the plaintiff to Johnson as a negotiable security. But that does not alter the character of the instrument; a bond is not a negotiable instrument, and the mere fact that the bond was given with the intention that it should be used as a negotiable instrument, the intention not being expressed on the face of the bond, does not make it a negotiable instrument. This bond is, upon the face of it, a mere bond, and the assignee was bound to know that in taking an assignment of such a bond he would take it subject to the equities subsisting between the obligor and obligee. The case is very different where upon the face of the instrument it is made negotiable; that was the case in *Re Agra and Masterman's Bank* (*supra*), where the bank, by the terms of the letter of credit, expressly contracted to honour the bills negotiated upon the faith of the letter of credit. The letter was to be shown to the persons who were to negotiate the bills, and they were requested to endorse on the letter the amount which they advanced. It was, in fact, an ordinary letter of credit, such as a banker gives to a person going abroad, upon which each of the foreign bankers who advances money upon it indorses the amount which he has paid, and the bank could not, after having held out to persons who were to negotiate the bills that it would be answerable for their payment, refuse to be answerable on the ground of any equity between the bank and the persons to whom the letter was given. If the plaintiff had said in this bond, "I undertake to pay anyone who shall advance money on the faith of this bond," the case would have been within the authority of *Re Agra and Masterman's Bank*, but it would be introducing a new doctrine if I were to hold that the assignee of a bond is relieved from the equities between the original parties by an unexpressed intention. Barlow's second ground of defence is, that what took place in 1865 between the plaintiff and Barlow's solicitors, created a new and independent contract between the plaintiff and Barlow. Now, in all the cases in which forbearance to sue has been held to be a sufficient consideration to support a promise to pay, the person forbearing to sue has had a right to sue. I have not now to consider what would have been the effect if Barlow had been induced to deliver up the bond to the plaintiff by the plaintiff's promise to settle it; but the question I have to consider is whether, assuming, as I must assume, that the plaintiff when he made the promise was ignorant that the Court of Chancery would restrain an action on the bond without re-

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quiring him to pay off what had been paid by Barlow to the obligee, his promise made in consideration of Barlow's forbearance to sue is binding on him. I think it is not; and that he is not, under the circumstances, precluded by it from availing himself against Barlow of the equities between himself and Johnson. I will, therefore, make a decree for a perpetual injunction to restrain the defendants from prosecuting any action at law or other proceedings against the plaintiff upon the bond, and satisfaction must be entered upon the judgment. I shall not make Barlow pay costs, but Johnson must pay the plaintiff's costs.

Solicitor for the plaintiff, *Elgood.*

Solicitors for the defendants, *Moseley, Tayler,* and *Moseley*; *Johnston, Farquhar,* and *Leech.*

April 30 *and May* 24.

ELGOOD *v.* COLE.

Will—Construction—"Profits"—Surviving family—Power of appointment—Execution of by will.

A testatrix, by her will, gave certain real and personal property to her daughter, Mary Anne, absolutely. She afterwards made a codicil to her will, which contained the following words:—"The profits arising in my will, which I have given my daughter Mary Anne, I give her for her life, and at her disposal by will into my surviving family, as she may think proper. In case she died without a will, then I request her property may be divided to the females in Mrs. L.'s, Mr. W.'s, and Mr. J.'s daughters, share and share alike." Mary Anne, by her will, in which she made no reference to her mother's will or codicil, gave all her property to her neice R., who was a grandchild of the testatrix:

Held, first, that the words, "the profits arising in my will," were confined to the real estate of the testatrix.

Secondly, that R. was one of the members of the testatrix's family, and one of the objects of the power.

Thirdly, that Mary Anne's will was not a good execution of the power, but that it operated upon all her property not included in the codicil.

Stillman *v.* Weedon, 16 *Sim.* 26, *not followed.*

This was a suit instituted by the legal personal representative of Mrs. Elizabeth Cole to obtain the decision of the court as to the rights of certain persons in the residuary personal estate of the testatrix.

By her will dated the 28th Oct. 1833, the testatrix (after reciting her husband's will, whereby he gave and devised all his estates, hereditaments, and premises, as well freehold as leasehold, at certain places therein named, to trustees upon trust, from and after the decease of his wife, for such persons and in such manner as she should by deed or will appoint) in exercise of the said power contained in her late husband's will, appointed and devised the same estates, hereditaments, and premises to trustees upon trust to pay the rents, issues, and annual produce thereof to such of her children, William George Cole, Robert Martin Cole, John James Cole, Elizabeth Laing, Maria Cole, and Mary Anne Cole as should be living at the time of her (the testatrix's) death, during their natural lives, share and share alike; and in case of the death of any or either of her said children either in her lifetime or after her decease (except her daughters Maria Cole and Mary Ann Cole) upon trust to pay and apply the share or shares in the said rents and profits of such child or children so dying and leaving lawful issue him or her surviving to or for the benefit of his, her, or their child or children respectively until the decease of the survivor of all her (the testatrix's) said children: and after the death of all her children upon trust to hold the said estates, hereditaments, and premises (except certain ground-rents therein mentioned) as to one-sixth part thereof to and for the use of her said daughter Mary Anne Cole in fee. And after making certain bequests, as to all the rest and residue of her personal estate and effects whatsoever and wheresoever, the testatrix gave and bequeathed the same unto her two sons, Henry Robert Cole and William George Cole, and her two daughters Maria Cole and Mary Anne Cole, their executors and administrators, equally to be divided between them, share and share alike.

The testatrix made ten codicils to her will, the second of which alone was material to the present suit, and which was dated the 8th Jan. 1835, and was in the following words:

A codicil to my last will and testament, dated 28th Oct. 1833. The profits arisseing in my will, which I have given to my daughter Mary Anne Cole, I give her for her life and at her disposal by will into my surviveing family as she may think proper. In case she dies without a will, then I request her property may be divid'd to the feemails in Mrs. Laing's, Mr. W. G. Cole's, and Mr. Jno. Jas. Cole's daughters, share and share alike.

The testatrix died in Sept. 1837.

Mary Anne Cole made her will dated the 28th Aug. 1863, and thereby, after giving certain legacies, bequeathed all the residue of her estate subject to the payment of her just debts, funeral and testamentary expenses and legacies, and the expenses of carrying into effect the trusts of that her will, unto her niece and goddaughter, Rosa Anne Cole, for her own absolute use and benefit, and appointed the plaintiff executor of her will.

This will did not contain any allusion to the will or codicils of Elizabeth Cole, and did not purport to be made in exercise of the power given to Mary Anne Cole by her mother's will.

Questions arose in the administration of the estate of Elizabeth Cole in regard to the one-fourth share of her residuary personal estate bequeathed by her will to Mary Anne Cole, as to the effect and meaning of the said codicil of the 8th Jan. 1835, and whether Rosa Anne Cole (who was made a defendant to the present suit) was entitled thereto by virtue of Mary Anne Cole's will, or whether such one-fourth share was divisible amongst the daughters of Mrs. Laing, Mr. W. G. Cole, and Mr. Jno. Jas. Cole, living at the decease of the said Elizabeth Cole, or born after her decease and before the death of the said Mary Anne Cole.

To determine these questions the plaintiff instituted the present suit, to which Rosa Anne Cole and Elizabeth Laing were made defendants.

Cates, for the plaintiff, took no part in the argument.

W. W. Karslake, for Rosa Anne Cole, submitted that she was within the power, as it was well settled that the donee of such a power might select persons not within the degree of next of kin, and that Mary Anne Cole's will was a good execution of the power given to her by her mother's will, though it did not purport to be an execution of the power. He cited,

Grant v. *Lynam,* 4 Russ. 292;
Williams v. *Williams,* 1 Sim. N. S. 358;
Stillman v. *Weedon,* 16 Sim. 26.

Southgate, Q.C., for Mrs. Laing (who represented the persons claiming under the gift over in the codicil of 8th Jan. 1835), cited,

Weale v. *Ollive,* 32 Beav. 421;
Knight v. *Poole,* 32 Beav. 548;
Cripps v. *Wolcott,* 4 Madd. 11.

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May 24.—Lord ROMILLY.—This is a suit to determine the rights of certain persons under the will and codicils of Mrs. Elizabeth Cole, who made her will in the year 1833, and afterwards made ten codicils to her will. On the second codicil the questions arise for the decision of which this suit was instituted. [His Lordship stated the will, and read the second codicil.] The first question which arises is, what does this codicil include under the words "the profits arising in my will?" I think that these words are confined to the income arising from the real estate, which she designates in the will by the words "rents and profits." The second question is, what is the meaning of the word "family;" and whether a person who is niece of Mary Anne Cole and grandchild of the testatrix comes within the word "family," and is one of the objects of the power contained in the codicil. The third question is whether Mary Anne Cole's will is a good execution of the power contained in the codicil. The cases on the meaning of the word "family" are very numerous, and its meaning depends on a variety of circumstances. Sometimes it means heir-at-law, at other times it means next of kin. In the present case I am of opinion that the niece of Mary Anne Cole and grandchild of the testatrix is one of the members of her family, one of the objects of the power contained in the codicil, and one of the persons to whom Mary Anne Cole must have given the interest given to her by her mother's will. But on the third and most important question, viz., whether Mary Anne Cole's will is a good execution of the power, I have reluctantly come to the conclusion that it is not, and that it is not assisted by the 27th section of the Wills Act, inasmuch as that relates only to general powers, while this cannot be treated as a general power, inasmuch as the appointees, the objects of the power, must be members of the surviving family of the testatrix. The case of *Stillman* v. *Weedon* (*sup.*), to which I was referred, seems to have a contrary tendency; but that case must be considered as resting on its own foundation exclusively. That case was very peculiar, and was affected by two different powers contained in it. I am of opinion, therefore, on the whole, that the codicil of the first testatrix is confined to the real estate, and that the will of the donee of the power, Mary Anne Cole, is not a good execution of the power given to her; but that it operates upon all that Mary Anne Cole tried to dispose of which was not included in the codicil.

Solicitor for all parties, *Elgood.*

May 29; *June* 1 *and* 3.

THE WATFORD AND RICKMANSWORTH RAILWAY COMPANY *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Suit for account—Agreement to refer—Railway Companies Arbitration Act 1859 (22 *&* 23 *Vict. c.* 59), *sects.* 2 *and* 26—*Jurisdiction.*

An agreement entered into between two companies contained an arbitration clause, by which it was provided that in every case in which any difference should arise between the two companies touching the construction of the agreement, or touching anything to be done, &c., in pursuance of the agreement, or touching any of the incidents or consequences of the agreement, &c., should be referred to and determined by arbitration according to the provisions of the Railway Companies Arbitration Act 1859.

On a bill by one of the companies praying for an account as to matters connected with the agreement, to which the other company objected, requiring the matters to be referred to arbitration:

Held that the 26*th section of the Act renders it compulsory on the court to give full effect to the agreement to refer.*

Bill accordingly dismissed.

This was a suit to obtain a declaration of the rights of the above-named railway companies, under an agreement made between them, and dated the 16th June 1862; the bill also prayed for the taking of accounts, and the payment of what should be found due to the plaintiff company under the agreement.

The plaintiff company was incorporated by the Watford and Rickmansworth Railway Act 1860, for the purpose of making a branch line from the Watford station of the London and North-Western Railway to Rickmansworth, and the agreement of the 16th June 1862 was entered into between the two companies for the working of the branch line by the defendant company, when opened for traffic. This agreement provided that as soon as the branch line should be completed to the satisfaction of the inspector to be appointed by the Board of Trade, so as to be opened for public traffic, and should have been passed by such inspector, together with all proper and sufficient sidings, stations, approaches, works, and conveniences, the plaintiff company should hand the same over to the defendant company, who should thereafter work and use the same with their own engines and carriages, and at their own expense; that on and after the expiration of one year after the completion and opening for traffic of the branch line, the defendant company should, at their own expense, keep in repair and maintain the same in good working order or condition; that in consideration of such working and use as aforesaid, the defendant company should pay to the plaintiff company half yearly a sum equal to 50 per cent. of the actual amount of the gross earnings from tolls, rates, and charges (to be fixed and levied in manner therein provided) received by them in respect of traffic of all kinds, as well local as through, over, and in respect of the branch line or any part thereof; that the defendant company should, within forty-four days after the 30th June and the 31st Dec. in each year, make out and submit to the plaintiff company a true and particular account of the gross earnings from traffic of all kinds, local as well as through, due in respect of such traffic over or upon the branch line or any part thereof, and should, if and when so required, duly verify such accounts, and permit inspection and transcripts to be made at reasonable times and by one or two persons to be appointed by the plaintiff company, of all books, vouchers, and documents relating thereto, and that such accounts respectively, if not objected to within fourteen days from the delivery thereof, should be accepted as final and conclusive except as to manifest errors; and if objected to, in whole or in part, and any difference or dispute should arise thereon, such difference or dispute should be referred to an accountant to be agreed upon between the companies, or, failing such agreement, to be nominated by the secretary for the time being of the Committee of the Railway Clearing-house, London.

The agreement contained an arbitration clause in the following words:—

In every case in which any difference shall arise between the London and North Western Company and the Watford Company, touching the true intent or construction of this agreement, or touching anything to be done, suffered, or omitted in pursuance of this agreement, or touching any of the incidences or consequences of this agreement, or touching any breach or non-fulfilment of this agreement, or touching any liability, damages, losses, costs, or expenses by reason of any such breach or non-fulfilment, or touching any claim or demand relating to any such liability, damages, losses, costs or expenses, or otherwise relating to the premises, every such difference shall be referred to and deter-

mined by arbitration according to the provisions of the Railway Companies Arbitration Act 1859.

The consent of the Board of Trade having been obtained, the Watford and Rickmansworth Railway was opened for traffic on the 1st Oct. 1862, and soon afterwards disputes began to arise between the parties to the agreement, the defendant company alleging that the branch line was not constructed in such a manner as to enable them to work it profitably.

By the present bill, which was filed in Aug. 1867, the plaintiff company claimed that there was due to them 50 per cent. on the sum of 8275*l.* 9*s.* 5*d.*, which they alleged to be the amount of the gross traffic earnings received by the defendant company; they prayed that the rights of the two companies under the agreement of the 16th June 1862, might be declared; that an account might be taken of the tolls, rates and charges levied or charged by the defendant company for the conveyance of passengers and goods upon the branch line; and that what should be found due to the plaintiff company in respect thereof might be ordered to be paid to the plaintiff company with compound interest at 5 per cent. per annum.

The defendant company claimed by their answer that they were entitled to set off against the plaintiff company's claims, sums amounting to more than the plaintiff company's claim, expended by them in completing the branch line, which they alleged ought to have been completed by the plaintiff company. They submitted that the proper remedy of the plaintiff company was by an action at law or by a reference to arbitration under the agreement, and not by a suit in equity, and they claimed the benefit of the objection as if they had raised it by demurrer or plea.

Locock Webb (with him Sir *R. Baggallay*, Q.C.), for the plaintiff company, first examined the items of the defendants' claim to set off, which were set out in a schedule to their answer, and submitted that their claim was unfounded. He submitted that the courts of law and equity had concurrent jurisdiction in a case of this sort, that this was a case which could not be satisfactorily dealt with at law, and that when proceedings were once commenced in equity, the court would direct an account to be taken. He cited

The South-Eastern Railway Company v. *Brogden*, 3 M. & G. 8;
O'Connor v. *Spaight*, 1 Sch. & Lef. 305;
Nixon v. *The Taff Vale Railway Company*, 1 H. of L. Cas. 111;
The North-Eastern Railway Company v. *Martin*, 2 Phil. 759; 5 Rail. Cas. 478.

As to the question of arbitration, he submitted that it was not compulsory upon the court to grant an arbitration, as there was no covenant in the agreement not to sue; this was clearly decided by the authorities on former Arbitration Acts, and he submitted that the Railway Companies Arbitration Act 1859 did not go any further than the other Arbitration Acts which preceded it. He cited

Scott v. *The Corporation of Liverpool*, 3 De G. & J. 334;
Halfhide v. *Fenning*, 2 Bro. C. C. 336;
Dimsdale v. *Robertson*, 2 J. & L. 58;
Scott v. *Avery*, 5 H. of L. Cas. 811;
The Earl of Mexborough v. *Bower*, 7 Beav. 132;
McIntosh v. *The Great Western Railway Company*, 3 Sm. & G. 146;
Croskey v. *The European and American Steam Shipping Company*, 2 L. T. Rep. N. S. 566; 1 J. & H. 108;
Cooke v. *Cooke*, 16 L. T. Rep. N. S. 313; L. Rep. 4 Eq. 77.

Speed, for the defendant company, contended that the account asked for was of such a simple nature that it could be obtained in an action at law, and that the agreement being one of which the court could not enforce specific performance, as it was one for the working of the branch line in perpetuity, the court would not decree an account. In *The South-Eastern Railway Company* v. *Brogden* (*sup.*) Lord Cottenham decreed an account, but he did so on the well known principle that the account was a complicated account, but in the present case there was no complication. He also referred to

O'Connor v. *Spaight* (*sup.*);
Nixon v. *The Taff Vale Railway Company* (*sup.*);
Dabbs v. *Nugent*, 13 L. T. Rep. N. S. 396; 11 Jur. N. S. 943;
Dinwiddie v. *Bailey*, 6 Ves. 136;
Phillips v. *Phillips*, 9 Hare, 471;
Padwick v. *Hurst*, 18 Beav. 575;
Foley v. *Hill*, 2 H. of L. Cas. 28;
The North-Eastern Railway Company v. *Martin* (*sup.*)
Smith v. *Leveaux*, 9 L. T. Rep. N. S. 313; 2 De G. J. & S. 1;
Moxon v. *Bright*, L. Rep. 4, Ch. App. 292;
Kernot v. *Potter*, 3 De G. F. & J. 447.

Moreover by the 2nd and 26th sections of the Railway Companies Arbitration Act 1859, taken in conjunction with the arbitration clause contained in the agreement of the 6th June 1862, the court was deprived of its jurisdiction.

Sir *Richard Baggallay*, Q.C. was heard in reply on the question of the effect of the sections of the Act, and the clause in the agreement on the jurisdiction of the court. He cited

Cook v. *Catchpole*, 11 L. T. Rep. N. S. 264.

The following sections of the Railway Companies Arbitration Act 1859, were relied upon by the defendant company:

Sect. 2:

Any two or more railway companies, whether already or hereafter incorporated (in this Act called "the companies") from time to time, by writing under their respective common seals, may agree to refer, and may refer, to arbitration, in accordance with this Act, any then existing or future differences, questions, or other matters whatsoever in which they then are, or thereafter shall be, mutually interested, and which they might lawfully settle or dispose of by agreement between themselves, and may delegate to the person or persons to whom the reference is made any power to determine all or any of the terms of any contract to be made between the companies which the directors of the companies might lawfully delegate to any committees of themselves respectively.

Sect. 26:

Full effect shall be given by all the Superior Courts of law and equity in the United Kingdom, according to their respective jurisdictions, and by the companies respectively and otherwise, to all agreements, references, arbitrations, and awards in accordance with this Act; and the performance or observance thereof may, where the courts think fit, be compelled by distress infinite on the property of the companies respectively, or by any other process against the companies respectively, or their respective property, that the courts or any judge thereof shall direct, and where requisite frame for the purpose.

June 3.—Lord ROMILLY.—On looking at the papers in this case I am quite satisfied that the account prayed by this bill is not one that would be taken in an action at law, but that if an action were brought the matter would at once be referred to arbitration. Many cases have been cited to me, but in these questions of account one case does not govern another, but each case depends upon its own circumstances. I am quite clear that the nature of this particular case is such that it would be a proper case for an account in equity; but a greater difficulty arises out of the agreement to refer disputes to arbitration. I am of opinion that it is impossible to evade the words of the agreement. The plaintiffs assert that the whole question between them is to be governed by the agreement, which they say has not been observed by the defendants; and they also say that the case made by the defendants for a set-off rests upon an alleged

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understanding, which was no part of the agreement. It is impossible, however, to escape from the words of the arbitration clause; the matters complained of by the plaintiffs have been done by the defendants either in pursuance of a right which they have under the agreement, or in non-fulfilment of their obligations under the agreement, and, in either case, these matters come within the questions agreed to be referred to arbitration. [His Lordship read the arbitration clause and the 2nd and 26th sections of the Railway Companies Arbitration Act 1859, and continued.] The present account is clearly within the arbitration clause; it remains to be considered whether the 26th section of the Act makes the reference to arbitration compulsory, and ousts the jurisdiction of the court, which is not ousted by an ordinary agreement to refer. The question is quite new to me, and no decision in point has been cited. The agreement, however, being clearly within the description contained in the 2nd section of matters which may be referred, I think that the words of the 26th section are conclusive, and render it compulsory upon the court to give full effect to the agreement. If the defendants will consent to waive the point, and, if both sides can agree as to the amounts of the items in dispute, I shall have no objection to act as arbitrator, and to hear in chambers and decide on the rights of the parties under the agreement; but if the defendants insist upon their right to take the objection that the plaintiffs' claim is covered by the arbitration clause, I must dismiss the plaintiffs' bill, but without costs, because the defendants might have raised their objection by plea.

Solicitor for the plaintiff company, *W. Clarke.*

Solicitor for the defendant company, *Blenkinsop.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

May 31st, and June 1st.

LAING v. REED.

Demurrer—Benefit society — Certificate of rules— 6 & 7 Will. 4, c. 32.

The trustees of a Benefit Building Society by its 18th rule were empowered to borrow money, at interest on legal security, and be indemnified by the society, the trustees not being responsible, and the money borrowed not to exceed a certain proportion of the society's mortgages. A bill was filed charging that the rule was invalid, and to restrain such borrowing. On general demurrer to such bill,

Held, that the barrister's certificate was only conclusive as to matters within his jurisdiction, and that the question of the validity of the rule was one upon which by possibility the plaintiffs might be entitled to relief at the hearing. Demurrer overruled, reserving costs.

This was a general demurrer for want of equity to a bill filed by Thomas Heron Laing, on behalf of himself and all other the shareholders of the Northern Counties Permanent Benefit Building Society except the defendants, against Matthew Reed, William Brogg Leighton, and Mason Watson. The bill stated that the society was formed in January 1851, at Newcastle-on-Tyne, under 6 & 7 Will. 4, c. 32, and rules were passed at a meeting, and certified by the barrister appointed for that purpose, the objects being thus stated: For raising, by weekly contributions, a stock or fund to enable each member to erect or purchase a dwelling-house, or other real or leasehold property. The affairs to be conducted by three trustees, two stewards, twelve directors, and a treasurer, surveyor, auditor, solicitor, and secretary, to be elected annually, except the trustees and stewards. The trustees *ex officio* to be directors, the funds and property being vested in them subject to the rules. That whenever a shareholder should desire to receive an advance he should make application, and if he did not offer security when the secretary gave notice, he should forfeit 2s. 6d. per share. The secretary at the first monthly meeting to produce to the directors all applications for advances, to be dealt with in a manner specified. As the society's funds accumulated, notice should be sent to shareholders on the list for advances informing them when they might receive them. The 18th rule was as follows:—

(1) That the trustees for the time being may, from time to time as occasion shall require, borrow and take up at interest any sum of money from any banker with whom the funds of this society shall be deposited, or from any other person; to procure which the trustees may give their own personal security, and they shall be indemnified out of the first funds of this society which shall be received. (2) That the parties lending money to the trustees of this society pursuant to the provisions herein contained, shall be allowed interest for the same at the rate of, and not exceeding, 5l. per cent. per annum, such interest to be payable half yearly or otherwise as may be agreed upon; and that all loans to the society shall be repayable to the lender by giving twenty-eight days' notice on any monthly meeting night of the society. (3) That for securing the repayment to the person or persons advancing the same, of all moneys to be so borrowed by the trustees, on behalf of the society as aforesaid, it shall be lawful for them, the said trustees, to give or authorise to be given such form of security as may be legal and as the said trustees shall think proper and necessary for or in respect of the same. (4) That no trustee (except by his consent expressly signified in writing on the security to be given to any banker) shall become responsible for any sum or sums of money so borrowed as aforesaid. And (5) That the total sum of money to be borrowed under the rule shall not at any one time exceed two-thirds of the amount for the time being secured by mortgages to the society, including mortgage or mortgages for which such advance or advances may be required.

That the society had carried on a considerable business for eighteen years, and the plaintiff on the 16th Jan. 1869 became a member and the registered holder of one unadvanced share, the defendants being the trustees. That said defendants from time to time and on the alleged authority of said 18th rule, had borrowed from various persons 66,362*l.* 19*s.* 8*d.* according to the financial statement of the society ending Dec. 1868, and submitted to a general meeting held the 18th Jan. 1869, secured by promissory notes signed by the defendants, and countersigned by the secretary, at six months, with interest at 5*l.* per cent., and it appeared by such statement that during the year 1868 8482*l.* 2*s.* 10*d.* had been paid out of the assets of the society for interest. The bill then charged that such 18th rule was absolutely illegal and invalid, and that the borrowing of money on behalf of the said society was beyond the powers of, and a breach of trust on the part of, the defendants as trustees, and the payment of such interest was a misappropriation of the funds and a breach of trust, for which the defendants were responsible. That the defendants had also lent a portion of the assets to other building societies, to wit, the Grange Permanent Benefit Building Society, and the Gateshead Institute Permanent Building Society, who were not members of the society, on the security of the promissory notes of the trustees. The plaintiff believed that those particular loans had been repaid, but he charged that they were absolutely void and illegal. The bill then charged generally that the transactions complained of were illegal and invalid, and incapable of confirmation by any majority of the shareholders, and alleged that the defendants threatened and intended to borrow money on behalf of the society and pay interest thereon, and that the defendants ought to be restrained from so doing, and from lending the assets until the moneys already borrowed had been repaid. That the shareholders were 1400 in number, too numerous to be

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made parties, and their interests were sufficiently resented by himself. And the bill prayed a declaration that the 18th rule of the society was absolutely illegal and invalid, and the borrowing money on behalf of the society and paying interest on it out of the assets, and lending any part of the assets to any person not being a member thereof were beyond the powers of, and a breach of trust on the part of, the defendants, and every other officer of the society. To restrain the defendants from borrowing money on behalf of the society and paying interest, and advancing any part of the assets to any member until all moneys borrowed by the defendants had been repaid, and from advancing any part of the assets to any person other than a member, and to provide for the costs.

Sir *Roundell Palmer*, Q. C., *Osborne*, Q. C., and *Chitty*, in support of the demurrer, contended that there was a statutory power to make rules, and those rules being certified by Mr. Tidd Pratt, that was conclusive of their legality. Independent of that, moreover, the terms of the statutes themselves showed that there was nothing whatever illegal or invalid in the 18th Rule. Sums were entirely comparative, and the 66,362*l.* 19*s.* 8*d.* might not be a large sum compared with the transactions of the society. It appeared on the allegations of the bill to be a flourishing one, and had continued for eighteen years doing a large business, and this rule had been acted upon satisfactorily and unquestioned during all that period, alone good evidence of its legality, and the plaintiff had now evidently purchased the least amount of interest he could acquire, merely for the purposes of the suit, and the court would look with little favour on such a person.

Mallock v. *Jenkins*, 14 Beav. 628;
Armitage v. *Walker*, 2 K. & J. 211-15;
6 & 7 Will. 4, c. 32, s. 4;
Dewhurst v. *Clarkson*, 3 Ell. & Bl. 206;
Pare v. *Clegg*, 29 Beav. 598;
Tidd Pratt's Practice of Benefit Societies;
Parker v. *Butcher*, L. Rep. 3 Eq. 762.

Glasse, Q. C. and *Graham Hastings*, for the plaintiff, insisted that however small his interest that had nothing to do with the matter; the case stated on the bill must be taken to be true on the demurrer. He was in fact a much better person to bring forward such a question, only having recently become a member, and therefore not having acquiesced in the wrong. It was a question of great public importance, and on the authorities the certificate of the barrister was only conclusive as to matters within the jurisdiction.

Kelsall v. *Taylor*, 11 Ex. 513;
Reg. v. *Davis*, W. N., Q. B. Jan. 1866, 24;
10 Geo. 4, c. 56, s. 3;
Grimes v. *Harrison*, 29 Beav. 440.

Sir *Roundell Palmer*, Q. C. in reply.

The VICE-CHANCELLOR.—This is a demurrer to the whole bill for want of equity, and, therefore, the question is whether the case so entirely fails, that I am bound, at this stage, to allow the demurrer and put an end to the litigation. (The Vice-Chancellor referred to the bill.) The objects of the society as stated in the bill, are entirely in conformity with the Act of Parliament, but it is alleged that one of the rules is entirely beyond the scope of it, viz., the 18th. (The Vice-Chancellor read the rule.) The power given by this rule is certainly, on the face of it, unlimited; it is "to borrow any sum from any person," the 5th paragraph of it only contains a restriction that the amount should not exceed two-thirds of the mortgages including the mortgage on the advance itself. (The Vice-Chancellor read the remainder of the bill.) It was argued in support of the demurrer that the court would not look with much favour upon a person who comes after eighteen years, no member having complained during all that time, and purchases a single share, I assume for the purpose of the suit. Mr. Glasse, for the bill, answered that by saying that the question may be one of general importance; and, for the purpose of raising that general question, a person not previously mixed up with the affairs of the society is a more proper plaintiff than an old member. Upon the demerits of the plaintiff and the object of instituting the suit I cannot enter on this demurrer; I can only take him as a shareholder prosecuting the litigation at his own risk, and therefore I cannot allow the demurrer on that ground. It is next said that this rule was certified by Mr. Tidd Pratt, and all rules so allowed are binding upon the society, and the 4th section of the 6 & 7 Will. 4, c. 32, is conclusive on that subject. By this it is enacted that all rules and alterations of rules for the management of such societies from the time of the certificate shall be binding on the members and officers and all other persons having an interest therein. It is then said that the certificate is conclusive, and therefore the plaintiff is not at liberty and cannot sustain any claim as to the invalidity of this rule. But authorities have been cited on the other side which oblige me to come to the conclusion that that is not so. Although it is true that *Dewhurst* v. *Clarkson* (*sup.*) decided that the certificate is conclusive, two authorities show the contrary. *Kelsall* v. *Taylor* (*sup.*), and *Reg.* v. *Davis* (*sup.*), where it was held that the certificate is only conclusive as to matters within the barrister's jurisdiction, and will not give validity to a rule repugnant to the objects of the society, in strict conformity with the Act. The 1st section enacts that the society shal assemble from time to time to make proper and wholesome rules for the government, &c., of the society, so long as such rules shall not be repugnant to the express provisions of that Act and the general laws of the realm. I admit that to borrow is not repugnant to the laws of the realm; as to whether it is repugnant to the provisions of the Act, I do not intend to decide anything. I am bound to come to the conclusion that at this stage of the case I cannot put an end to it. If the plaintiff makes out a *primâ facie* case, the question must be decided at the hearing, when the court will be able to act upon complete information. Now, the Legislature says that by means of small periodical subscriptions a fund may be obtained to acquire freehold or leasehold property, and can I say that it is repugnant to the objects of such a society that they should have an unlimited power of borrowing and lending irrespective of the amount of the assets? As I understand it, the object of these societies is to receive from the members certain payments, that is, an income from such payments, fines, &c., that is to be accumulated, and when it is found that they have more than they want for the present expenses, that they should make advances to members, these being the subject of competition by ballot. I had occasion lately, in *Ingles* v. *Cave*, to consider this subject, and if it is said that in order to make advances money should be borrowed, one cannot help regarding it with some suspicion; and upon such materials as the bill presents a demurrer is a very inconvenient form to consider such a question. I am not told the extent of the mortgages; they may amount to a million, and, if so, the 66,000*l.* odd is a small proportion; but the bill alleges, and I must take it to be true, that 3652*l.* was paid last year for interest. It is settled by the two cases cited that the certificate is not final, and cannot give legality to that which is

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illegal otherwise, and Sir Roundell Palmer admitted that this rule did not authorise embarking in any trade, nor did the certificate make it legal. But I find it decided by the Court of Appeal that the certificate is not absolutely binding, and that it has been held that an order signed by the Lord Chancellor and Vice-Chancellors under the Winding-up Acts, was null because not within the scope of those Acts, and by the Court of Exchequer in *Kellsall* v. *Tyler* (*sup.*) that it was not within the province of the society then in question to take policies, all these questions I shall reserve until the hearing, not being satisfied that such an unlimited power of borrowing, is within the provisions of the Act, and warranted by law. *Mallock* v. *Jenkins* (*sup.*) was cited in support of the demurrer; but there the Master of the Rolls stopped the litigation, because there was an attempt to keep both land and money by raising a technical question; but, subsequently, the same judge, in *Grimes* v. *Harrison* (*sup.*) decided that it was beyond the scope of a benefit building society to transact business as a freehold land society. I also decided a similar point in a case where one man purchased, as the agent of another, and repudiated subsequently. Without, therefore, expressing any opinion upon this question, there being considerable doubt how far such a power as this is consistent with the object of the society, I overrule the demurrer, in order that the question may have full consideration on all the facts, and leave it now entirely open; and I shall reserve the question of costs until the hearing.

Solicitor for the plaintiff, *John Tucker*.

Solicitors for the defendants, *Shum* and *Crossman*

Thursday, July 8.

MONTGOMERY v. CAMERON.

Practice—Pro confesso—Requisite forms.

A defendant, having appeared and taken out a summons for time to answer interrogatories, was attached, and there was a return "non est," as he could not be found. On certificate of record and writ clerk, and evidence of service, and on fourteen days' notice, order made to take bill pro confesso.

Langley moved in this cause to take the bill *pro confesso*, on the usual fourteen days' notice. The bill was filed in respect of a breach of trust on the 5th Feb. 1869, and the defendant appeared in person on the 19th. Interrogatories were filed, and served on that day. On the 20th March the defendant took out a summons for time to answer; and on the 24th (a letter having been written meantime) an attachment issued, and a return was made of *non est inventus*. There was an affidavit of the sheriff's officer that on the 3rd June he served a warrant of arrest on the defendant for contempt, and attended at his residence at Richmond on six different occasions, on some of which he saw a female servant, and on one a lady, who said he was not within; and he had not been able to meet with him, although inquiries were subsequently made. There was the usual certificate of the proceedings of the record and writ clerk, and evidence of service:

Seton, 1265.

The VICE-CHANCELLOR.—You appear to have gone through all the regular forms, and you may therefore take the order.

Solicitor: *Proudfoot*.

Friday, July 9th.

Re CROCKFORD'S ESTATE.

Railway company—Payment into court—Will—Precatory trust.

A testator gave all his property, real and personal, to his wife, "relying upon her doing what was right." He left his wife and four daughters surviving, to whom the widow by her will left all her property in joint tenancy. A railway company took part of the land and raised an objection to the title that there was a precatory trust:

Held, that there was not.

Osborne, Q. C. and *C. Locock Webb* appeared upon a petition asking payment out of court of 500*l.* paid in under the provisions of the Lands Clauses Act in order that the Holywell Railway Company under this Act (1864) might take possession. William Crockford, by his will dated in May 1844, gave all his real and personal estate whatsoever and wheresoever to his wife, Sarah Crockford, and continued as follows: "relying on her doing what is right." Sarah Crockford by her will gave all her property to her four daughters (petitioners), who were all single, in such a manner as *primâ facie* to make them joint tenants, and they being in possession the railway company served them with the usual notice to treat and took the land in the ordinary way under the Lands Clauses Act, paying 500*l.* into court. It appeared that the testator had a son. An abstract title was delivered, and matters went on until the spring of the present year, when the company took an objection to the petitioners' title, contending that the will of William Crockford contained a precatory trust to the widow. The petitioners being ready to execute a conveyance, on the ground that the company were in truth only taking this and other objections in order to force them to sell another piece of land required by the company but which they had no Parliamentary powers to purchase, presented the present petition.

Fischer, for the company, contended that there was a trust granted by the will of William Crockford in favour of some objects, or for some purposes unknown, or which did not appear, but were probably known to the widow, and it made no difference that she had not acted upon it. In *Briggs* v. *Penny*, 3 M. & G. 546, there was a gift of certain property to Sarah Penny, her executors, administrators, and assigns, "well knowing that she will make a good use and dispose of it according to my views and wishes," and there it was held that there was a good trust. Moreover the abstract was quite insufficient, and there was no delay on the part of the company. The testator had also left a son.

The VICE-CHANCELLOR (without hearing a reply).—I cannot destroy the title of these petitioners upon a mere conjecture. If I were to yield to the argument they have no title at all. The sole question is whether, under the will of William Crockford, a trust was created. What he says is simply "relying upon her (his wife) doing what is right." Not, "I have told her to do anything"; neither the purpose nor the persons are indicated, and what language can possibly be more vague. It would be impossible for the court to act upon it, even supposing I held that there was a trust of some kind, unless there is some evidence from which a conclusion can be drawn. Taking the words in the largest sense, even if you read them "relying that under the circumstances she will make a good use of the property," what does that amount to more than that she can do with it as she chooses; in other words that he gave her, without any annexed obligation

an absolute and unqualified interest, that is an estate in fee-simple. She then made her will devising this same property to her four single daughters in a manner which probably makes them joint-tenants of it for life with remainder to the survivor. It is admitted, indeed it cannot be denied, that the four petitioners amongst them took a fee-simple, and, therefore, the title is clear beyond all possibility of doubt. The company having been put into possession, if I entertained this objection I might keep this money in court for half a century. The contention cannot be sustained, and the argument founded on the testator having left a son must also fail, because mere lapse of time must prevail against him supposing all the rest clear, for once having began to run it was an absolute bar, no subsequent disabilities stopping it. Let the order be made, but not acted upon for a fortnight.

Solicitors for the company, *Sharpe* and *Co.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

Friday, May 7.

Re THE EAST AND WEST JUNCTION RAILWAY COMPANY.

Scheme—Railway Companies Act 1867—Debenture holders — Outside creditors — Absence of fraud — Effect of a majority of three-fourths of debenture holders.

A scheme of arrangement by a railway company with its creditors under the 30 & 31 Vict. c. 127 (The Railway Companies Act 1867), had been assented to by three-fourths in value of the debenture holders of the company.

Held, that in the absence of fraud to invalidate that majority, such assent was binding on all the other debenture holders of the company.

Held, also, that outside creditors were not bound by the scheme.

This was a petition by the directors of the above-named railway company to confirm the details of a scheme of arrangement between the company and its creditors under the Act.

The company was incorporated in 1864, under its particular Act, for the purpose of making a railway from the Northampton and Banbury Junction Railway to the Great-Western Railway at Stratford-on-Avon. The capital was to be 300,000*l.*, in 15,000 shares of 20*l.* each. They had all been issued and called up, and a sum of 100,000*l.*, which the company had power to borrow, had been raised on debentures.

In 1866 an application was made to Parliament to enable the company to increase their capital, and by the East and West Junction Railway (Capital) Act 1866 they were empowered to raise additional capital, not exceeding 300,000*l.* by the creation of new shares, and to borrow further sums, not exceeding 100,000*l.*, when the additional capital should have been subscribed for. It was also provided that all mortgages granted under the powers of the original Act should have priority over any mortgages granted by this Act.

Resolutions were passed at an extraordinary general meeting of the shareholders, held in Jan. 1867, for raising this additional capital, but nothing had been done under those resolutions, and since Aug. 1866 the works on the contemplated line, about twenty miles of which were partially completed, were suspended.

The company had no rolling stock, plant, or other property, beyond land held for the purposes of their undertaking to the alleged value of 43,000*l.*, and they were unable to meet the engagements to the outside creditors, or to pay the interest, much less the principal moneys, due on the debentures.

The debts and liabilities of the company in round numbers amounted to 195,000*l.*

In 1868 an attempt was made by the directors and other parties interested to extricate the company from its difficulties, and to complete the railway. An investigation took place, meetings were held, new directors had been appointed, and a scheme of arrangement was prepared, in which, as subsequently filed, under the Act of 1867 on the 8th March 1869, it was stated that "It is believed that the company can procure from a responsible and experienced contractor an agreement to complete the construction of the company's line of railway;" and that in the event of such a contract being entered into, the company would be able to procure 100,000*l.* on debentures to rank in priority to the existing share and debenture capital. The proposed scheme also stated "that the outside creditors whose claims amounted to 46,377*l.* 11*s.* 5*d.*, will, it is believed, agree to take in satisfaction of their respective claims, equivalent amounts of debenture stock of the company, such debenture stock ranking after the 100,000*l.* debenture stock, and also after the existing debentures of the company."

The scheme also contained *inter alia* the following provisions:

First. That the directors be at liberty to enter into a contract for the completion of the railway within twenty-four months for a sum not exceeding 230,000*l.*

Secondly. That in lieu of the additional share capital of 300,000*l.*, and 100,000*l.* debenture capital authorised to be raised, there shall be created and issued at a discount not exceeding 20*l.* per cent. on the nominal amount thereof debenture stock, to be called *First* Debenture Stock, to the amount of 400,000*l.*, bearing a fixed and perpetual interest at 5*l.* per cent.

Thirdly. That such *First* Debenture Stock and the interest thereof shall be a first charge on the company's undertaking, and shall have priority over the existing debentures of the company, and the interest thereof due and to become due.

Fourthly. That the existing debentures be converted into a sum of 100,000*l.* debenture stock, bearing interest as from six months after the date of the opening of the line at 6*l.* per cent., payable only out of the net profits of the year during which such interest accrues, to be called *Second* Debenture Stock, and to have priority over all other charges except first debenture stock.

Fifthly. Creation and issue of a debenture stock not exceeding 100,000*l.*, to bear interest at 6*l.* per cent, payment only out of the net profits of the year during which such interest accrues, as from six months after the opening of the railway, to be called *Third* Debenture Stock, to rank next in priority after the *Second* Debenture Stock, "and to be allotted and taken at par by the outside creditors of the company (including 8700*l.* 19*s.* 10*d.* arrears of interest, and including also interest on the original debentures, and also upon the claims of the outside creditors from the 31st July 1868 to the expiration of six months after the opening of the railway) as fully paid up stock, according to the amount of their respective debts, and in satisfaction thereof.

At a general meeting of the shareholders of the company especially convened for the purpose, the scheme was assented to without any dissentient, and debenture holders representing 75,280*l.*, out of 99,580*l.*, the amount actually issued, had also assented. It was also stated that nearly all the outside creditors had assented to the scheme.

The scheme, however, was opposed by a Mr. Toogood, a holder of nine mortgage bonds of 500*l.* each, containing an assignment of all the tolls and sums of money arising by virtue of the Companies Act of 1864, from the railway, and all the estate, right, title, and interest of the company therein, dated the 7th Sept. 1864, and falling due in Sept. 1869.

A judgment at law had been obtained by him against the company for 185*l.*, the arrears of interest upon his mortgage securities, and in Dec. 1868, he

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had filed his bill in the court of Malins, V.C., to enforce his security.

After the filing of the scheme the company had, on the 1st April 1869, served Mr. Toogood with notice of motion before James, V.C., for an injunction to restrain him from prosecuting his suit. This, on the 16th April, was ordered to stand over until he had amended his bill.

The scheme was also opposed by a Mr. Pell, who claimed to be a creditor to the amount of 15,000*l.*, for costs and professional charges. This claim was, however, disputed by the company, and by an affidavit made by the secretary in support of the present petition, he stated his belief that upon the matters between Mr. Pell and the company being properly gone into, it would be found that nothing was due to Mr. Pell.

Willcock, Q. C., and *Fry*, in support of the petition, contended that the scheme having been assented to by three-fourths in value of the debenture holders, such appeal bound the rest, and the scheme must be presumed to be right and proper.

C. Dale, for outside creditors to the amount of 25,000*l.*, assented to the terms of the scheme.

Westlake for Mr. Pell, the outside creditor.

The VICE-CHANCELLOR said he considered that outside creditors would not be bound by the scheme. The effect of the judgment of Lord Cairns in the case of the *Cambrian Railway Companies Scheme*, L. Rep. 3 Ch. 278; 17 L. T. Rep. N. S. 512, 530, was to declare that the assent of outside creditors was not required. An outside creditor was not within the meaning of sect. 18 of the Act of 1867.

Westlake then contended that the court would not confirm any scheme which attempted to bind outside creditors without their written consent.

Re The Bristol and North-Somerset Railway Company, L. Rep. 6 Eq. 448; 17 L. T. Rep. N. S. 641.

E. E. Kay, Q. C., and *J. Napier Higgins*, for Mr. Toogood, the dissenting debenture holder. In addition to the case cited by Westlake, they relied on

Furness v. *Caterham Railway Company*, 26 Beav. 614, 27 Beav. 358.

The VICE-CHANCELLOR said:—In this case I am of opinion that the scheme ought to be confirmed, notwithstanding the objections that have been raised to it, and I propose to preface my order by a declaration that the court is of opinion that according to the true construction of the scheme it does not, and does not purport to, bind the outside creditors to accept the *Third* Debenture Stock in satisfaction of their debts. The clause relating to this *Third* Debenture Stock is to be read in connection with the recital which precedes, viz., "The outside creditors of the company, whose debts and claims as hereinbefore stated amounted to 46,877*l.* 11*s.*, will, it is believed, agree to take in satisfaction of their respective claims, equivalent amounts of debenture stock of the company, such debenture stock ranking after the 400,000*l.* debenture stock and also after the existing debentures of the company;" and in the belief that they will take it, authority is given to raise debenture stock, to be allotted to them and taken by them, at par, if they agree to take it in satisfaction of their debts. That, I think, disposes of the objection of the one creditor who comes here to oppose the scheme; and having regard to the circumstances that he is a creditor certainly in a very doubtful position, being a person who has got an account pending between himself and the company, on which the company say it will turn out that he is a debtor and not a creditor, and also that the account has been in abeyance since last August, I do not think he stands in a very favourable position for asking the court to interfere in his behalf. If I thought that the scheme deprived any creditor of any reasonable prospect of being paid, I should have had much more hesitation in confirming it; but I cannot help seeing that unless some scheme is resorted to there will be nothing for the company and nothing for the outside creditors. With regard to the debenture holders, it may be different, as there may be some little value in the price of the land which has been obtained for the purposes of the railway. Now, the 10th section of the Act of 1867 has said that a majority of three-fourths of the debenture holders shall bind the others, and that when three-fourths in value of the holders of such mortgages or bonds have assented in writing it shall be deemed to be assented to by the holders: that is to say, by all the holders, and therefore the debenture-holder comes here having in law assented to it by the vote of the majority. It is still open to the debenture-holder (and I have therefore heard him) to show that it was a fraudulent arrangement, and that the majority was really obtained by fraud. Supposing it was made out that in order to constitute a majority some of them received a bribe, that would be a very substantial objection. When the books are looked at the objection seems to resolve itself into this, that there has been a great waste of money, and an improvident expenditure in the conduct of the affairs of the company, but there is nothing, in my opinion, averred showing that the holders who have given their votes are not holders of mortgages or bonds, or that they do not amount to that which the Act of Parliament has required, to three-fourths in value of the existing mortgages or bonds. That being so, in the absence of any case of fraud—not fraud in the dealings of the company, but fraud in obtaining the assent of the requisite three-fourths—the debenture-holder is bound by the assent of that majority. I do not know whether it is likely to do the company any good or not, but all the outside creditors except this one who has got a particular reason for objecting to any scheme apparently, and all the debenture-holders except one having come to the conclusion that this is the best thing to be done for the company, I must arrive at the same conclusion, taking their testimony upon it, and therefore the order to confirm the scheme ought to be made. There will be no order as to costs, there not appearing to be any fund out of which they could be paid.

Order accordingly.

Solicitors: *Ashurst, Morris*, and *Co.*, *Parker, Rooke*, and *Co.*, *Dale*, and *Stretton*.

July 19 *and* 20.

HALDANE v. ECKFORD.

Domicil—Animus manendi—Length of residence previous to decease—Implied domicil—Costs of inquiry.

R. E., a Scotchman by birth, resided in Jersey for twenty-four years preceding his decease. He took occasional excursions to his native place in Scotland and elsewhere. Two of his children had died in France, and he caused their remains to be disinterred and buried in Jersey. It was proved that he contemplated being buried there himself. He had been in India in early life in the service of the late East India Company. He went to Scotland a short time previously to his death, but there was no proof of any intention to return and reside there:

Held, under these circumstances, and particularly as to

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the length of his residence in Jersey previously to his death, that he had obtained a domicil in Jersey.

Costs of the inquiry out of the general estate.

This cause came on for further consideration on a question raised in chambers as to the domicil of a testator under the following circumstances:—

Robert Eckford, formerly President of the Medical Board of Bombay, in the East Indies, but lately residing in the Island of Jersey, made and executed his last will and testament, bearing date the 28th March 1862 with certain codicils thereto annexed, and which were duly proved in Jersey and England by his executors therein named.

The testator died in Jersey in the year 1865. He was born in 1779 in Dumfriesshire, in Scotland, of Scotch parents. He studied medicine in Edinburgh, and obtained an appointment in the navy. He afterwards accepted an appointment in the East India Company's service, and went out to India. In 1815 he returned to England, and in Jan. 1817 was married in London to a Miss Halliwell. He and his wife shortly afterwards proceeded to India, but in consequence of the bad state of her health she returned to England after two or three years residence, and never returned to India. Dr. Eckford came back to England shortly afterwards, and he and his wife resided in Edinburgh. Two children were born to them there. He returned to India, and remained there till 1832 or 1833, when he quitted India, retiring on the usual pension. He had in the mean time become President of the Medical Board of Bombay.

Within a short period after his quitting India, he and his wife went to live in Jersey, where in the year 1834 a daughter was born. Some time after this they went to St. Servan, on the neighbouring coast of France, where a son was born, but died shortly after its death. The daughter also afterwards died, and both children were buried at St. Servan. In 1841 the husband and wife returned to Jersey. He took a house and resided there until 1865, when he died. He had had the bodies of his two children who had died in France exhumed, and re-interred in Jersey. He had purchased the ground for a grave for them, and he was ultimately buried there himself. He had been in the habit of making occasional excursions to France, Scotland, and other places during the last years of his life, and went to Scotland two or three years before his decease.

The following are extracts from the depositions of some of the witnesses:

Mrs. Elizabeth B. M. Threshie, the wife of a writer to the signet, residing in Jersey, deposed as follows:

I knew and was acquainted with the said Dr. Robert Eckford previous to my marriage, and for fourteen years previous to the decease of said Dr. Eckford. . . I verily believe that during the period over which my acquaintance with the said Dr. Eckford extended it was his intention to spend the remainder of his life in Jersey. I have sometimes heard him say, in reference to the climate of Jersey, "Is not this a fine climate? I never could live anywhere but in this place," or words to that effect. Upon one occasion, when reference was made to my children, he said to me, "Mine are in St. Saviour's burial ground, where I hope to be buried some day.'

Another witness, a Mr. Gautier, also residing in Jersey, said

I knew and was well acquainted with the late Dr. Eckford. In 1846 he became my tenant of a house, garden, and premises in St. Heliers. Subsequently, a written memorandum as to the said tenancy was signed by him and me. He furnished the said house himself, and he continued my tenant for eighteen years and upwards, until the time of his decease.

A Mrs. Mary Anne Robertson, also residing in Jersey, deposed:

Among other conversations with Dr. Eckford, I mentioned on one occasion that I had an idea of going to England, and in a jocular, off-hand kind of way suggested his doing so also, when in reply he adverted to the fact of one of his children having been buried in St. Saviour's Churchyard, in the Island of Jersey, and remarked that that for one thing would keep him in Jersey. In another conversation he told me that nothing but a war with France would induce him to leave Jersey.

A Dr. Vaudin, also of Jersey, deposed:

I knew and was well acquainted with the late Dr. Eckford for a period of at least twenty years preceding his death, and during all that time he resided continuously in Jersey, with the exception of occasional short travelling excursions chiefly in the summer time, never, as I believe, exceeding a few weeks on each occasion. During my acquaintance with the said testator he never consulted me as to his leaving the island, or expressed or intimated any desire or intention to go to reside at any other place. He frequently told me that the climate of Jersey suited him, and that it resembled that of the hilly ranges of India. On one occasion when I tasted a pipe of port wine which he had purchased, he remarked that it would turn out a good wine with keeping, and told me that it was his practice to lay down a quantity of wine from year to year for keeping, meaning, as I understood him, that he laid down such wine in Jersey for the consumption of himself and friends there.

A grandson of the testator, also residing in Jersey, deposed,

That the said testator has never since the year 1841 expressed or intimated to me, or in my hearing, any intention of ever leaving Jersey for another place of residence; and, on the contrary, he at one time was about buying a piece of ground in Rouge Bouillon, Jersey, for the purpose of building a house there for his own residence, and only gave up the idea of so doing from the impression that if he made such a purchase he could not, by the law of Jersey, dispose of the property by his will as he pleased. The said testator also informed me that about thirty years ago he was in actual treaty for the purchase of a house at St. Servans, and only abandoned such purchase because he understood that under the French law, as under the law of Jersey, he could not dispose of his real property by will as he pleased. The testator has frequently, in the course of conversation, told me that he never would leave Jersey, except in the event of a war with France. I have frequently heard him say that the climate of Jersey was the finest in the world, and that there was nothing like the Jersey climate to live in, and that he never wished to live in a better; that it had cured him of dysentery and liver complaint: and that, in his opinion, invalids coming to Jersey would prolong their lives; and he has often written to me when I have been absent from Jersey as if it were his home, using such expressions as "When are you coming home? When you get your holidays be sure to spend them at home with me," and I have heard him say that the Scotch climate was a miserable one, and that he could not endure it on account of the cold. The said testator purchased ground and built a vault in St. Saviour's churchyard, Jersey, and the bodies of his two children, who had been buried at St. Servan were disinterred and brought to Jersey, and deposited in such vault where they still remain, as well as the bodies of their nurse Susan de Maistre and her daughter, both of whom were also buried there. In the year 1851 the said Susan de Maistre, who had been my nurse, died; and the testator caused her to be buried in his said vault, and I and the said testator were present when the same was opened; and the said testator in my presence asked the mason if there was room to bury another person besides the nurse, and the mason replied, "that by adding two bricks to increase the height there would be room," when the testator added, "That will be for me." The said testator repeatedly told me that he would never leave Jersey; that almost all his old friends were dead, and that all those he had remaining were living in Jersey, and he did not wish to form new acquaintances, and he invariably spoke of Jersey as his home. I often expressed a wish to leave Jersey, and to travel to different places, but he would not give me permission to do so. Early in the month of Feb. 1865 the said testator laid down at his residence in Jersey about fifty or sixty dozens of wine. I helped him to lay it down, and at the time of his decease there were about 200 dozens of wine in his cellar in Adelaide-place, Rouge Bouillon, some of which was very old, but the testator drank very little wine himself, and at the rate of consumption in his household the stock of wine in his cellar when he died would have lasted for ten years at least.

The brother, Capt. Robert Eckford confirmed this testimony, and added many facts of a similar character to the above.

Mr. Edward Flower, a solicitor of St. Helier's, deposed:

That the said testator, Robert Eckford, employed me as his solicitor to prepare his will and codicil, and in relation to other business. In pursuance of his instructions I prepared his will and the two codicils thereto. Upon several occasions I had conversations with him as to his past history, and he informed me that he had resided in India for a period of forty years or thereabouts, and that upon leaving India he came to Jersey, where he had resided

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for a period of thirty years. During the last eight years of his life to which my knowledge of him extends, his home was entirely in Jersey and not elsewhere. At the time when I prepared the codicil to his will bearing date 15th Feb. last, I explained to him that the English law concerning perpetuities and the provisions of the Act of Parliament called Thelluson's Act, would, if he were domiciled in England at the time of his decease, prevent his making such dispositions of his property as are made by the said codicil, but that if his legal domicil at the time of his decease were in Jersey, such disposition of his property would, in my opinion be valid and effectual. I further explained to him by the expression "his domicil" I meant the place where he had made his home, with the intention of remaining in it as his home, or to that effect. And I say that the testator was a man of considerable shrewdness and intelligence, and appeared to understand fully what I said to him as before mentioned with regard to his will and codicils, and his domicil; and I have no doubt whatever that he executed the last-mentioned codicil on the 15th Feb. last in the conviction that he was then legally domiciled in Jersey. And I say that the said testator died in Jersey a few days after the time of his making the last-mentioned codicil.

Depositions were also made by advocates in Jersey that the testator's will and codicils were valid according to the laws in force in Jersey.

As to the Scotch domicil the following are some of the extracts from depositions made in furtherance of that view of the question.

A domestic servant to the testator, one Hannah Groizard, who lived in his service during three and a half years preceding his death, deposed:

That she had heard the testator say that he was a native of Scotland. That he had great love for Scotland, for Scotch people, and for everything Scotch. If anything occupied his mind he used to sing about it to himself. I have frequently seen him walking in the greenhouse, and heard him singing about Scotland. He died in Feb. 1865. It was his intention to have gone to Scotland if he had lived till the summer following. He often spoke about his intended journey, and appeared to be longing for the summer to come that he might go, and looked forward to the journey with great pleasure. He was always very pleased to hear from Scotland. For about a year and a half before his death he used regularly to receive a Scotch newspaper, and of this newspaper he took particular care. He has often said to me, pointing to the newspaper, "Mind, you must not touch this, it comes from Scotland." When he received his letters, if there was one from Scotland he would always open it first. About a year and a half before his death he went to Scotland on a visit. I heard him talking about going before he went, and after he came back I heard him say, "I have been to my dear native land." He had a number of Scotch books. I believe he lived in Jersey more for its cheapness than anything else. He was very close in money matters. He liked the climate of Jersey because it suited his health, but I never heard him say that he would never leave it, or anything to that effect.

A Mrs. Susan Hood, of St. Heliers, Jersey, *inter alia* deposed:

About ten years ago I became acquainted with Dr. Robert Eckford. He had great love for Scotland. He always sang Scotch songs. Scotland and his early associations there were the constant themes of conversations between him and my mother and ourselves. Anything relating to Scotland interested and excited him, and he was down to the time of his death thoroughly Scotch at heart, and always prided himself on being a Scotchman. I have frequently heard him say that he was the chief of his clan. I never heard him express any intention of adopting Jersey as his country. On the contrary, he disliked the laws of Jersey, and particulary those relating to real property, and I believe his dislike in this respect prevented him from acquiring real property in Jersey. He attended occasionally at the Scotch church in Jersey, and at his funeral there was the usual Scotch service performed in the house. There are a number of Scotch people staying in Jersey in the same way, who would be very much surprised to hear that they could be considered domiciled in Jersey.

A brother of the testator deposed that he (the testator) disliked the Jersey laws, particularly those relating to real property, and he has often said to me "Never buy a house in Jersey."

Amphlett, Q. C. and *J. F. Villiers*, for the trustees of the testator's will, submitted the questions to the court.

E. E. Kay, Q. C., *Eddis*, Q. C., *De Gex*, Q. C., and *W. Dundas Gardiner* contended for the domicil of the testator being in Jersey. They cited:

Story's Conflict of Laws, 947;
Phillimore on Domicil, p. 148;
Bruce v. *Bruce*, 2 Bos. & P. 229, note (*a*);
Somerville v. *Somerville*, 5 Ves. 571;
The Indian Chief, 3 C. Rob. Adm. Rep. 12;
Munroe v. *Douglas*, 5 Madd. 379;
Colville v. *Lander*, Phill. Dom. 22, 23.

W. W. Mackeson, Q. C. and *Crossley*, *Willcock*, Q. C. and *Cates*, for parties interested in making out a Scotch domicil, argued that the domicil was in Scotland. They contended that strict proof of the domicil being in Jersey was on the other side. That the domicil of origin was undoubtedly Scotch, and that that had not been rebutted by any of the evidence produced. Only two years before his death the testator contemplated purchasing an estate, and living in Scotland, and the very recital in his will "now residing in Jersey," raised the presumption that he did not intend permanently to reside there. Jersey was only a half-way house towards Scotland. They cited

Forbes v. *Forbes*, Kay 341;
Attorney-General v. *Fitzgerald*, 3 Drew. 610;
Hoskins v. *Matthews*, 8 De G. M. & G. 13;
Hodgson v. *De Beauchene*, 12 Moo. P. C. Cas. 285;
Whicher v. *Hume*, 7 H. of L. Cas. 124;
Moorhouse v. *Lord*, 10 H. of L. Cas. 272; 8 L. T. Rep. N. S. 212;
Aikman v. *Aikman*, 3 H. of L. Cas. 854;
President of United States v. *Drummond*, 33 Beav. 449; 10 L. T. Rep. N. S. 321;
Re Capdevielle, 2 Hurl. & C. 985;
Blucher v. *Wahlstatt*, 3 Hurl. & C. 374;
Udney v. *Allnatt*, in the H. of L. 3rd June 1869, MS.

No reply.

The VICE-CHANCELLOR said the law of the case was very succinctly laid down by Lord Westbury in the observations attributed to him in *Udney* v. *Allnatt*, in which he said "that domicil was *an unlimited intention* of continuing to reside;" "there must be a residence freely chosen, not dictated by any external necessity." The law of domicil was also very aptly expressed in Turner's, L. J. observations in *Hoskins* v. *Matthews*: "Questions of change of domicil depend upon the *animus* and *factum*." The state of circumstances predicated by that able and painstaking judge may be predicated of the present case. Jersey was the place in which the testator had set up his family. He had two grandsons with him, over whom he exercised a control. He did at one time contemplate a possible change of residence from Jersey; but with a view of continuing to reside there, and that his grandson might reside with him, he gave him a larger pecuniary allowance if he would remain in Jersey. A very important fact was his removal of the remains of his two deceased children from St. Servan to Jersey. His residence in Jersey for so long a period of time was also another most important circumstance. When preparing his will he was reminded that it would be valid if his domicil were in Jersey. His conduct on that occasion was tantamount to saying, "I elect to be considered a domiciled Jerseyman." The present case was quite as strong as *Forbes* v. *Forbes*, and *Udney* v. *Allnatt*. I must, therefore, declare that the testator's domicil was in Jersey.

An application was then made that the Vice-Chancellor should now give some directions as to the general costs in the cause; but

The VICE-CHANCELLOR said that he must be presumed to be sitting in chambers on the hearing of the present summons, which was an adjournment from thence; but he might direct the costs of the present inquiry, and the evidence relating thereto,

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to be taxed, and paid out of the general fund of the estate.

Order accordingly.

Solicitors: *Lambert, Hampton,* and *Co.; W. J. Myatt; Travers Smith,* and *De Gex; G. Cates.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

April 26 *and May* 11.

REG. v. THE WALLASEY LOCAL BOARD OF HEALTH.

Public Health Act—Compensation—Premises injuriously affected—11 & 12 *Vict. c.* 63, *ss.* 69, 144.

By sect. 69 *of the* 11 & 12 *Vict. c.* 63 (*Public Health Act*) *the local board may by notice require the owner of premises fronting, &c., any future street (not being a highway) to sewer, level, &c., the same, and in default the board may themselves execute the works, and the expenses incurred are to be paid by the said owner. By sect.* 144 *full compensation is to be made out of the general district rate to all persons sustaining any damage by reason of the exercise of any of the powers of the Act.*

E. T., an owner of premises, having had a notice served upon him under the above section, refused to comply therewith, whereupon the board themselves did the work, the result of which as alleged by the said E. T. was to obstruct the entrance to his house, and to render the access to his doorway dangerous and inconvenient, and for this he claimed compensation under the above 144*th section:*

Held, that he was entitled to such compensation.

On a former day a rule had been obtained on the part of one Evan Thomas calling upon the Wallasey Local Board of Health to show cause why a *mandamus* should not issue commanding the said local board to make compensation to the said Evan Thomas out of the general district rate levied under the Public Health Act (11 & 12 Vict. c. 63), for damage sustained by him by the exercise of the powers vested in the said board.

By the 69th section of 11 & 12 Vict. c. 63, it is enacted that

In case any present or future street, or any part therof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such board may, by notice in writing to the respective owners or occupiers of the premises adjoining or abutting upon such parts thereof as may require to be sewered, levelled, &c., require them to sewer, level, &c., within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act, and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided.

By sect. 144 it is enacted

That full compensation shall be made out of the general or special district rates to be levied under this Act to all persons sustaining any damage by reason of the exercise of any of the powers of this Act, and in case of dispute as to amount, the same shall be settled by arbitration in the manner provided by this Act; or if the compensation claimed do not exceed the sum of twenty pounds, the same may be ascertained by, and recovered before, justices in a summary way.

From the facts it appeared that Mr. Evan Thomas was the owner of a house which abutted upon a road or district of the Local Board of Health for Wallasey, which road, however, was not a highway, and that in Dec. 1865, he was served with a notice which required him, within a time specified, to sewer, level, pave, flag, and channel a certain part of the said street. As Mr. Thomas did not comply with such notice, the board proceeded to execute the works themselves, and in so doing they raised the level of the road opposite Mr. Thomas's house, so as to block up a portion of the doorway, and so obstruct the access to the house from the street.

Milward, Q. C. and *R. G. Williams* showed cause.

Bruce in support of the rule.

Cur. adv. vult.

May 11.—HANNEN, J.—In this case a rule was obtained for a *mandamus* to the Wallasey Local Board of Health, to cause compensation to be make to Evan Thomas for damage by him sustained by the exercise by the local board of the powers of the Public Health Acts. The local board, acting under the 69th section of the Public Health Act 1848 (11 & 12 Vict. c. 63), required the owners (the said Evan Thomas and others) of premises in a certain street in New Brighton, to sewer, level, pave, and channel the same; and the said Evan Thomas having made default in complying with the notice, the board executed the required works, and claims as the contribution payable by the said Evan Thomas in respect of the said works the sum of 71*l.* 8*s.* It is alleged by Evan Thomas that the effect of the works as executed is to obstruct the entrance to his house and to render the access to his doorway inconvenient; and in respect of this injury he claims compensation under sect. 144, which enacts that full compensation shall be made to all persons sustaining any damage by reason of the exercise of the powers of the Act. It was contended, on behalf of the local board, that inasmuch as the owners of the houses in the street were bound to do the works themselves or, if done by the board, to pay for them, they could not be entitled to compensation for injury occasioned by the works. We are of opinion, however, that this argument is not well founded. There is no necessary connexion between the cost of the works and the damage which they may occasion. The raising of the level of a street may be very advantageous to the majority of the houses in it, but be very injurious to one. Although, therefore, the owner of that house may be bound under sect. 69 to pay his proportion of the costs (having regard to the frontage of the house) of altering the level, he may still be entitled to compensation out of the general district rates for the special damage which he has sustained in order that his neighbours and the district generally should be benefited. We are, therefore, of opinion that Evan Thomas is entitled to have it ascertained whether or not he has sustained damage by the execution of the works in question, and to receive compensation for such damage, if any. The rule will, therefore, be made absolute for a *mandamus.*

Rule absolute.

Attorneys for the claimant, *W.* and *A. Clare.*

Attorneys for the defendants, *Simpson* and *North,* Liverpool.

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In Parliament.

Reported by FREDERICK CLIFFORD, and PEMBROKE S. STEPHENS, Esqrs., Barristers-at-Law.

THE COURT OF REFEREES ON PRIVATE BILLS.

Monday, April 12.

(Before Mr. DODSON, M.P., Chairman; Mr. WYNN, M.P., and Mr. RICKARDS, Referees.)

ST. HELEN'S BOROUGH IMPROVEMENT BILL.

Objections to the *locus standi*: (1) of Messrs. ROBERTSON GLADSTONE, and others; (2) of Sir R. T. GERARD, Bart.; (3) of Rev. JAMES ABRAHAM; (4) of the Marquis of SALISBURY; (5) of THOMAS DICCONSON, Esq.

Improvement Bill — Rating powers — Exemptions— Lands and minerals—Representation—Landowners affected by taxation.

A Bill was promoted by the corporation of St. H., acting under a charter of incorporation newly granted, for the extinction of local bodies with taxing powers previously existing within the borough, and for conferring additional powers on the corporation. Five petitions were presented, four by landowners, and one by owners, lessees, and occupiers of land, mines, and collieries within the borough limits, complaining that their property would be injured by the transfer and the granting of the proposed powers; and more especially that they would be deprived of the protection from taxation afforded to mineral and agricultural property in St. H. by a clause in an Improvement Act of 1855, *proposed to be repealed. None of the existing public bodies petitioned against the Bill, and none of the petitioner's lands were scheduled for compulsory taking:*

Held, that the owners whose mineral and agricultural property was or might be affected by the Bill, had each a locus standi; but that only such of the owners, lessees, &c., "as were owners of property within the area affected by the Bill" were entitled to be heard.

The Bill had for its object "to dissolve the local boards of the districts of Sutton and Parr in the borough of St. Helen's in the county of Lancaster, and to repeal the St. Helen's Improvement Act 1855; to constitute the corporation of the said borough the local authority therein for the improving and governing of the said borough; and to enable the said corporation to extend their waterworks and to purchase the undertakings of the St. Helen's Waterworks Company and the St. Helen's Gas Company, and for other purposes."

From the statements in the petitions and the arguments, it appeared that the town of St. Helen's in Lancashire, an active manufacturing centre, is built upon the points of junction of four districts or townships, viz., Sutton, Parr, Eccleston, and Windle. The central area, or town of St. Helen's, including portions of each of these townships, was governed by improvement commissioners under an Act of 1855. The townships of Sutton and Parr each adopted the Local Government Act some years ago, and were consequently under the jurisdiction of local boards. Eccleston and Windle remained purely agricultural districts under the highway system.

In the year 1866 some of the inhabitants of St. Helen's were desirous of obtaining a charter of incorporation for the town, and for extending the boundaries, and on the 5th March 1868 a charter was accordingly obtained, whereby the inhabitants of St. Helen's proper, those of the districts of Sutton and Parr, and of parts of the townships of Windle and Eccleston contiguous to the town, were incorporated by the name of the Mayor, Aldermen, and Burgesses of the Town of St. Helen's, and had extended to them the powers and provisions of the Municipal Corporation Acts. This, however, was but the creation of a new and independent jurisdiction, leaving untouched the jurisdictions already existing. The present Bill was brought in by the corporation for the purpose of getting rid of this conflict of authority, by consolidating all the existing powers in the hands of the corporation, and arming them with such new and further powers as the promoters considered desirable.

The petitioners were all owners of property within the original limits of the improvement commission, or within the extended municipal boundary, and were apprehensive of injury from the provisions of the Bill. The nature of their representations and complaints will appear from the arguments addressed to the court, which it had been arranged in the case of these five petitions should be taken and dealt with as a class.

The objections to the *locus standi* of the different petitioners were identical in each case, and were as follow:

1. That no land of the petitioner will be taken under the powers of the Bill, nor is any property right, or interest of the petitioner injuriously affected by the provisions of it.

2. That the petitioner's only objections to the Bill are founded on his character of a ratepayer, and he is not, according to the practice of Parliament, entitled to be heard apart from other ratepayers, or as representing them.

3. That the petitioner, in his character of a ratepayer, is represented by the corporation, who are the promoters of the Bill.

4. The petition does not show any ground of objection which, according to the practice of Parliament, entitles the petitioner to be heard against the Bill.

Round (for Messrs. Robertson Gladstone, and others.—My clients are owners and occupiers of property in the borough of St. Helens, and in the townships of Sutton and Parr. They are not merely ratepayers, as stated in the objections, but landowners as well. The objections to our *locus* rest upon the fallacy that the corporation represent us. They represent their own ratepayers; but the doctrine of representation by a corporation does not hold good in cases where third parties are introduced; and if this be so with regard to the inhabitants of St. Helen's itself, it must be more especially the case with regard to owners and occupiers in the townships of Sutton and Parr. Under the Act of 1855, which it is now proposed to repeal, coal mines in St. Helen's are exempted from rating, and arable and pasture lands are only liable to be rated at one-fourth of their net value. But under the 352nd clause of the Bill, coal owners in St. Helen's who are now exempt will be rated like owners of other property. In the districts of Sutton and Parr the special exemption of coal mines does not exist, and, therefore, they are not affected to the same extent by the change; but no one can doubt that in these, which are to a great extent agricultural districts, the rates at present leviable are much smaller than those which will be levied by the corporation. This is a transfer of our allegiance, without our consent, and behind our backs.

Mr. RICKARDS.—Do the local boards of Sutton and Parr petition?

Pembroke Stephens (for the promoters).—They do not.

Round.—And that is an additional reason why the petitioners, who are owners and occupiers, both in the inner and the outer districts, ought to be

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heard before they are transferred to the sole control of the new municipal body. Under clause 109, taken in connection with the interpretation clause, the corporation may declare a lane, or a bridge, or two or three straggling houses, "a street;" and, having declared it to be a street, they may under the 97th clause call upon the petitioners, as owners, to incur very large expenses in paving, &c.; and under the 98th clause, if the petitioners do not comply, the corporation may do these works themselves and charge the petitioners for "new street expenses." Such extensive powers will press hardly upon the petitioners. With respect to bridges, the 125th clause provides that "the plans and sections of all bridges which shall be built or rebuilt after the passing of this Act (other than county bridges) shall, before each such bridge be commenced, be laid before and be subject to the approval of the corporation." A private bridge between two persons' estates would be subject to this objectionable provision. By the 192nd and 194th clauses no trade of a noxious character is to be carried on without the consent of the corporation. The petitioners ask to be allowed to show that St. Helen's owes very much of its importance to the fact of certain trades being carried on there, and that there ought not to be a wider power vested in the corporation than is absolutely necessary to prevent nuisances arising from noxious trades. Under the Bill it would be in the power of members of the corporation engaged in trade to prevent trades being set up in competition with their own. And the petitioners claim the right of going before the committee to see that those powers, and the other powers of which they complain, are fenced in with sufficient restrictions to prevent their being used harshly. We are owners transferred from a jurisdiction with which we are content to a new jurisdiction which we fear. If we are not heard, in future corporations may promote Bills extending their territory indefinitely, and nobody will be heard in opposition, except persons whose lands are actually taken. This is a Bill of 480 sections. Is no one to see that proper safeguards are introduced? If so, the corporation are absolute master of the position; and owners will have their property saddled with taxes, remaining powerless all the while. Parliament will never shut out from the discussion persons plainly interested as we are.

Counsel was proceeding to comment upon the effect of a MS. addition to one of the clauses, when

Mr. DODSON said: The practice of the court is to take the Bill as deposited.

Pembroke Stephens (for the promoters).—Unless the petitioners are prepared to point out the names of any coal owners in St. Helen's who are exempt from taxation at present, and who will be subject to taxation under the provisions of this Bill, we shall contend that there are not any such. And I now call upon them to do so.

Round subsequently said: I have ascertained that two of the persons joining in the petition of Messrs. Robertson Gladstone, and others—*i. e.*, Messrs. Brown and Robinson, are lessees and occupiers of coal mines and working coal mines. The coal they work is partly situated in the township of Windle and partly in the townships of Sutton and Parr, some of it lying within the limits of the jurisdiction of St. Helen's. According to law, those persons would be rateable, not only at the place in which the coal is raised, but at the place where the coal is worked. Therefore, inasmuch as those petitioners are lessees of coal which is worked, though not raised, within the limits of St. Helen's, they would be rateable by law for that coal, were it not for the Act of 1855, which at present exempts them. The Bill proposes to do away with this exemption.

Pembroke Stephens.—The question now raised is a legal question. But the petitioners have still failed to distinguish those whose interests lie, as a matter of fact, within St. Helen's proper, from those which are outside.

Round.—The Referees doubtless can give the petitioners a *locus standi* in such terms that when they come before the committee only such of them will be heard as come within the scope of the Bill.

Mundell, Q.C. (for Sir R. Gerard).—My client is the owner of a large quantity of agricultural land; namely, forty-four acres, in the district at present under the St. Helen's Improvement Act, in which district also he has coal works, not yet leased, and 110 acres of land in the district of Windle, within the municipal boundary, but not at present subject to any taxation for local purposes, except highway rate and poor rate, no action under the Health of Towns Act having been taken within that district There is no ground for the objection that Sir R. Gerard is a ratepayer represented by an elected body, that is to say, by the corporation, for Sir R. Gerard is not a ratepayer, and has no share in the election of the corporation, and, consequently, is in no way represented by them. As an owner of agricultural land and of coal mines within the district proposed to be included in the area of rating, he claims to be heard against a Bill the provisions of which will injuriously affect his property. At present, in St. Helen's proper, under the 159th section of the Improvement Act 1855, neither coal mines nor agricultural land have to pay anything, whereas in future they will both be taxed. It is idle for the promoters to object that Sir R. Gerard will not be rated, he being the owner and not the occupier; for the value of his property as owner will be diminished by the amount of the rate. As in the case of land under tithes and land tithe free, the difference in value is the amount of the tithe; so here, the taxation imposed by the Bill will be the difference that will be made in the value of our collieries. The estimated value of Sir R. Gerard's coal mines unworked outside the boundary is 80,000*l.* How can it be said that Sir R. Gerard either is or will be represented? The representation, if any, accorded under the Bill is the representation of somebody who may hereafter be our tenant for the mines, not of Sir R. Gerard as owner. All that Sir R. Gerard can be said to have any representation with regard to, is in respect of the municipal borough rate. Sir R. Gerard stands, in one respect, in a different position from the other petitioners, as he alleges in his petition that when the corporation of St. Helen's were about to seek for a charter of incorporation "negotiations took place between the promoters of the charter of incorporation and your petitioner's agent, and your petitioner being anxious to further the wishes of the town of St. Helen's to the utmost of his power, ultimately acquiesced in the incorporation scheme, upon the express understanding, which was reduced into writing, that all property of which your petitioner is in possession, as well in the township of Windle as of Parr, and used only as agricultural land, should not be charged with rates beyond the average of that imposed upon such property within the five preceding years." So that, in fact, an agreement has been come to upon which the petitioner would have a right to be heard. But he does not put it upon that narrow ground, for the agreement referred to does not touch upon or include the main question of the mines. The mineral property was not included in that agreement, Sir R. Gerard never

supposing that any municipal body would seek to tax mines to their full extent. And I claim now as a right to protect 80,000*l.* worth of property from harsh and needless taxation. He consented to come within the taxable area for municipal purposes under the 5 & 6 Will. 4, when the borough was newly constituted, the money leviable under that Act being for strictly municipal purposes. Under this Bill the promoters have not only retained the borough rate for municipal purposes, but for a great many other purposes besides. They are about to impose liabilities on the new district different from those contemplated either by the Municipal Acts or by the Local Government Acts at present in force in portions of the district. Counsel referred in detail to various clauses of the Bill as bearing out this assertion, and, in anticipation of arguments which might be urged by the promoters, relied upon the case of the *Maryport Improvement Harbour and Dock Bill* 1866—*Petition of Ratepayers, Shipowners, and Coalowners* (Smethurst 128.) Sir R. Gerard does not petition as a ratepayer, and hence the objection on that score does not apply. But he is a coalowner, and coalowners were heard in the *Maryport* case. The only other objection is that he is represented. By whom? Not by the improvemement commissioners, whose Act is to be repealed; for under that Act he is not taxable, and therefore cannot be represented by them. Not by the corporation, to whom the powers of the improvement commissioners will be transferred, for the same reason; although, as to the taxation which may properly be levied under the 5 & 6 Will. 4, he may be said to be represented by the corporation. For the sake of argument, I admit that if they were only going by the Bill to regulate the borough fund, it would not be competent for Sir R. Gerard to object. But they are going to do something for which the assent of Parliament is necessary, and therefore Sir R. Gerard claims the right to be heard against the proposals of a body which does not represent him, or only represents him in a special manner to increase their area of taxation.

April 14.—*Webster*, Q. C. (for Rev. James Abraham).—Mr. Abraham is the owner of valuable property, consisting to some extent of coal mines and house property, but mostly of agricultural land, occupied by tenants for agricultural purposes. [Refers to sect. 159 of the Improvement Act 1865, containing the exemption; and to the charter of incorporation.] Under this Bill the status of the petitioner will be changed. As matters stood, he and other landowners were subject to taxation for municipal purposes, but otherwise they were protected. The promoters are now seeking to bring them under a local Act, with new powers of taxation, and jurisdiction of a more extended character than at present exists. Notwithstanding this, as the petition alleges, no notice of the Bill was ever given to the petitioner, a portion of whose coal mines are situated under the townships of Parr and Windle, and to whom also a considerable portion of the surface lands of those townships belongs. The Bill is of a very sweeping character. It contains provisions for discontinuing the Local Government Acts within the several parts of the borough in which they are now in force, powers for the supply of water and gas, for paving and making roads, streets, and sewers, for providing a police force, and powers also with respect to the regulation of buildings, with regard to nuisances, slaughter-houses, and other matters, all or any of which may be put in force hereafter, in the discretion of the corporation, although such powers may be inapplicable or actually injurious to property situated and circumstanced like that of the petitioner. For these and other purposes the Bill authorises the corporation to levy a highway rate and a borough rate in respect of the whole of the property comprised within the limits of the borough. The amount of these rates is practically unlimited, and may become a heavy charge upon the petitioner's property, whilst, from its nature, he will receive little or no benefit from the outlay in respect of which these rates are to be levied. In his petition, he further objects to the powers sought to charge upon rates levied on the borough as a whole the payment of debts contracted for local purposes by the improvement commissions, the corporation, and the local boards; and he also contends that he or his tenants ought not to be taxed for promoting a private Bill of great length, when the general Acts are sufficient for the wants of the town. Dealing with the points raised in the objections, I contend that the Rev. Mr. Abraham is not a ratepayer in the sense in which he would be a ratepayer under the Bill, being at present merely a ratepayer under the charter of incorporation for municipal purposes. Wherever a person possesses an incorporeal right, which incorporeal right is proposed to be affected by special legislation, that person has a *locus standi* to show in what respect the special legislation will interfere with that right.

Cripps, Q. C. (for the Marquis of Salisbury).—In his petition the marquis alleges himself to be "an owner, not only of property within the town of St. Helen's, but also of considerable agricultural land and of mineral property within the limits of the said Bill" (*i. e.*, Sutton) "and subject to taxation under its provisions." We deny the necessity of the proposed legislation, and allege that certain specific provisions will be unjust to us and to other owners of property proposed to be taxed for lighting, sewering, and general purposes, being only liable now to highway rate and poor rate. This property will accordingly be rendered less valuable by the Bill. The 358th clause is especially objectionable, and, moreover, is without precedent, for it gives the Corporation power to make a retrospective rate. [Counsel relied strongly upon various clauses, which he said imposed restrictions upon the petitioner's property from which it was now free, and on the following passage of the petition:] "The powers given by the Bill to the Corporation as to streets, and the cost which may be incurred by them in respect thereof, and which they can charge upon the owners of property adjoining the highway, would or might impose upon your petitioner liabilities to which he ought not to be exposed; and the provisions in the Bill as to nuisances, and particularly the 192nd clause, which prohibits the establishment hereafter of any noxious or offensive business, trade, or manufacture, in any building or place without the consent of the corporation, might, in its operation, perpetuate a monopoly in favour of existing manufactories, and is totally inapplicable to St. Helen's, whose trade and prosperity mainly depend upon the carrying on of works, which, in their nature, must be more or less noxious and offensive." Upon these two general principles we are distinctly entitled to a hearing—first, that we are the owners of property proposed to be affected by private legislation; and, secondly, that new and special legislation affecting trades and manufactures is contemplated, by which we are, or may be, injuriously affected.

Riddle (for Mr. Thomas Dicconson).—We rely on several of the arguments already urged. Mr. Dicconson is an owner within the limits of the Improvement Act of 1855, and also of lands in Sutton and Eccleston, his property consisting of agricultural and mining property, that on lease representing 103,000*l.* in value, and that out of lease representing a value

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purpose it surely has never been held that a single owner of property has a right to set himself up in opposition and be heard. If the owners of property or inhabitants want to be heard, let them hold a public meeting, and declare the Bill injurious to the district, and sign a petition in sufficient numbers to show that they represent the district.

Mr. RICKARDS.—The petitioners do claim a *locus standi* as owners, on the ground that their property, becoming liable to increased taxation, will be rendered less valuable; and that their only remedy is to go before a committee?

Stephens.—But not individually. Under the existing system the local boards in Sutton and Parr are partly elected by owners of property; they can accordingly be heard through those local boards.

Mr. RICKARDS.—If you touch the land of a landowner at all, he has a right to be heard. But here is a case of a landowner whose property will be permanently diminished in value by liability to certain burdens. Ought not he to be heard, on the same principle on which an owner whose land is taken is heard?

Stephens.—He must claim to be heard on one of two grounds: either that his property is injuriously affected—in which case he has no *locus standi*—or he must claim in common with other ratepayers who would be equally injured.

Mr. RICKARDS.—This is not an injurious affecting within the meaning of the Lands Clauses Act, but an injurious affecting in this sense, that the property will become less valuable than before; how do you distinguish this case, and the case of a man whose property is taken compulsorily?

Stephens.—In the one case the injury done is done to the man's private property; while, in the other case, the injury, if any, is one which the man can only suffer in common with the rest of the community. He can only suffer by the levying of rates.

Mr. RICKARDS.—Put the case of there being only one landowner, in that position, whose property would be liable to the exceptional rate?

Stephens.—If the landowner has an exceptional injury to show, he will of course set that forth in his petition; but the only injury which these petitioners allege is one to which they will become liable by the payment of rates, which they will only have to pay in common with their neighbours. If one landowner be admitted to petition separately on this ground, this court must be prepared to let in every landowner in the district. In towns of this kind somebody must have the controlling power; and the only question is in whose hands it ought to be deposited. The rural districts are sure to make their influence felt, seeing that Sutton and Parr elect one half the corporation. This question has been argued as if the doctrine of representation were altogether new. But *The Staffordshire Potteries Water Bill* 1868, *Petition of the Corporation of Longton*, 18 L. T. Rep. N. S. 539 affirms the principle that municipal corporations and local boards of health are properly the guardians and representatives of individual interests affected. Here the local boards do not in any way petition or oppose the Bill. As to the rating powers being retrospective, the rates referred to are only rates to pay off charges incurred previous to the passing of the Act. Messrs. Gladstone and others, although challenged, have failed to show that they have any property within St. Helen's to which the exemption would apply. And if Mr. Bower and Mr. Robinson worked coal under St. Helen's, as alleged, their names would appear in the highway rate book, which is not the case. Sir R. T. Gerard stands in a different position, and we are willing to concede a *locus standi* to him, for the purpose of seeing that the agreement is preserved by the Bill.

Mundell, Q.C.—The corporation have refused to carry out that agreement; and a limited *locus* will not suit my purpose.

Stephens.—Many of the clauses complained of are taken in substance from existing public Acts. If we succeed to the revenues of public bodies, we must also take over their debts. We do not schedule Mr. Dicconson's lands, and therefore there is nothing in his complaint as to watercourses; if he wants water for his mines or agricultural lands he will be enabled to obtain it from us. The petitioners here, instead of indicating any special grievance, and suggesting a remedy, one and all seek to be heard with the same object, that of altering the Bill for their own advantage. It is to prevent this that the court refuses to hear a single trader, as distinct from a class, seeing that his object is to make terms for himself. Yet, a particular trade may be injured or crushed by legislation, and an exemption may sometimes be beneficial. But a landowner who, as a ratepayer, makes terms for himself, not only fails to contribute his proper share of taxation, but the amount which he fails to contribute has to be made good by his neighbours. And if one landowner is to make terms for himself, on the same principle you should admit 500. It will then become a race between those quick enough, or rich enough, to be heard before committees. This is a principle novel, dangerous, and unsupported either by the Standing Orders or by the previous decisions of this court.

The Referees remained for some time in consultation. When the parties were called in,

Mr. DODSON said: The *locus standi* of Sir R. T. Gerard, of the Rev. J. Abraham, of the Marquis of Salisbury, and of Thomas Dicconson is allowed. The *locus standi* is allowed of such only of the subscribers to the petition of Robertson Gladstone and others as are owners of property within the area affected by the Bill.

Agents for Sir R. Gerard; and for the Marquis of Salisbury, *Dyson* and *Co.*

Agents for the Rev. J. Abraham, *Wyatt* and *Hoskins.*

Agents for Robertson Gladstone and Co., *Field* and *Co.*

Agents for Thomas Dicconson, *Loch* and *Maclaurin.*

Agent for the Bill, *S. H. Lewin.*

Wednesday, April 14.

(Before Mr. WYNN, M.P., Chairman, Mr. ST. AUBYN, M.P., and Mr. RICKARDS.)

ST. HELEN'S BOROUGH IMPROVEMENT BILL.

Objections to the *locus standi* of DANIEL WILLIS.

Waterworks—Corporation—Landowner — Interference with soil beneath road—Underground water.

An Improvement Bill promoted by the Corporation of St. H., among other objects to sanction the extension of their waterworks, was petitioned against by a landowner apprehensive of injury from the abstraction of underground water. It appeared that the pipes of the corporation would be laid along a road, the soil of which belonged to the petitioner, though the surface had been dedicated to the public:

Held (without completing the discussion of the water

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question), that the petitioner had a locus standi on the ground of interference with the soil.

The Bill had for its object to constitute the corporation of the newly-created borough of St. Helen's the local authority for that borough, and among other things, "to enable the corporation to extend their waterworks, and to purchase the undertakings of the St. Helen's Waterworks Company.

The petition set forth that it was intended by the Bill to empower the mayor, aldermen, and burgesses to make and maintain certain waterworks described in the Bill, comprising a well or shaft, pumping engines, and other buildings and works in the township of Whiston, in the parish of Prescot, in the county of Lancaster, in a field belonging to the trustees of Thomas Atherton, deceased, and in the occupation of Thomas Asherton, and to make and maintain other wells or shafts, pumping engines, buildings and works.

The Bill also gave power to the corporation for the purpose of these works, and of any waterworks vested in them, absolutely, or by way of lease, to collect, pump up, take, use, and appropriate all such springs, streams, and waters, which might be found in, upon, or under the lands described in the book of reference, and to carry the same by pipes under a road, a considerable portion of which passed through the petitioner's estate, and to the soil of which he was entitled, subject to the public right of way over it.

The petitioner was owner as tenant for life in possession of a valuable estate in the parishes of Prescott and Huyton, with a park and mansion house called Halsned Hall, let for 600*l.* a year; and also of another residence in the same parish, called Sandfield, which he occupied; and the situations of the wells or shafts proposed to be sunk were at a short distance from both the residences and from the village of Whiston, which contained a great number of cottages, many belonging to the petitioner, and wholly or partly supplied with water by the existing wells or springs. A large sum had been expended by the petitioner in bringing a supply of water to these two residences from a spring about half a mile distant; and the petition alleged that if the proposed shafts were allowed to be constructed, and the springs and waters appropriated under the powers of the bill, the water supply of the petitioner's two residences would be in danger of being seriously diminished, and the inhabitants of the village of Whiston, principally labourers in coal mines or agricultural labourers, would be deprived of their water supply. The corporation, therefore, it was contended, should be bound to furnish the petitioner and his tenants with a supply of water equal in quantity and quality to that which they now possessed.

The *locus standi* of the petitioners was objected to on the following grounds:

1. The Bill does not contain any provision for taking any lands, streams, or springs of water, the property of the petitioner, and no property, right, or interest of the petitioner's is injuriously affected by the provisions of the Bill.

2. One of the objects of the Bill is the sinking of a well on lands belonging to the petitioner, and to raise a supply of water from a considerable depth below the surface, to which water the petitioner has no right or claim.

3. The petition does not show any ground of objection which, according to the practice of Parliament, entitles the petitioner to be heard agains the Bill.

Pember, for the petitioner.—A slight verbal addition to the petition will render it more specific.

Mr. RICKARDS.—The court cannot alter the terms of a petition. We take the petition and the Bill as deposited.

Pember, for the petitioner.—The petitioner is, or may be, seriously affected by the proposals of the Bill. I admit that, according to the strict reading of *Acton* v. *Blundell*, we cannot probably claim any property in underground water; but that has always been considered a hard decision, its propriety has been questioned, and more than one eminent authority has from time to time considered and referred to it. The position, however, of the promoters differs from that of an adjoining landowner who sinks wells on his own land; for they came for powers to sink shafts, having at present no right whatever to sink them, not being owners of adjoining lands. If the promoters seek to shut out the petitioner on the technical legal ground, I shall meet that technicality by another, and shall insist that, technically, Mr. Willis has a *locus standi* as legal owner of the soil of the highway under which the pipes are proposed to be laid; being proprietor of the land on each side of the highway, having dedicated the highway itself to the use of the public. In the *Aberdeen Water Bill* (before the Court of Referees was established), Sir William Burnett was allowed a *locus standi*, because the pipes were proposed to be taken through his property. But, beside that technical ground, the petitioner possesses a substantial claim to be heard in the probable loss of water which he will experience. Owners of springs and wells, or owners of adjoining property, are entitled to be heard where they apprehend abstraction of underground water.

Cambridge University and Town Waterworks Bill 1866, *Petition of the Master, Fellows, &c., of Sidney Sussex College*, 14 L. T. Rep. N. S. 85;
South Staffordshire Waterworks Bill 1866, *ex parte Feoffees, &c., of Lichfield*, 14 L. T. Rep. N. S. 237.

All we seek is proper protection in the event of injury arising to us from the operation of the Bill, and to obtain that, a *locus standi* is indispensable.

Pembroke Stephens (for the promoters).—Apprehension of injury from the abstraction of underground water cannot possibly give a *locus standi*. The legal question has been decided, not merely by the case of *Acton* v. *Blundell*, but by the later case of *Chasemore* v. *Richards*. According, moreover, to the decision of this court in the *Southport Water Bill* 1867, *Petition of the Ormskirk Local Board*, the mere abstraction of underground water is not in itself such an injury as will entitle petitioners to a hearing. Then as to the technical question. It has never been the practice of the examiner of standing orders to regard the owner of lands adjoining a highway as entitled to notice in respect of interference with that highway. Notice is sent to the road trustees. It cannot therefore be said that the adjoining owner has any rights of ownership in the roads, after they have once been dedicated to the public.

The CHAIRMAN.—Put the case of a mine under the road?

Pember.—And that I am informed is actually the case here; there are minerals under the road, and which might be worked; and our petition stated that the petitioner is entitled to the soil under the road through which the pipes of the promoters are to be carried.

The CHAIRMAN.—We need not trouble counsel to argue the legal question further, as we are of opinion that Mr. Willis has a *locus standi* on the ground of

interference with the soil of his property underlying the roadway.

Locus standi allowed.

Agents for the petitioners, *Dorrington* and *Co.*

Agent for the bill, *S H. Lewin.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

June 12 *and* 22.

(Before the LORDS JUSTICES.)

Re THE LONDON MARINE INSURANCE ASSOCIATION; J. W. SMITH'S CASE.

Mutual Marine Insurance Association—Winding-up—Contributory—Unstamped policy—Statute 35 *Geo.* 3, *c.* 63.

A contract for mutual insurance of ships is within the Stamp Act (35 *Geo.* 3, *c.* 63).

Accordingly, a member of a mutual marine insurance association, who had never received any stamped policy of insurance upon his own ship, was held not liable as a contributory of the association upon its being wound-up.

This was an appeal by the official liquidator of the above company from an order made by James, V. C., removing the name of Mr. John Watson Smith from the list of contributories of the company.

The London Marine Insurance Association was a mutual society for the insurance of the ships belonging to the members thereof. Each member was bound to contribute to make good the losses sustained by other members during the period of his membership, in proportion to the amount for which his own ship or ships was or were insured by the other members. The usual practice was for each member on entering the association to sign a power of attorney appointing the secretary of the association his attorney for the purpose of signing and underwriting policies of insurance, to recover contributions from the members, and to draw for and to pay all losses and averages, contributions, and expenses. Each member of the association was entitled upon application to receive a stamped policy for the amount insured by himself upon payment of entrance fees and stamp duty, but it appeared that in practice stamped policies had been very seldom issued. The secretary of the association was Mr. Joseph Henzell.

Every member on entering the association signed an application in writing, in which he stated the amount for which he desired to insure his own ship or ships.

Mr. John Watson Smith, on the 6th Sept. 1864, applied for an insurance to the amount of 300*l.* upon a ship belonging to him called the *Holywood.* His application (so far as material) was as follows:

To Mr. Joseph Henzell, and to the secretary or manager for the time being of the London Marine Insurance Association.

I, the undersigned, John W. Smith, of North Shields, do hereby authorise and empower you to insure in the London Marine Insurance Association the sum of 300*l.* on the ship *Holywood*, of the port of Shields. I hereby acknowledge myself to be a member of the said association, under and subject to the rules, regulations, and warranties thereof, and I authorise you, or any three members of the committee for the time being for me, or in my name, as such members to sign and underwrite all policies of assurance upon all ships that may from time to time be approved of by the committee of the said association in such sums respectively as they may think proper. And I undertake to accept and pay all drafts for losses and contributions that shall be drawn, made, or ordered to be paid by the said committee, and I also undertake to abide by the rules, regulations, and warranties of the said association in every respect. Risk to commence the 6th Sept. 1864.

By a letter from Mr. Henzell, dated the 7th Sept. 1864, this offer by Mr. Smith was accepted on behalf of the association. Mr. Smith paid the sum of 2*l.* 0*s.* 6*d.* for entrance fees, and on the 8th Sept. 1864 he wrote to Mr. Henzell asking that a proper policy of insurance might be sent to him. No stamped policy was ever sent to him. The ship *Holywood* suffered some damage at sea, and on the 1st Feb. 1865 Smith made a claim upon the association in respect of the loss, which he had thereby sustained. Henzell in reply agreed to follow the course taken by some other insurance associations, of which Smith was a member. These other associations afterwards admitted Smith's claim upon them. On the 1st July 1865 the association was ordered to be wound-up. Before this date Smith had paid some contributions demanded of him by the association in respect of losses sustained by ships of other members; but no payment had been made to him by the association in respect of his own claim. On the 21st Dec. 1866 he was settled upon the list of contributories of the association during the period of his membership. In Jan. 1867 he sent in his claim against the association for the sum of 70*l.* in respect of the damage suffered by his ship *Holywood*, and in Aug. 1867 he filed an affidavit in support of this claim. The official liquidator having taken out a summons for a call upon the contributories of the association, Mr. Smith applied to the Vice-Chancellor to have his name removed from the list of contributories, upon the ground that, as he had never received a stamped policy of insurance, his contract of membership was, by virtue of the Act 35 Geo. 3, c. 63, altogether void. The Vice-Chancellor took this view, and removed Mr. Smith's name from the list of contributories. The official liquidator appealed.

Eddis and *Lindley*, for the appellant, contended that there was a distinct agreement by Mr. Smith to bear his share of the payments ordered by the committee to be made for losses and contributions. There was no necessity for a policy of insurance, and though an unstamped policy of insurance could not be admitted in evidence, yet this species of contract for mutual indemnity was not within the Stamp Act (35 Geo. 3, c. 63). Mr. Smith was at any rate stopped from saying that he was not a member of the association, and he had, moreover, delayed too long in repudiating his liability. They referred to

35 Geo. 3, c. 63;
54 Geo. 3, c. 144;
9 Geo. 4, c. 49;
7 Vict. c. 21;
30 Vict. c. 23, s. 7;
Arnold on Marine Insurance.

And they cited

Taylor v. *Dean*, 22 Beav. 429;
Bromley v. *Williams*, 32 Beav. 177;
Harvey v. *Beckwith*, 10 L. T. Rep. N. S. 632;
Mead v. *Davison* 3 A. & E. 303;
Re Agra and Masterman's Bank, L. Rep. 2 Ch. 391; 16 L. T. Rep. N. S. 162;
Underwood's case, 5 De G. M. & G. 677.

Macnaghten, for Mr. Smith, was not called upon.

Lord Justice SELWYN said:—We entertain no doubt that the conclusion of the Vice-Chancellor is correct. He has ordered the name of Mr. Smith not to be included in the list of contributories of this company. The question, in my judgment, depends entirely upon the construction of the Stamp Acts, and especially upon that of the Act 35 Geo. 3, c. 63. The case of the appellants cannot be put

more favourably to them than by saying that a contract in writing was entered into, and for some time acted upon, by both parties to it. What, then, was the contract? In my judgment it was a contract for insurance. Then how is that contract affected by the Stamp Acts? Assuming that before the Act of 1867 a policy of insurance was not necessary, still the question remains whether this was not a contract for insurance within the meaning of the Act 35 Geo. 3, c. 63. Now, by sect. 1 of that Act, "from and after the 5th July 1795, there shall be raised, levied, collected, and paid for every skin or piece of vellum or parchment, or sheet, or piece of paper, upon which any insurance upon any ship or ships shall be engrossed, printed, or written," the stamp duties therein mentioned. That section imposes a stamp duty on every writing effecting a contract of insurance, and those words cast upon the appellants the duty of showing that these contracts of mutual insurance are exempt from the Act, a stamp having been imposed upon every piece of paper by means of which any insurance upon any ship shall be made. Then sect. 11 enacts that "every contract or agreement which shall be made or entered into for any insurance, in respect whereof any duty is by this Act made payable, shall be engrossed, printed, or written, and shall be deemed or called a policy of insurance." The first section is quite general in its terms; there is nothing in any way to limit it. Then we come to sect. 14, which is very material, as it contains an express reference to agreements for insurance. That section is—"No insurance made or entered into in Great Britain, in respect whereof any duty is by this Act made payable, nor any contract or agreement for such insurance as aforesaid, shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless the vellum, parchment, or paper, on which such insurance shall be engrossed, printed, or written, shall be stamped with a lawful stamp, to denote the rate or duty, as by this Act is directed, or to denote some higher rate of duty in this Act contained; and it shall not be lawful for the said commissioners of the said stamp duties, or any of their officers, to stamp any vellum, parchment, or paper, with any stamp directed to be provided or used by virtue of this Act, at any time, after any such insurance as aforesaid, or contract for such insurance, shall be ingrossed, printed, or written thereon, under any pretence whatever." That section plainly applies, not merely to policies for insurance, but to any agreement or contract for such insurance. It is perfectly unlimited in its language, and there is no ground for contending that, because the contract in the present case was not a contract for a policy of insurance, therefore it is not within the words of the Act. The case cannot be put higher than by saying that there was an agreement in writing between two parties, which was acted on for some time, but it was, however, a contract for the insurance of ships; and I agree with the Vice-Chancellor that it is not the duty of a court of law or of equity to be astute to find out ways in which the object of an Act of Parliament may be defeated. Then some reliance was placed in argument upon the 18th section of the Act, which provides that nothing in the Act contained shall extend to subject any of the members, officers, or servants of the corporations of the London Assurance and the Royal Exchange Assurance to any of the penalties by the Act imposed for or by reason of their making any agreement to insure by any label, slip, or memorandum, in writing, upon unstamped vellum, parchment, or paper. The proviso, however, at the end of that section puts an end to the argument which was raised, for that proviso is "provided that in every such case a policy of insurance according to the agreement expressed in such label, slip, or memorandum, shall be made out according to one of the forms in the schedule to this Act annexed, and duly entered and stamped within three office days from the time of making such agreement as aforesaid." The case may be looked at in two ways, and in two only. The policy would either be entered within the three days, or it would not. In the first case no question could arise, as the contract would then be merged in the policy; in the second case, the section would have no operation at all. That section cannot, therefore, operate to take a contract for insurance out of the provisions of the Act. In this case, therefore, the contract entirely failed, for by the Act we are precluded from taking notice of any contract as having any effect whatever at law or in equity. The name of Mr. Smith was, therefore, rightly omitted from the list of contributories. *Underwood's* case which was cited has really no application, and there has been no such *laches* on the part of Mr. Smith as can disentitle him from now saying that there is no contract binding him to become a member of the company. The decision of the Vice-Chancellor was right, and the appeal motion must be refused with costs.

Lord Justice GIFFARD.—Mr. Smith cannot be made a member of this company unless it can be shown that he entered into a binding mutual agreement for the insurance of ships. The contract, if there was any, was unquestionably a contract in writing, and I agree with the Vice-Chancellor that we cannot read any document in evidence in support of this contract, and that is the effect of the Act 35 Geo. 3, c. 63. It is clear under that Act that every contract in writing for the insurance of ships must be stamped, and cannot be used in evidence if it is not, and there is no difference between a court of law and a court of equity with regard to the evidence which can be used in support of such a contract. Then it was said that Mr. Smith is estopped from denying that he entered into this contract. But there is a complete answer to that argument in the fact that Mr. Henzell was the agent of the association as well as the agent of Mr. Smith. Moreover, with regard to *laches* I can find nothing to induce me to say that Mr. Smith was too late in making his application to be removed from the list of contributories. The appeal must, therefore, be refused with costs.

Solicitors for the appellants, *Mercer* and *Mercer*.

Solicitors for Mr. Smith, *Young, Maples*, and *Co.*

May 1 *and* 3.

(Before The LORDS JUSTICES.)

LAMB *v.* THE NORTH LONDON RAILWAY COMPANY.

Railway company and landowner—Compulsory powers to acquire lands—Purposes of the special Act—Unauthorised use of—Later Act for other purposes.

A railway company was, by an Act passed in 1865 empowered to take compulsorily certain lands for the purposes of the Act, amongst which was the stopping up and appropriating A. street. The plaintiff, owner of lands adjacent, had no notice of the intention to apply for this Act, nor were his lands included or referred to therein, or in the deposited plans. By an Act passed in 1864, the company were, however, empowered so to take his lands, but solely for the purposes of that Act, amongst which the stopping up of A. street was not included.

Held, that the company could not avail themselves of the powers of the earlier Act to take the lands of the

plaintiff against his will, in order to apply them to the purposes of the later Act, and an injunction granted by James, V. C., was continued by the Court of Appeal.

The company already possessed lands sufficient for the new road, but they were desirous of applying those lands to other objects, and therefore would not avail themselves of them, but it was

Held, by Giffard, L.J., that this fact would have afforded no ground for the interference of the court by injunction at the plaintiff's instance, if the company had determined to take his land for purposes duly authorised by the Act under which they were empowered to acquire it.

This was a motion by the defendants, appealing from an order of James, V.C., who had granted an injunction restraining them from taking proceedings for obtaining compulsory possession of certain lands and hereditaments, the property of the plaintiff, and from entering upon or taking possession of the same, or any part thereof.

The hereditaments referred to were freehold messuages, shops, &c., in Islington, near the Highbury station of the defendants' railway, to which the plaintiff was entitled in fee.

The railway company was incorporated in Aug. 1846, and its line has now been for several years completed and open for traffic. At the Highbury station the line passes under Upper-street and Albert-street, in a cutting at a considerable depth below the level of the land on either side.

The company intended to apply to Parliament in the Session of 1864 for additional powers to take new lands and construct new works, and gave notice of their intention to the plaintiff as being interested in the hereditaments referred to, which were among the lands so required. In accordance with their intention they applied for and obtained an Act entitled, "The North London Railway (Additional Powers) Act 1864," which, amongst other things, incorporated the Lands Clauses Consolidation Act. The preamble recited that it was expedient to empower the company to purchase or acquire by compulsion or otherwise additional lands and houses in connection with their undertaking, and that plans and sections showing the lands and houses which the company might purchase under the Act had been deposited with the clerk of the peace. Then by the 6th section it was enacted that, subject to the provisions in this Act, and in the incorporated Acts contained, the company might enter upon, take and use all or any of the lands and other property shown in the plans, and described in the books of reference so deposited, but the power of taking the same compulsorily should not be exercised after the space of three years from the passing of that Act. And by the 19th section it was enacted that nothing in the Act contained should empower the company to stop up or alter the present level or inclination of the public road, numbered 35A, and called Albert-street on the deposited plans, without the previous consent in writing of the vestry of the parish of St. Mary, Islington.

The defendants were unable to obtain this consent to stop up or alter Albert-street, but as, after the passing of the Act of 1864, they required, for the purpose of carrying out a contemplated enlargement of their station at Highbury, to take and use a certain portion of Albert-street, otherwise Swan-yard, they in the following year applied for and obtained the North London Railway Act 1865, which also incorporated the Lands Clauses Act, but not any provisions or clause of the Act of 1864.

The preamble to this second Act recited that the said street or lane, called Albert-street, passed over the railway at Highbury station, and that in order to carry out the contemplated enlargement and improvement of that station, it was expedient to empower the company to stop up a portion of the said street or lane, and to appropriate part of the site thereof for the purposes of their undertaking, and that it was also expedient to empower the company to purchase or acquire, by compulsion or otherwise, and hold, additional lands and houses in connection with their undertaking, and that plans and sections showing the line and levels of (*inter alia*) the said street proposed to be stopped up, and also showing the lands and houses which the company might purchase under that Act, together with a book of reference to such plans, had been deposited with the clerk of the peace for the county of Middlesex.

This Act, by its 21st section, provided that, subject to the provisions in this Act and in the incorporated Acts contained, the company might enter upon, take, and use all or any of the lands and other property shown on the plans and described in the book of reference so deposited as aforesaid, but that the power of taking the same compulsorily should not be exercised after the space of three years from the passing of the Act.

Then by the 58th section it was provided that—

Subject to the provisions and restrictions in this Act and the Acts wholly or partially incorporated herewith respectively contained, the company may also permanently stop up and appropriate for their use portions of the street or lane in the parish of St. Mary, Islington, known as Swan-yard, otherwise Albert-street, to the extent shown upon the said plans; and the site of so much of the said street or lane as shall be stopped up and appropriated as aforesaid shall, from the time of such stopping up and appropriation thereof respectively, beabsolutely vested in the company; provided nevertheless that the company shall have previously constructed at their cost a new or substituted road of twenty feet in width, and running from the portion thereof cut off and lying south of the railway to Upper-street, Islington, in a direction as near as may be parallel to that of the line of the railway. And the company shall at their cost pave and keep in repair for the space of twelve months, the said substituted road, and the same shall ever thereafter be dedicated to the use of the public, and be maintained, repaired, and regulated by the Vestry of St. Mary, Islington.

The lands and hereditaments of the plaintiff, which were included in the plans deposited in contemplation of the Act of 1864, did not form any part of the lands and houses defined or shown upon the plans, or sections, or book of reference, as lands or houses which the company might purchase under the Act of 1865, and the company never served the plaintiff with any notice of their intention to apply to Parliament for power to purchase or acquire any property of the plaintiff for the purposes of the Act of 1865, and no power was by the later Act given to or conferred upon the company, to take, acquire, or use any of the plaintiff's lands for the purposes of that Act.

The company did nothing with respect to their powers under the Act of 1864 to take the plaintiff's land, until the time for exercising their compulsory powers had nearly expired; but on the 16th May 1867 the company served him with notice, alleging that they required such part of his land as was mentioned in the schedule to the notice, and that they were willing to treat with him for the purchase; and the plaintiff, in the belief, as his bill alleged, that the defendants really and truly required the lands for the purposes of the Act of 1864, entered into negotiations accordingly. These negotiations were, however, protracted, and at the date of the filing of the bill no agreement had been concluded.

The plaintiff recently discovered, and it was the fact, that the defendants did not require the lands for the purposes for which alone, by the Act of 1864, they were empowered and authorised to take them, but that in point of fact the defendants desired to take them for the purpose of constructing

the new and substituted road which, under the provisions of the Act of 1865, they were bound to make before they could permanently stop up and appropriate the portions of Albert-street, and for the further purpose of applying such parts as were not required for the new roads for purposes other than those authorised by their Acts, or any of them.

The defendants had, moreover, purchased of other persons lands between the plaintiff's property and the wall of the railway at Highbury Station, which lands were of more than sufficient width for the construction of the proposed new road, and the bill alleged that they might construct the road over those lands; but the defendants did not intend to use these intervening lands for the purposes authorised by the Act of 1864, but for private purposes of their own; for, being owners of the Cock Tavern, they intended to enlarge their station, which lies behind it, by pulling down the Cock Tavern, and they had entered into arrangements with the lessees to erect, or permit to be erected, a new tavern upon the vacant space (the intervening lands), which was to be connected with the station so as to be used therewith as a refreshment room.

The bill, after stating these facts, as to which there was substantially no dispute, charged that no part of the "intervening" lands was ever *bonâ fide* required for the purposes of their undertaking, and that no part of the plaintiff's lands was *bonâ fide* required by the defendants for the purposes of the Act of 1864, but that all such lands were alleged to be so required only under colour of the powers of the Act of 1864, to enable them to erect the new tavern, and to construct the proposed new road over the plaintiff's land, and to annex so much of the plaintiff's land as should not be required for the new road to the back premises of the intended tavern; that the plaintiff had accordingly refused to sell, or in any manner to treat for the sale, but that the defendants had, on the 9th March 1869, issued their warrant to the sheriff to summon a jury to assess the compensation to be paid to the plaintiff, and they threatened and intended to take possession of the lands. The bill prayed to the effect already stated for an injunction, which was granted on motion by the learned Vice-Chancellor, against which the present appeal was brought.

Sir *Roundell Palmer*, Q. C. and *Rodwell* supported the appeal.

Kay, Q. C. and *Woodhouse*, for the plaintiff, opposed.

The authorities referred to were:

The Eastern Counties Railway Company v. *Hawkes*, 5 H. of L. Cas. 331;
The Warden and Assistants of the Harbour of Dover v. *The South-Eastern Railway Company*, 9 Hare, 489;
Cother v. *The Midland Railwoy Company*, 2 Ph. 469;
Sadd v. *The Maldon, &c., Railway Company*, 6 Exch. 143;
Reg. v. *The Wycombe Railway Company*, L. Rep. 2 Q. B. 310; 15 L. T. Rep. N. S. 610;
Galloway v. *The Mayor and Commonalty of London*, L. Rep. 1 Eng. and Ir. App. 34; 14 L. T. Rep. N. S. 865;
Flower v. *The London, Brighton, and South Coast Railway Company*, 2 Dr. & Sm. 330; 12 L. T. Rep. N. S. 10;
Webb v. *The Manchester and Leeds Railway Company*, 4 Myl. & Cr. 116;
Eversfield v. *The Mid-Sussex Railway Company*, 3 De G. & J. 286;
The Railways Clauses Consolidation Act 1845, ss. 16, 45, 46.

Sir *Roundell Palmer*, Q.C. having been heard in reply,

Lord Justice SELWYN said: In cases like that which is now before the court, the burden lies upon those who seek to take the property of others against their will, to show that a compulsory power enabling them so to do has been conferred upon them by Parliament. Such powers are not to be created or extended by doubtful implication, but, as Lord Cottenham observed in the case of *Webb* v. *The Lancashire, Sheffield, and Lincolnshire Railway Company* (*ubi sup.*), it is the duty of the court to keep those companies which possess such extraordinary powers strictly within the limits of those powers.

In the present case, the plaintiff's land is shown on the plans, and described in the books of reference referred to by the Act of 1864, but it is not included in the plans, nor described in the books of reference referred to by the Act of 1865; and in my judgment it is perfectly clear, and indeed the contrary has not been insisted upon in argument, that the company could not, for the purpose of making their new road which that Act did not contemplate, have acquired the property of the plaintiff under the Act of 1864; for although it is true there are no negative words contained in the 6th clause of that Act, still it has been very fairly and properly admitted by Sir Roundell Palmer that the company is necessarily restricted to the purposes of the Act when they come to acquire compulsory land under the powers conferred upon them. I think it did not require the authority of the recent case in the Court of Queen's Bench, *Reg.* v. *The Wycombe Railway Company* (*ubi sup.*), to show that there was no foundation for the argument which was addressed to us by Mr. Rodwell, that, under circumstances such as exist in the present case this company had power to stop up the street called Albert-street, under the general powers conferred by the 16th section of the Railway Clauses Act, limited as those powers are by the words at the commencement and the close of that section, and also by the express enactment of the 46th section of the same Act of Parliament. I think it is perfectly plain that they had no such power, still less had they any power to make another street at right angles with that street, and running into another and entirely different road. I think, therefore, we must proceed upon the hypothesis that under the Act of 1864, taken by itself, the company had no power to take or purchase against the will of the plaintiff this land for the purpose of making any such road.

Under these circumstances, then, if the plaintiff had been able to foresee what the company would require for the purposes of the Act of 1864, excluding from those purposes the formation of this new street, he would have known that a very small, if any, portion of his land would be required for the purposes of that Act, and he might, therefore, reasonably abstain from offering any opposition to the passing of that Act through Parliament. Then he received no notice of the introduction of the Act of 1865, or of any intention to obtain from Parliament any extension of the powers contained in the Act of 1864; and it certainly would be a case of considerable hardship if a person in the possession of land over which no powers were conferred by the Act of 1864, should find himself exposed to the exercise of such compulsory powers without any notice, or any means of opposing the passing through Parliament of the Act conferring those powers. But, nevertheless, if such powers had been clearly given by the Legislature, whatever the hardship might have been upon any individual, it would have been our duty to act upon and maintain the provisions of the Act of Parliament.

But the question which we have to decide is whether, in fact, any such powers have been conferred by the Act of 1865. I think it is upon th

construction of that Act, having reference, of course, to the former Act, that the question before the court turns. Now, in considering that Act of Parliament, I think there are three things which are to be observed. The first is, that the two Acts of Parliament are entirely distinct, that there are no words incorporating the one Act with the other; secondly, that the second Act does not continue or extend the powers contained in the Act of 1864; and, thirdly, that in the Act of 1865 there is no reference to the lands authorised to be taken by the former Act; but, on the contrary, the two acts are, as I have said, separate and distinct Acts of Parliament. The powers conferred by each of them are separate and distinct, and the lands which the company is authorised to purchase under the Act of 1864 are quite separate and distinct from those which are authorised to be purchased by the Act of 1865. That is done in a very marked manner by both the Acts of Parliament. It will be sufficient to refer to the second Act, that of 1865, for the observations which I made upon that apply also to the Act of 1864. It contains a recital that "it is expedient to empower the company to purchase, or acquire by compulsion, or otherwise, and hold, additional lands and houses in connection with their undertaking, and whereas plans and sections showing the line," and so forth, "and of the intended new cut from the company's existing railway dock into the river Thames, and of the intended new road in substitution of Grange-road, and of the said street proposed to be stopped up, and also showing the lands and houses which the company may purchase under this Act, together with a book of reference to such plans have been deposited with the clerk of the peace. [His Lordship then read the 21st and 58th sections of that Act, and proceeded:] Now, as I have already said, the construction of this new or substituted railway cannot be considered, in my judgment, as one of the purposes of the Act of 1864 at all; it is a matter entirely collateral to the formation of the railway; it is in fact the price or condition upon which, as between themselves and the public, the company were authorised to stop up and appropriate for their own use a certain portion of the street called Albert-street; but there is no express direction that they shall construct this new street, there are no special powers given to them for purchasing the land which is necessary for the formation of that new street, but it is merely imposed as a condition upon their acquisition of so much of the street called Albert-street as they were entitled to appropriate to their own use. And therefore, in my judgment, if Parliament had intended, for the purpose of this new street, to give powers of compulsorily taking any particular portion of land, that being one of the purposes of the Act of Parliament, the lands which were necessary for that purpose would have been included in the plans and in the books of reference, and also would have been stated to be lands which were to be purchased for the purposes of that Act. Of course if such lands had been included in plans previously deposited, and if they had been comprised in the former Act of Parliament, it would have been very easy to have referred to them without the necessity of requiring any new deposit or any new description of these lands. But we do not find any such reference, nor is there any incorporation of the provisions of the former Act at all. I think, therefore, this being an entirely separate and collateral thing, we must take it that Parliament meant this company to acquire, as they best might, the lands which were necessary for the formation of this new road, only saying that unless you do acquire land necessary for that purpose, and do form this new street, then the condition will not be complied with; and unless you do that, you will not be at liberty to appropriate to your own use that portion of Albert-street which, upon the performance of that condition, is to become the property of the company. I think, therefore, that the 58th section cannot be considered as, either directly or indirectly, conferring the power of compulsorily purchasing these lands, which are the property of the plaintiff. Then an argument was also founded upon the recital in the Act of 1865, to which I have already referred, and which is similar to the one contained in the Act of 1864, namely, the recital that it is also "expedient to empower the company to purchase or acquire, by compulsion or otherwise, and hold additional lands and houses in connection with their undertaking." I agree with the argument that that word undertaking must include the whole undertaking from the commencement of the company to the time when this Act of Parliament was passed. But I think the very collocation of the recitals that immediately follow it will show that it really could not have been the intention of the parties to include the plaintiff's land for the purpose of making this new road; for the next recital after it is this: "Whereas plans and sections showing the line and levels of the proposed widening of the said portion of the company's railway, and of the proposed enlargement and improvement of the said bridges respectively, and of the intended new cut from the company's existing railway dock into the river Thames, and of the intended new road in substitution of Grange-road, and of the said street proposed to be stopped up, and also showing the lands and houses which the company may purchase under this Act have been deposited." Now adopting the argument of Sir Roundell Palmer upon this point, that this was intended to give them, by compulsion or otherwise, the power to obtain additional lands in connection with their undertaking, that power of obtaining by compulsion these additional lands, is one of the express purposes of the Act of 1865. Then the next recital is, that the lands which are to be acquired, and which the company may purchase under this Act for those, amongst other, purposes, are described in the plans and books of reference, and those plans and books of reference do not include the plaintiff's land. Therefore, I think there is no sufficient ground for saying that, by means of that recital or otherwise, any such power can be implied. I think it is clear that no such power is expressed in the terms of this Act. I think, therefore, that the company have failed in showing the existence in either of these Acts of Parliament of any power enabling them compulsorily to purchase the plaintiff's land. In my judgment the company have failed upon the merits, and the consequence is that the appeal motion must be dismissed, and they must pay the costs of the motion.

Lord Justice GIFFARD said:—There were certain subordinate points which were adverted to in the argument upon this case, which I will just touch upon before going to the real questions which arise on this appeal. It was alleged that, because the company had some other land which they might apply to this purpose, and were building, or proposed to build, an hotel upon it, therefore the plaintiff was entitled to the injunction. I am quite satisfied that that circumstance would have afforded no ground for interfering, provided this land was actually being taken for the purposes for which the company might lawfully take it.

Then, again, it was argued that the notice included some land which was taken for lawful purposes, and that the notice was separate, and that at all events the injunction ought not to prevent that, or, at least, that certain terms ought to be imposed on the plain-

tiff. Now first of all there is no distinction; the notice applies to certain specified lands without any distinction whatever; and, secondly, I cannot see either how it can be separable, or how you can take one part of the notice and disregard another. The fact is, that when the notice is given it is the foundation of all the subsequent proceedings, and all the subsequent proceedings must necessarily accord with it; and if they do not accord with it, it necessarily follows that the notice itself is wrong. That being so, it is clear that there are no grounds whatever for imposing terms on the plaintiff. There is no act done by him which has misled the company, and no reason why terms should be imposed upon him.

That brings me to what is the real question in the case; and that is, whether the compulsory powers of this company extend to taking the plaintiff's land for this purpose. Under the Act of 1864 it is conceded that this particular thing could not be done. The preamble of the Act of 1864 has been read, and in point of fact it recites that it is expedient to take certain lands in connection (that is the widest way of putting it), certain additional lands and houses in connection with the defendants' undertaking. Then those lands are specified, and the 6th clause says: "Subject to the provisions in this Act, and in the incorporated Acts contained, the company may enter upon, take and use all or any of the lands and other property shown on the plans and described in the book of reference, so deposited as aforesaid;" and then the compulsory powers were not to be exercised after a given period.

Now, seeing what the law with reference to these companies is, I can have no doubt but that this company could, of course, only take those specified lands for lawful purposes; that is, the specified lands for such purposes as were authorised by this Act, and that the Act must be taken quite as strongly as if it had said, "You shall take the lands for those purposes, and for no others."

That being so, we then come to the Act of 1865. The Act of 1865 does specify other lands, and does give, with reference to those other lands, compulsory powers, and it in no way refers to the compulsory powers given by the Act of 1864; nor, even if the vestry had consented, do I think that any power was given by the Act of 1864 to make this substituted road. It might well be if the vestry had given power to stop up Albert-street that, even with that consent, there would have been no power to make the substituted road.

Then we come to the 58th section of this second Act; and beyond all question all these compulsory powers are directly in derogation of private rights, and are to be read most strongly against the railway company, and are to be read most strongly in favour of private rights; and you could not imply any extension of the compulsory powers, unless there was a positive and absolute necessity for doing so. In this case there is no positive or absolute necessity for doing so, and it might well be that this company could agree with some one who would sell them land; they might lawfully do that under the Railways Clauses Act, and I think under the implied power which would arise under this 58th section, it might well be that they might have agreed with this plaintiff. If they had agreed, or could now agree, with him they could do that thing which was a condition precedent to their having a right to stop up this Albert-street. Again, if it were convenient to them to apply that land which was in their possession for the purpose of making this road, then they could do that thing which was a condition precedent to their stopping up Albert-street. Upon that, therefore, it is plain that it is not absolutely necessary to imply an extension of those compulsory powers. There was a state of circumstances under which it might be reasonably assumed that it would be possible to do this thing without any extension of the compulsory powers. In terms there is no extension of the compulsory powers, and the compulsory powers being directly and distinctly in derogation of private rights, I am of opinion that it would not be a sound construction of Acts of Parliament of this sort, to imply or to give to any such clause as that which is represented by the 58th section of this Act, any such extensive meaning as would by implication extend these compulsory powers, when they are not so extended in terms. In point of fact if companies want to extend their compulsory powers, they should tell the public so plainly, and they should give the public the opportunity of appearing before Parliament, and opposing them if they think fit.

Upon these grounds the appeal motion must be dismissed with costs, but our order will confine the injunction in effect to proceedings upon the footing of this notice.

Solicitors for the appellant company, *Paine* and *Layton.*

Solicitors for the plaintiff, respondent, *Langham* and *Son.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

June 30 and July 1, 3, and 5.

MACKIE *v.* THE EUROPEAN ASSURANCE SOCIETY.

Insurance company—Agent—Temporary agreement for policy—Fire before policy and after agreement and deposit.

W. being the agent of the C. U. Assurance Company, M. insured a mill and warehouse through W. in that office. W., without M.'s knowledge, ceased to be such agent, and became agent for the E. A. Company, and on M.'s application for a fresh policy gave him a printed receipt filled up for a deposit for a month until a regular policy should be made out. M. did not at first discover that the form was on behalf of the E. A. Company, but when he did wrote to W. noting the change, and saying that he knew nothing of the E. A. Company, and should require to be satisfied of their respectability and standing before he could consent to give them over all the sums. Before any policy was made out part of the premises were burned down, and nothing having been communicated to M. by the E. A. office, either as accepting or refusing his proposal, nor several letters from him claiming the sum insured answered, the office sent down a clerk, who viewed the premises, and then refused to pay the insurance, chiefly on the ground that M. by his letter had repudiated the insurance with them:

On bill filed for recovery of the insurance, decree made with costs.

This bill was filed by Robert Mackie to recover 2800*l.* the amount of an insurance on a Scotch bonnet manufactory at Stewarton in Ayrshire, Scotland, under somewhat peculiar circumstances: The plaintiff had for some years carried on the above business under the firm of "Robert Mackie and Co.," the premises consisting of a wool mill, a bonnet factory, and wool store; the two latter portions were not injured by the fire, a steam boiler and chimney being between the mill and factory, and the engine working both; and the wool-store was detached. Previously to Nov. 1866 these premises were insured with the Commercial Union Assurance Company for 2700*l.*, the insurance having been effected through James Waddell (till recently agent to the Commercial Union) in yearly policies. In April

1866, the plaintiff gave Waddell general instructions to insure his stock for an additional 200*l.*, and this was done, and would expire in Nov. 1867. In 1866 the plaintiff enlarged his premises, and during the alterations James Waddell made suggestions as to diminishing the risk. The plaintiff then saw Waddell, and proposed to insure the mill for 1400*l.*, and the bonnet factory for 1300*l.* James Waddell took down the particulars in pencil, and asked the plaintiff for 2*l.*, and said he would give him a deposit receipt which would hold him covered until the policies were arranged, and put them in one receipt. The plaintiff told Waddell that he had insured the mill for 1400*l.* also in another office, when Waddell said he should like to have had all. The plaintiff subsequently met Waddell at Kilmarnock Railway Station, paid him 2*l.*, and Waddell handed him a deposit receipt which he put in his pocket, being pressed for time, and just going by the train, and noticed only that it was a receipt for the 2*l.* It was as follows, in a printed form and stamped:

No. 5966.

THE EUROPEAN ASSURANCE SOCIETY.
(Empowered by special Act of Parliament.)
Chief Offices, London:
Fire, 69, King William-street, E.C.
Life, 2, Waterloo-place, Pall-Mall.

Glasgow, 16th Nov. 1866.

Memorandum of Deposit.

Messrs. R. Mackie and Co., Stewarton, having this day proposed an insurance of 2700*l.* to the European Assurance Society, on property described in their fire order of this date, and having made a deposit of 2*l.* in part payment of premium and duty, it is hereby declared that the property so described shall be held insured in virtue of such deposit for one month from this date, or until notice be sooner given that the proposal is declined. Total, say 2700*l.*

JAMES WADDELL, for the Society.

On the 17th Waddell sent by post to the society fire orders for 11,020*l.*, including the 2700*l.*, and the receipt was acknowledged by the head office, and on the 20th he sent a ground plan of the mill and bonnet factory. On the 22nd the plaintiff wrote to Waddell saying that the other office had behaved shabbily, and refused the insurance, and asking if he would take all, to which he replied that he would, and on the same day he communicated the fact to the office. On the 24th the plaintiff sent a post-office order to Waddell for 2*l.*, the additional insurance (2800*l.*), and on the 26th a stamped printed filled up receipt in the same form as the first was sent by Waddell to the plaintiff, and on the 27th be communicated it to the office. On receiving the second deposit receipt the plaintiff noticed for the first time that the office was the European, and wrote the following letter on the 28th.

Mr. Waddell.

Sir,—I see from your receipt that you seem to change our insurance from the Commercial Union to the European. Now you did not acquaint me of that, and I expected that you were continuing us in the old office. Do they refuse to take it now, if so, do they refuse also to take the bonnet works? I do not want any change in the office if they were willing to take all or part. As for the European, I know nothing about them, and would require to be satisfied of their respectability and standing before I could consent to give them over all the sums. Please write me and say if the old office refuse to take the assurance still, and if they also refuse the bonnet works, which I would prefer not to change at all events, and wait our reply before proceeding with the change.—We are, yours respectfully,

R. MACKIE and Co.

No reply was sent to this letter.

The bill alleged that some of the insurance offices in consequence of the fire at London Bridge had raised the rates on a tariff, but the Commercial Union was then a non-tariff office; but that insurance having expired, the plaintiff considered he had better let the insurance remain with the European. On the 1st Dec. 1866 the woollen mill was burned down, and notice of it was given to Waddell by special messenger immediately, and Waddell having inspected the ruins on the 4th, wrote to the plaintiff, inclosing a copy of the bonnet policy, and asking him to make out the wool claim minutely, and push on the other claims, as the head office was applying for them.

On the 6th the plaintiff went to Glasgow with an estimate of loss, and gave it to Waddell, from whom he understood that it would be settled in due course. The plaintiffs met W. H. Hepper, a clerk of the defendants, at Waddell's, and they went through the estimates, with which Hepper found fault, and suggested a compromise, which the plaintiff declined; when he asked him when he first knew he was insured in the European, to which he replied, not until the 26th Nov., when Hepper said, as it was alleged, very offensively, "I am glad you confess that," and some words ensued, Hepper saying he had discovered something he should not disclose. What followed may be thus summed up. Hepper did not go to Stewarton, and although the plaintiff wrote to the office, sending particulars of his claim, four times he received no reply. He likewise wrote to Waddell three times, who replied on the 11th Jan., wishing to see him, inclosing a letter of the 9th from the secretary (the defendant J. Hamer Owens), written to him, Waddell. This letter stated that the directors had deliberately considered the claim, and were convinced that not the slightest liability attached to the society in connection with it; that the money (4*l.*) paid, not being intended for them, ought to be returned. The result was, that this bill was filed for the recovery of the money with interest, after a letter of remonstrance had been written by the plaintiff to Waddell. There was a great deal of evidence, that for the plaintiffs going to show that Waddell had communicated everything to the office, although there was a conflict on this point, the defendants denying that. With this exception, the facts were hardly in dispute. It appeared, however, that the office had given up their fire business.

Glasse, Q.C. and *Macnaghten* appeared for the plaintiffs, and argued that the two documents being receipts for the respective sums of 2*l.* each, were quite sufficient alone to bind the office. The terms were distinct; they were to cover the insurance for a month, unless the proposal was declined (that is, before a fire), which it never was. Indeed, it never was declined at all, but a fire having immediately happened, the office, finding that matters had gone against them, sought to escape from the liability, and sent Hepper down to do so in a most unfair way. The letter written by the plaintiff was no repudiation; at all events, he wished to be insured, and considered that he was for the month, during which time he wished to consider whether he would continue with the European by taking a regular policy; nothing more. It was only a question of responsibility of the office. Waddell and the office treated it as a continuing contract, and it never would have been in question if the fire had not so immediately happened, and if the company had not given up their fire business. There were all the elements of a contract, and even supposing there was a repudiation the refusal came too late, after so long an acquiescence:

Wing v. *Harvey*, 5 De G. M. and G. 265;
Law v. *London Indisputable Life Policy Company*, 1 K. & J. 223.

Sir *Roundell Palmer* Q.C. *Cotton*, Q.C. and *Bevir*, for the defendants, contended that there was no binding contract. To form a binding contract there must be two parties agreeing to the same thing. Here they disagreed, and it was not the same subject matter; for not only was everything left open by the letter of the plaintiff, but it operated as a distinct repudiation. The plaintiff took a receipt and aid the deposit under an entire misapprehension, and the moment he discovered it threw the

whole open, and in distinct terms said that he could not agree with the European until he was satisfied of their responsibility; and while this was pending the fire happened. The company at once declined and disclaimed all title to the money, putting the matter in the right light, namely, that it was never intended for them. No doubt had nothing been said the defendants might have been bound; although that was very doubtful, for their agent had not disclosed the fact that he had made out the deposit as the agent of the European, and he could not bind them, if, without their knowledge and sanction, he had imposed upon a third person. If remedy there were it was as between him and that third person. When the fire occurred both parties were considering the question, and the plaintiff in writing had actually thrown it all open, and therefore it was impossible that there could be any relief.

The VICE-CHANCELLOR, without hearing a reply (after stating the facts).—I do not hear a reply, because I entertain no doubt on this case. This office, which in 1866 was a life office, carried on business at various places, and a large proportion, through the instrumentality of agents, and, not satisfied with business in England, were desirous of carrying on business in Scotland; and in the usual course employed a gentleman, who was highly respectable, and carried on a large business at Glasgow, as their agent, being also agent to another office called the Commercial Union, a fire office, which branch of business the European has discontinued. That he ceased to be fire agent to the Commercial does not appear to have been known to Mr. Mackie; but eventually, the amount of insurance being fixed at 2700*l.*, and some time necessarily occupied in preparing the policy, a receipt was given in a form, as I understand it, not peculiar to this office, but common at other offices. This note, so far as Waddell's authority extended, was an immediate assurance for 2700*l.* and it is agreed that, assuming it was within his authority, if a fire had happened while the letter he wrote the office was in transit, the loss sustained would be covered by the policy, because the regulations most properly provided that "should the directors decline the assurance, the money was to be immediately returned to the assured. During the interim the assurance remains in legal force." In the letter which Mr. Waddell wrote, referring to many assurances, he specifies this amongst others, and the defendants' answer admits it. It was competent for the office by return of post to decline the proposal, without giving a reason, but until such notice was received the insurance would continue, and if a fire happened in the interval this office would have been answerable. But they deliberately accepted it. Mr. Owens, the secretary, admitting in the answer that the fire order was acknowledged in due course, he having the management of the fire business; also, in his letter to Mr. Waddell he says, "I am in receipt of your favour of the 17th instant, and note that you have accepted proposals to the amount of 11,020*l.*, the particulars of which I await." Is it possible that there could be a more distinct acceptance of the proposition, or a more distinct adoption of the contract? It is really "We have accepted." Nothing can be more distinct to my mind than that Mr. Waddell being their agent from the very commencement of this business; having, as he says, effected for them no less than 160 policies; being a man with whom they were perfectly satisfied and as to whose discretion they had no reason to complain—they leave it to him to accept or reject what he thinks fit. There is not in evidence an instance of their having rejected one proposal made to them by him. Here they deliberately accepted it, and it became a binding contract on this company. But Mr. Waddell, knowing that the plaintiffs had got an insurance in another office, and having for some reason, wholly unimportant, ceased to be agent for the Commercial Union Assurance Company, was desirous of obtaining the whole of the plaintiffs' assurance for this office, and therefore, as the defendants admit, on the 23rd Nov. he wrote to Mr. Hepper saying he had a letter from Mackie and Co. giving him the whole of their fire risks; that he had pressed it hard before, and would send particulars by next post. Was that repudiated? Quite the contrary. They are well satisfied and adopt this act. That would be received on the 24th, and on the 26th Mr. Mackie makes his final proposal to increase the insurance to 2800*l.*, and Mr. Waddell gets from him a further 2*l.* by post office order, how he received it being immaterial, and Waddell gave the formal receipt for the increased insurance. He swears, and I believe his statement, that by the post of the 27th he wrote informing the office of the circumstance. Against this statement there is nothing but that the office says they have not got the letter, and they did not receive it; but here is the positive statement by Waddell, corroborated by a document referred to containing extracts from Waddell's books, where this entry appears, "Wrote Hepper that I had got Mackie and Co's additional half on the mill." I am, therefore, satisfied, on the evidence, that Waddell wrote, on the 27th, and that the letter was received by the office. Can I, under these circumstances, have any doubt that that letter being received, they would as readily accept the additional 1400*l.* as they did the original 1400*l.*? Why am I to assume that they would not? They did not know that the place was going to be burnt down in three or four days, and were anxious to get business, and the more Waddell got for them the better agent they considered him. There is in evidence a book of this society containing a solemn address to their agents. The instructions are clearly detailed, and his careful perusal solicited, the advantages of a good agency pointed out, and exertion urged upon him. It means this, "Push your business, seek for, and get as many policies as you can, and the more you get the better agent we shall esteem you." Can I therefore presume in favour of the office that when he got more business they would repudiate it because they tell me so now that the place has been burnt? I presume everything against them, that they would have continued in the usual course, never having before repudiated any of Mr. Waddell's proposals, and I am satisfied that they received the letter; and if they did not it was not the fault of the assured but of their own agent; and if they received it they would as gladly adopt the second proposal as they had the first. This, therefore, completes the contract to cover one month during which the policies were to be prepared; although I agree that during that month it was open to the office on further inquiry to refuse to grant the policy and to terminate the contract at the end of the month. It was equally open to the assured to say he did not like the European office, not thinking the capital sufficient, or for other reasons, or that they had taken the same course before, and that he disliked a repudiating office. It was open to either party during the month. But it is of the highest importance, not only to the public generally, but to that class interested as shareholders in these companies, that this kind of business should be conducted on principles of integrity, and no trickery had recourse to when the risk has gone against the insurers. It is only due to this company to say that their rules seem proper and moderate, and probably such as to suit their transactions. One

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refers to special risks requiring special descriptions, and there are instructions to agents that no assurance will be held in force unless on prepayment of deposit or premium with printed acknowledgment. Therefore when payment is made, and a receipt given, the risk is incurred. It is also provided that if the insurance is declined the money is to be immediately returned, and "during the interim the assurance remains in legal force." Therefore the proposal having been made and accepted, and the contract, as I think, fully in force against the office on the morning of the 1st Dec., fifteen days after the first proposal, and five after the second, the premises are burned, and thereupon, if the contract was in force, the plaintiff became entitled to the 2800*l.* if he had sustained that damage. [Having considered the correspondence and the steps taken to ascertain the damage, the Vice-Chancellor proceeded:] It turns out that this office, presided over by a gentleman of high position, with a respectable body of directors and firm of solicitors, and a respectable staff, whether by deliberations of the board, which I hope it was not, or circumstances which I cannot get at, did not send the clerk down fairly to ascertain the damage, but to see what holes he could pick in the contract, to enable a repudiation, and leave this poor man, as far as they knew, utterly ruined by the fire, against the perils of which he thought himself protected by the contract. This clerk, whether from overheated zeal or instructions, I know not which, fancied he had made a great discovery, that the plaintiff who wished his property insured, when he wrote to Waddell intended to effect a policy in the Commercial Union. It has been strenuously argued as a fatal objection that to constitute a contract there must be the consent of both parties to the same thing; and in consequence of this discovery, after the fire and this poor gentleman's property had been destroyed, he has been kept out of the money for more than two years and a half, which ought to have been paid within a month. There is no doubt on his evidence that although he received from Waddell, the agent in whom he had confidence, the printed forms, arming Waddell with authority, he put them in his pocket and did not look at them, and it was not until he received the second that he was aware that he was insured in the European. Now, on the 28th, he wrote to Mr. Waddell, and this is part of Mr. Hepper's great discovery, two days before the fire. [The Vice-Chancellor read the letter.] It is contended that this letter was a repudiation; I cannot treat it as anything of the kind. It amounts, in my mind, to this, that he having been satisfied with the Commercial found that Waddell, in whom he had perfect confidence, had handed him over to the European, and that he had a contract for a month with them. I read it thus: "I intend, during the whole month, to consider whether I will accept the European," but can any reasonable man conclude that he meant, "sooner than be insured in the European I will remain uninsured altogether?" He knew that he was exposed to peril by fire every hour, and until he got another document, he could not be insured anywhere but in the European. I must put a rational construction on this letter, viz., that he intended to make further inquiry, and upon making such inquiry, he would have felt himself at liberty to decline further insurance with the European. But he would have made further inquiry of Waddell, and he would have told him truly that he had ceased to be agent for the Commercial Union, but that the European was at least as good, and perhaps better. The advertisement in the *Law List* states that they never dispute policies, with an income of 300,000*l.* a year. If he had made inquiries, he would have accepted the policy, as accept it he did. He had a perfect right to adopt or repudiate the contract, and he adopted it until he distinctly repudiated. It was not a repudiation by him, but a continuing contract, as if that letter had never been written—as if when he accepted the document, he had been aware that it was the European, and not the Commercial with whom he had contracted. The defence set up on this ground is contemptible and ridiculous. I am told that eminent counsel, I neither know nor wish to know whom, advised the office to resist the policy. I stated when I heard it that I hoped it was accompanied by advice that if on technical grounds they had such a defence they ought not to avail themselves of it. The first objection therefore is, that it was not the plaintiff's intention to insure in this office. My opinion is, that his intention was not to remain uninsured for an hour, and in what office it was was a secondary consideration, provided it would meet its engagements, and was able to do so. This office has the ability, and I am sorry that they have not taken a different view. On the other part of this case, their first objection totally failing, the next is, that Mr. Waddell miscarried by not making such communication to their office as he ought considering the peril. I am perfectly satisfied that between the 16th Nov., and even after the second document and before the fire, there was ample opportunity for the office to complain to the agent and require him to perform his duty; and nothing could be more fatal to the interests of the public in fire and life assurances, which are carried on to such an enormous extent through agencies, than for the court to sanction the idea that the assured is to run the peril of the agent strictly performing his duty. I am happy to be supported in this view by an authority cited for the plaintiffs, and on which the defendants' counsel have made no observation. It is *Wing* v. *Harvey* (*sup.*), which, by arrangement, was an original hearing before Knight Bruce and Turner, L. JJ., in which I and Mr. Glasse were counsel. There a life was insured in the Norwich office, to be vitiated if the assured went beyond certain limits. He went to Canada, beyond the limits; but the agent, knowing the fact, still annually accepted the premiums. I argued for the office that the agent exceeded his authority, and that he could not bind the office unless expressly authorised. But Knight Bruce, L. J., asked how the plaintiff was to know the limits of the agent's authority; and I ask that question here, or how are the public to know them? I cannot imagine anything more fatal to the interests of insurance offices; and in mercy to this and other offices I think I should refuse to accede to such an argument, because it would lead to the annihilation of a great portion of insurance agencies. Turner, L. J. said that the office did not know that the assured was beyond the limits, but the agent did; and both learned judges treated the knowledge of the agent as the knowledge of the office. (The Vice-Chancellor read passages from the judgment.) In that case the policy was void at the office's option, and would have become void, but for the non-communication of the fact of the assured going beyond the limits; but as it had been communicated to the agent it was treated as communicated to the principal. So here I treat Waddell's acts as the acts of the office; if he miscarried, the office has a remedy against him; but if I held this policy vitiated, because in a manner of which the assured is ignorant the agent goes beyond his authority, no insurance effected through an agent would be safe. The agent binds the company, and they can repudiate if he exceeds his limit before the event happens, and afterwards it is too late to set up the defence. It is impossible that an office can escape liability on grounds so frivolous. Upon every ground I condemn this defence, which ought never to have been

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set up, and has done the plaintiff much injustice, as he relied on the insurance. I think, however, he was wrong in coming to this court, and should have brought an action. There has been considerable delay, not attributable to this court; there is an interval between the answer in April 1866 and the plaintiff's affidavit in Sept. 1868, that is very great. Having raised these objections, fatal to the public and to the success of the office, and most unwisely taken, and frivolous and ridiculous in themselves, I fear I can only make a decree that they are bound to the terms of the policy, and must make reparation for all damage, with interest on the money. I should be glad if I could make them pay damages for the injury which this defence has caused to the plaintiff; it could not have originated with the respectable directors or solicitors, but the miserable officials. There must be a decree, with 5*l.* per cent. interest from the 10th Jan. after the fire. I would give 10*l.* per cent. if I could, with all costs of suit. As to the case in the Exchequer, I think that must have turned upon the usage at Liverpool; it has no application. I follow *Wing* v. *Harvey* (*sup.*).

Solicitors for the plaintiffs, *Uptons, Johnson,* and *Co.*

Solicitors for the defendants, *Eyre* and *Lawson.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET, and R. T. BOULT, Esqrs., Barristers-at-Law.

Saturday May 8.

THE KING OF HANOVER *v.* BANK OF ENGLAND.

Trustee Act 1850—*Transfer of fund—Non-corporate body—New trustees.*

A fund standing to the credit of a non-corporate body in the books of the Bank of England, ordered to be transferred into the names of new trustees, to be held by them upon the former trusts, and those declared by a certain law and convention of a foreign power.

This was a bill filed by the King and Crown Prince of Hanover, praying that a certain sum of 600,000*l.* standing in the books of the Governor and Company of the Bank of England to the credit of "The Lords of His Majesty's Royal Regency of Hanover" might be transferred into the names of the plaintiff and two of the defendants, the Duke of Cambridge and the Duke of Brunswick, to be held by them upon certain trusts declared by a law and convention affecting the revenue of the Kingdom of Hanover, and also that the dividends accrued since the last payment of same and those to accrue due until the transfer might be paid to the King of Hanover.

Sir *Roundell Palmer,* Q.C., and *Eddis,* in support of the application.

Cotton, Q. C., and *Kekewich,* for the Bank of England, mentioned that the "Royal Regency of Hanover" was not a corporate body in the sense applicable to such a body here, but was a fluctuating body of official authorities. It was true that the Bank of England had been in the habit of dealing with the fund and the dividends thereof under the authority of instruments which purported to have been issued under a seal belonging to the body as above named. The Bank, therefore, did not oppose the application should the court think proper to make the order, but they suggested that the court should appoint two new trustees under sections 32 and 35 of the Trustee Act 1850, and to direct them to transfer the fund. This they asked as a protection to the Bank of England, and which might prevent any question which might arise upon the construction of the Acts of Parliament under which the Bank was incorporated and acted.

Osborne Morgan for the other defendants.

The VICE-CHANCELLOR said as there was no opposition, he would make the order in the terms proposed by the counsel for the bank. Two new trustees to be appointed, to be named by the royal personages interested in the dealing with the fund, and empowering and directing them to transfer the fund, and receive and pay over the past and future dividends.

Solicitors, *Pemberton* and *Co.; Freshfields* and *Newman; Farrer, Ouvry,* and *Co.*

Tuesday, June 29.

PLANT *v.* STOTT.

Injunction—Mines—Compensation for damage done—Preventing the working of adjoining coal mine.

The proprietors of a coal mine had so worked their mine by opening cuttings to draw off the water therein that they had caused the neighbouring and adjoining mine of the plaintiffs to be flooded, and from such openings the defendants had also abstracted coal from their neighbours' mine, and sold the same for their own benefit.

An injunction was granted to restrain the defendants from further proceeding; to stop up the existing openings and cuttings; from making another further opening which would have the effect complained of; for compensation for what damage had been sustained by the plaintiffs; and for an account of the value of the coal abstracted.

This was a bill filed by the plaintiffs, Thomas Plant, and others, against the defendants, James Stott and James Ashworth, under the circumstances and for the relief after mentioned.

The plaintiffs had been for the last six years before bill filed entitled to all the mines, veins, beds, and strata of coal and ironstone under certain lands called the Jackfields Farm, in the county of Stafford. They had worked this coal to a considerable extent, and had employed a large capital, and made large profits by such workings. The defendants were during the same period the owners of and worked other coal mines, under lands called the Banktop Lands, lying to the east and rise of the said Jackfields Farm.

There were several veins or seams of coal which ran continuously underneath both the Banktop lands, in the possession of the defendants, and the Jackfield land, in the possession of the plaintiffs, with an inclined slope or dip from the Banktop lands to the Jackfield lands.

There was in particular amongst such veins or seams one of valuable coal, called the Rowhurst Seam, which was a seam or vein of such a nature as to allow water to percolate and pass through it, but the stratum or upper boundary of the Rowhurst Seam which formed the roof, and also the stratum which formed the floor upon which the Rowhurst Seam rested were impervious to water—the said other seams or veins were generally of a like character, and had like roofs and floors. The water which entered the Rowhurst Seam on the Banktop lands percolated to the bottom of the same seam in the Jackfield lands. The plaintiffs and defendants had respectively large pumps and engines for raising the water which collected in their respective mines, and they had been in the habit of pumping out such water to the surface, and so getting rid of it.

In Nov. 1867, as alleged by the bill, the plaintiffs discovered that the defendants shortly prior to

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March 1866, and for some time thereafter continued these workings from their Banktop Mine into and under parts of the Jackfield lands, and partly into the said Rowhurst Seam under the same lands, and excavated large quantities of coal the property of the plaintiffs from under the Jackfield lands, and sold and applied some of it to their own use. That the defendants in continuing the said workings into and under the plaintiffs' mines, opened up deep headings and artificial channels and communications leading from the defendants' workings into the excavations and workings made by defendants in the plaintiffs' land; that such workings within the plaintiffs' bounds were done secretly and without the knowledge or sanction of the plaintiffs; that by reason of such communication a large body of water flowed from the defendants' mines through the headings and channels into such excavations under the plaintiffs' land, and collected there in great quantities; that defendants had also made within their own mines cruts or openings, and channels or pipes, through both the plaintiffs' and defendants' mines, and particularly above the seam called the Rowhurst Seam, so as artificially to let large quantities of water, the contents of the overlaying seams, into the underlying seams or veins, and particularly into the Rowhurst Seam; that such cruts and openings had not been made for the purpose of properly working the coal in defendants' mines, but for the purpose of conducting the water from the upper seams into the lower seams, particularly into the Rowhurst Seam, and for the purpose of thereby drawing the water from the defendants' mines into the plaintiffs' mines; that this had caused much injury to the plaintiffs' property; that such water continually arose from the increases by the ordinary workings and getting out of coal by the defendants within their mines and colliery, and that, so long as cruts or openings, or channels or pipes existed, and no proper barrier was made below the defendants' mines and the plaintiffs' mines, the water arising from such ordinary workings would flow into plaintiffs' mines. That such cruts, or openings, channels, or pipes also increased the flow of water through the workings in the defendants' mines, and which water arose from such ordinary workings and getting out coal, and by means of the openings or communications made by the defendants' mines as aforesaid the plaintiffs' bounds and workings made by the defendants under the plaintiffs' land as aforesaid were deteriorated. That the collection of water by these means in the last-mentioned excavations or workings not only greatly increased the quantity of water that flowed into the plaintiffs' workings, and which had to be pumped out by the plaintiffs, but also prevented the plaintiffs from working the coal within their mines without danger, and rendered a large quantity of such coal valueless. That plaintiffs had lately been compelled to expend large sums in pumping out the water which the wrongful acts of the defendants had sent into plaintiffs' mines, and they would be obliged to continue such expense unless defendants were restrained as prayed by the bill.

The bill also alleged that the damage done by the defendants' acts by the quantity of water flowing in from defendants' workings was so great that the plaintiffs' workings were likely to be drowned out, and irreparable injury would be occasioned if the defendants were not restrained as prayed. That the defendants ought to be compelled to close up the openings or communications so made by them, and to make a proper barrier on their side of the said Rowhurst Seam, to prevent the water flowing through into the plaintiffs' mines.

The bill therefore prayed that the defendants, their agents, &c., might be restrained from further digging any coals or carrying any workings into or under the said Jackfield lands. That they might also be restrained from making any cruts, or openings, or channels, or pipes, or from doing any other acts to conduct water from any of the upper seams within their mines into the lower seams so as to send such water through such lower seams into the plaintiffs' mines. That defendants might also be ordered to stop up the openings and communications made by them from their mines into the plaintiffs' mines, and to prevent by sure and sufficient barriers the water conducted by such cruts, or openings, or channels, or pipes, into the lower seams from passing through such lower seams into plaintiffs' mines. For an injunction to restrain the defendants from getting more coal from said Banktop Colliery; and for an account and compensation.

The defendants denied many of these allegations, and evidence was entered into on both sides in support of their respective cases by surveyors, viewers, and others.

E. E. Kay, Q. C., and *E. Chisholm Batten*, for the plaintiffs, contended that a sufficient case had been made to entitle them to the injunctions prayed.

Little, Q.C., and *W. W. Cooper*, for the defendants, contended that although there might have been some degree of negligence in the mode of the defendants working the coal in their mines, still there was no *animus furandi*, and that the damage done was slight in degree, and the compensation must be proportionate.

The VICE-CHANCELLOR said it was quite clear that the plaintiffs were entitled to the relief prayed by their bill. The defendants had not only injured the plaintiffs in their occupation of obtaining the coal from their own mine, but they had actually entered upon their neighbours' property, and obtained coal which in fact belonged to the plaintiffs, and sold it for their own benefit. This, of course, could not be allowed, and the injunction must go in the terms of the prayer of the bill. An account must also be directed of the full market value of the coal extracted. It appearing that the lease to the defendants of their mine would expire in five years' time, and that of the plaintiffs in eleven years, should the defendants obtain a renewal of their lease, they would, of course, be liable to a similar injunction. The plaintiffs would then have liberty to apply to the court. He should also, in addition to the usual costs, direct that the costs properly incurred by plaintiffs in ascertaining the openings in the defendants' mine which had caused the injurious flow of water into the plaintiffs' mine, should be paid by the defendants.

Injunction and decree accordingly.

Solicitors: *Wedlake* and *Letts*, for *Keary* and *Son*, Stoke-upon-Trent; *Sale* and *Co.*, Manchester, for defendants.

Monday, Aug. 2.

Re PHENE'S TRUST.

Disappearance—Presumption of death.

A person who has not been heard of for seven years will be presumed to be dead at the end of such seven years, and to have lived during the whole of that period.

This was a petition presented by the administrator of the estate and effects of one Nicholas Phené Mill, who, had he survived the testator, Francis Phené, who died on the 5th Jan. 1861, would be entitled,

as one of the nephews of the testator, to a distributive share of his estate.

Nicholas Phené Mill was born in the year 1829. He became a sergeant of marines in the American service. He had been in the habit of corresponding with his mother from time to time up to the 15th Aug. 1858. A letter from him to his mother of that date was proved to have been then written by him. This letter was dated at sea, on board the American ship *Roanoke*. It appeared by extracts from that ship's books that on the 16th June 1860, a sergeant of marines named Nicholas Mill, left that ship to join some port at Philadelphia. It was suggested that he had perished on his voyage to the latter place. It was certain that nothing was heard of him after the date of the letter to his mother before mentioned.

Francis Phené, the testator and uncle of the supposed deceased, died on the 5th Jan. 1861, and by his will bequeathed a certain sum of money arising from the residue of his estate to be divided amongst his nephews and nieces. If Nicholas Phené Mill survived the testator he was entitled to a share of this residue.

Amphlett, Q. C. and *W. H. G. Bogshawe*, for the petitioner, contended that the presumption of law was that a person who had not been heard of for seven years was alive during the whole of that period, and that his death had occured at the end of the seven years.

The Vice-Chancellor said he should have considered that the presumption was that the person was dead at the end of the seven years, but that evidence of the date of his actual death within that period was necessary to establish the fact that he had survived a particular person who was clearly proved to have died after the time when the person was last heard of, and within the seven years. He felt no difficulty about the identity of the party in the present case.

F. W. S. Everitt, contra, contended that such evidence was necessary.

C. J. Hill, for the trustees of the will.

G. O. Edwards and *Langworthy*, for parties who would take in the event of N. P. Mill dying in the lifetime of the testator.

Re Benham's Trusts, L. Rep. 4 Eq. 416; s. c. on appeal (overruling that decision), Dec. 6, 1867, MSS.;

Thomas v. *Thomas*, 2 Drew. & Sm. 298; 11 L. T. Rep. N. S. 471;

were referred to.

The Vice-Chancellor said that he should have agreed with Rolt L. J., in *Benham's Trusts* on appeal, but for the decisions of Kindersley, V. C. and Malins, V.C. in the other cases cited; and that after those decisions he could not hold otherwise than that it must be presumed that N. P. Mill had survived the testator, and he must declare accordingly. He, however, added, that that part of the fund should be retained in court until next Michaelmas Term, to allow the parties interested an opportunity of taking the opinion of the Court of Appeal if they should think fit so to do.

Order accordingly.

Solicitors, *A. C. Briant; M. Pope; Fielder* and *Co.; Gaussent.*

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. Leycester, Esq., Barrister-at-Law.

June 2 and 3.

(Before Lord Penzance, J.O.)

St. Paul v. St. Paul and Farquhar (Queen's Proctor intervening.)

Dissolution suit—Intervention of Queen's Proctor—Neglect and conduct conducing to adultery—20 & 21 Vict. c. 85, s. 31.

Held that the wilful neglect or conduct conducing to adultery contemplated by the 20 & 21 Vict. c. 85, s. 31, as constituting a bar to divorce is that which conduces to a woman's first lapse from virtue, and not that which occurs after she has committed adultery.

This was a husband's suit for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent. A decree *nisi* was granted in the first instance, but the Queen's Proctor subsequently obtained leave to intervene, and charged the petitioner with collusion, connivance, conduct conducing to adultery, and suppression of material facts.

The parties were married in 1859, and cohabited first at Clifton, and subsequently at Maidenhead. Early in 1866 the respondent made the acquaintance of the co-respondent, Capt. Farquhar, while residing at Blarney, near Cork. About Easter the petitioner went over to see his wife at Blarney, and there was introduced to the co-respondent, who spent a few days with them by invitation. On the petitioner returning to England, Mrs. St. Paul went to the Isle of Man, where she gave birth to a child in Jan. 1867. As to the paternity of this child the petitioner admitted that he had expressed doubts before his wife's confinement, but they were removed by her explanations. She returned to Maidenhead with the petitioner after her confinement, but shortly afterwards went to visit his mother at Clifton. After she had been there some days she wrote to the petitioner that she had an offer of a return ticket as far as Dublin, and asking to be allowed to make use of it, in order that she might visit her father at Cork. In the same letter she stated that Capt. Farquhar was going to Ireland, and would act as her escort. The petitioner being anxious for business reasons that the respondent should see her father, consented on the condition that she should return from Cork to Bristol, and the respondent accordingly left Clifton with Capt. Farquhar on Feb. 24, 1867. The respondent and co-respondent slept together at Stafford that night, and when she arrived in Dublin she wrote to her husband to say that she should not be in Cork for a week, and requested that all letters and parcels might be forwarded to an hotel in Dublin. To this the petitioner returned the following answer:—

27th Feb. 1867.

My dear Lucy,—I cannot help saying I am vexed much that you did not go straight to Cork as intended. You were well aware a word in season might have been beneficial in a certain matter. You would have been in ample time, since I have not as yet heard from father. I shall blame you greatly if the affair miscarries. If you knew of this before starting, you ought to have informed me. If, on the other hand, this is a new scheme, surely you ought in your letter to have told me with whom you are staying. If at a friend's house I might not see so much objection; but at an hotel, to allow other people to incur expense, is very wrong. I of course assume you are not reckless enough to incur such expense yourself. You keep far too much back from me. I cannot see why (as you are allowed every liberty) you should do so. I had before the receipt of your letter posted one to Cork. I have consequently been obliged to write to your father to explain why you were not with him. Please go at once to him on receipt of this letter. All letters will be forwarded.

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A few days afterwards he received the following communication from his wife:

Reynolds's Hotel, Dublin, 3rd March 1867.

My dear Albert,—Papa is here, and means to write to you to-night, and I scarcely know if the subject of his letter will surprise you; I think not. When I said good-bye to you on Sunday evening, I meant it then, and I mean it now, to be final. I shall never live with you again. You will have as little to do with me as though I never existed, or that I was dead. This, I feel sure will be some consolation to you, and will enable you to bring your bachelor habits and *menage* to great perfection; and so I pray you will grant my last request—the necessary separation. This can be soon arranged, in a few days, and so the whole matter settled, unless you really require time for any consideration. Let me hear from you as soon as possible, as any unnecessary delay here will be inconvenient to me, and I presume in this matter I may look for as much courtesy from you as you would vouchsafe to a perfect stranger.

Upon receiving this letter the petitioner went immediately to Dublin, and saw his wife in company with her father. A reconciliation was effected, and Captain Farquhar dined in the hotel with the petitioner and his wife. The petitioner left that night, but Captain Farquhar remained and slept with the respondent. The petitioner stated that when he left he was under the impression that Captain Farquhar had gone back to Newbridge barracks, where the regiment was quartered. He discovered next day that a correspondence was still being carried on between his wife and Captain Farquhar, and he offered to continue cohabitation if she would give it up. but she refused. After further communication, and on receiving a written promise that no damages would be claimed, the respondent and co-respondent confessed the adulterous intercourse. The evidence on behalf of the Queen's Proctor established the fact that adultery had been committed as early as January 1866, and it was also proved that after the suit had been commenced the co-respondent had offered the petitioner 1000*l.* if he would withdraw the petition, which he had indignantly refused to do. The case was heard before Lord Penzance on June 2nd and 3rd.

The *Attorney-General* (Dr. *Spinks* and *Archibald* with him), for the Queen's Proctor, referred to *Dering* v. *Dering and Blakeley* (*Queen's Proctor intervening*), L. Rep. 1 P. & D. 531.

H. Giffard, Q.C. (*McIntyre* and *E. J. Dunn* with him), for the respondent.

Pritchard for the co-respondent.

LORD PENZANCE, J.O.—The facts of this case force upon the court a very difficult and very critical duty. I may say, at the outset, that no one who has heard the evidence can doubt that if Mr. St. Paul has suffered both by mental anxiety and by the costs incurred in these proceedings, he has only himself to blame. Because, whatever view the court may take of the legal result of his conduct, nobody can doubt that he was wanting in decision, wanting in firmness, wanting in a manly assertion of his own rights, and I should say also wanting in judgment with regard to the facts that were brought to his cognisance and the course that he ought to take. It is these deficiencies on his own part that have led to these proceedings. Turning from the petitioner to the respondent, it is equally plain from the evidence that she was a very self-willed determined woman, who cared little or nothing for her husband from the outset, who was determined to have her own way, and who appears, as far as I can judge, to have obtained a sort of moral ascendency over her husband, which enabled her to have that way whenever she was so minded. The Queen's Proctor, instigated, it is said, by the co-respondent, or, if not by him, by his father, who wishes to stand in the way of this decree being made absolute, has brought before the court various facts and made certain charges; and I may say, in passing, that it seems to me to be no wrong whatever that a co-respondent or a respondent should furnish to the Queen's Proctor these facts in cases of this kind. It is for the Queen's Proctor when he has the facts to submit them to Her Majesty's Attorney-General, and it is then for the Attorney-General to consider and direct whether in the interests of the public the expense ought to be incurred of proving the facts with a view of stopping the decree. To my mind, therefore, it matters little or nothing from what source the information came. I have to deal with the facts as they are proved and to ascertain to the best of my ability whether they support the Queen's proctor's pleas. The substance of the complaint against the petitioner is twofold. The first complaint against him is that he was guilty of conduct conducing to his wife's adultery. The language of the statute is that the court may withhold a decree where it is satisfied that the petitioner has been guilty of "such wilful neglect or misconduct as has conduced to the adultery." Now that is a most salutary provision. It is salutary as regards the public, because it is some safeguard against a man first throwing his wife into temptation, first allowing her to be exposed to the addresses of other men, and then afterwards casting her aside. But it is also a measure of fairness to the wife herself, because if a wife can come to this court and say, "Notwithstanding that I have sinned, my sins really have been brought about, or very much helped forward, by the carelessness, neglect, and indifference of my husband," that is a matter which clearly ought be taken into consideration, even in favour of the wife, who is herself a sinner. But this is very delicate ground, and the court must be very careful in applying the provision of the section that it is able to see its way pretty clearly to the conclusion that the conduct of the husband did really conduce to the adultery of the wife before refusing a decree. The statute says "conduce to the adultery," but in reflecting upon those words of the statute the conclusion at which I have arrived is this: That the Legislature did not mean that a husband should be deprived of his remedy if his conduct had conduced to any particular act of adultery after his wife's first fall from virtue, but that it meant that his remedy should be withheld from him if he had so acted as to bring about the fall of his wife or the loss of her virtue. What the Legislature appears to me to be pointing at under the word adultery is the lapse from virtue of the wife, and I think the intention was that the husband who had led to that lapse by his own conduct should not afterwards take advantage of it. But it is quite consistent with that that a case might arise in which a husband would be perfectly blameless as to his wife's adultery in the first instance, and that after she had established her adulterous intercourse with another man, the two together might throw dust in his eyes, and his conduct might appear more or less neglectful. It seems to me that the neglect which is followed by a subsequent act of adultery after the loss of virtue by the wife is not the neglect which the statute meant; it must be that neglect which conduced to the fall of the wife. Now the circumstances of this case bring that distinction into prominent relief. The lady went in 1865 or the beginning of 1866 to stay at a hydropathic establishment, about seven miles from Cork, where her father resided. It was at her father's instance that she went to this place; and, looking to the sort of life that the petitioner and his wife had led—her determination to be as little with him as possible—the want of affection that appeared to exist between them, at any rate on her part, and the little control that he

had over her, it is impossible to say that allowing her to go to that hydropathic establishment, avowedly for the sake of her health, was a matter that can be imputed to the petitioner as an act of wilful neglect. She goes there, and the court fortunately has a date from the mouth of the groom of the co-respondent which fixes the period of her guilt; it does not, indeed, fix the first time, but it fixes a time at which this adulterous intimacy undoubtedly subsisted. The groom says: "About January 1866 I saw the respondent go to the co-respondent's room at the barracks. After that she used to come with him once or twice a week. Sometimes she came on horseback. She always used to come with the co-respondent. She used to go into his room and remain alone with him for hours." It is quite plain, therefore, that in January 1866 this adulterous intercourse was thoroughly established, and that so far as the wife's loss of virtue is concerned, whenever it first took place, it had taken place long before the period which is afterwards spoken to as the date of the husband's visit. The husband never went to the hydropathic establishment until Easter 1866. Well, what took place? The wife, carrying on at that time this illicit intercourse, persuaded the husband to ask the co-respondent over to the hydropathic establishment as his guest. He did so, and the co-respondent, I think, made himself agreeable to him and offered to take him over to his rooms at the barracks to see some races or some other amusement that was going on. They also used to play billiards together and were apparently on friendly terms. The court has very little doubt that then, at that very time, whenever opportunity offered, the same adulterous intercourse was going on. But it is impossible up to this period to put one's finger upon anything that the husband had either done or omitted to do which led to the wife's misconduct. He had done nothing and omitted to do nothing. His position was that of a man who was hoodwinked for the time—who had no reason to suspect anything, because those who saw the lady and the co-respondent at the time, even the nurse who was constantly in the room with her and living with her, declare that they never saw any signs of familiarity between these two people. Therefore, there really was nothing to show the husband at that time that anything wrong was going on. It is said that he allowed her to go out riding with the co-respondent, but on turning to the evidence of the groom, I find he says he only took the horses over to the hydropathic establishment once while the husband was there, and the husband swears that it was so; that the horses were brought there once, but that he rode out with them, and was by his wife's side the whole day. Therefore, carefully looking at the evidence at this period of the transaction, the court is really unable to discover anything in the charge against the petitioner as to neglect or misconduct. The subsequent history of the case is no doubt very different. In Easter 1866, this visit of the husband was paid. The lady remained at the hydropathic establishment until the month of July following. She then writes to him and says she wishes to go to the Isle of Man I put the question to him and he swears positively that he objected to her going to the Isle of Man. There does not seem to have been any reason for it. The reason that she assigned was that they were badly off, and the Isle of Man was a cheap place; but to the Isle of Man she went, and after she had been there some time, she came back to the mainland and went down to Maidenhead where her husband was living. She then returned to the Isle of Man, and after she had got back, as far as I can gather dates correctly, the co-respondent seems to have come and stayed there three or four days. Now, to show the footing the parties were on at that time, the husband had "asked" her (that was his expression), to be allowed to come and see her at the Isle of Man, and she refused. Well, he seemed to have acquiesced in that refusal, and accordingly went to spend his Christmas with his relatives at Clifton. When he returned to business he again wrote to her saying, "Your confinement is about to take place, and may I come and see you?" She answers by telegraph, "Yes, you may." Thereupon he did so. He arrived a week before her confinement, and stayed with her during her confinement. Now the court is at a loss to see any other object in the petitioner going there at that time, except the pleasure of indulging his affection and being with his wife. She was about to undergo her confinement, and it appears to the court that the petitioner had a most praiseworthy motive in going and remaining by her side on the occasion. When he got there he said at first that he did not learn that Capt. Farquhar had been in the island. It afterwards turned out upon better reflection that he did learn the co-respondent had been there, but then it came out incidentally. It was said he had been there with some other gentlemen, and it arose upon the question how some wine came into the house, which the wife explained in that way. Well, up to this time, the court must bear in mind that there is not a tittle of evidence to show that Mr. St. Paul knew of the adultery that had taken place at the hydropathic establishment while the respondent was resident there. Here is not a tittle of evidence to show that any familiarity had been seen or known to have taken place between her and the co-respondent. We now know that there was flagrant, open adultery carried on from week to week, from day to day, the lady visiting the barracks, where this man lived; but the petitioner did not know that, and the mere fact that she told him that Capt. Farquhar and some other gentlemen had come over to the island, and had called and asked for refreshment, which led her to send for some wine, in the then state of the petitioner's knowledge, is not such a fact as, it seems to me, ought to have led him to take any definite steps with a view to his wife quitting the Isle of Man, or dropping the acquaintance of Capt. Farquhar. She was confined in Jan. 1867; she came over to England on the 18th Feb. in that year. She went down to Maidenhead with her husband. The next thing that happened is that on Sunday, the 24th Feb., or the day before, she announced to her husband her intention of going to Clifton, so he says. She seems never to have been easy and at rest when she was at home at Maidenhead. He combated the idea of going to Clifton, but ultimately yielded, and then she said she had had a return ticket given to her to go to Dublin; and that she should also like to go to Cork and see her father who was said to be unwell. There was likewise a pecuniary matter involved in this proposed visit to Ireland, some bill that had to be renewed or taken up, or an account guaranteed, and the husband was interested in her going to see her father. Well, the court, bearing in mind the position of the parties at that time, that the wife was carrying on this adulterous intercourse, and wanting to get away from her husband in order that she might consort with the co-respondent, and that the petitioner was ignorant of all that, the court can understand perfectly well that the wife might wheedle him into consenting to the proposed arrangement, or if she did not wheedle him into consenting, that she might be strong enough of her own will to force hin into it. His representation is, that he consented reluctantly to her going. She did not seem to have made any concealment as to Capt. Farquhar accompanying her, because she said that Capt. Farquhar happened

to be going to Ireland at that time, and that he had consented to escort her. Now no one can doubt that the arrangement by which this young lady was to travel down by the night mail to Holyhead with Capt. Farquhar was a very imprudent one; but supposing that the husband saw no reason to suspect Capt. Farquhar at that time, it is not an imprudence of that kind that would lead the court at once to come to the conclusion that he had been guilty of wilful neglect or misconduct. However, I have already pointed out what the court has to inquire into at this period of the case is not whether there was neglect or misconduct, but whether there was connivance; and in that aspect of the case everything that fell from all three of the parties, every expression used by the wife, by the respondent, and by the co-respondent, appeared to me to negative the idea of a connivance. She was making excuses; she was pretending about a return ticket; she was invoking her father's illness; she was raising this matter about the bill, all for the purpose of deluding her husband, and he was no doubt more or less deluded by it. When I say "more or less," I mean that a more vigilant man, a man of stronger temperament would have probably burst the sort of veil that was thrown over this relation, and would have seen his way clearly to the thing that really existed. She went to Dublin, and there several letters passed between her and the petitioner. He thought she was going straight through to Cork. She writes from Reynolds's Hotel, Dublin, and tells him that she is stopping there; upon which he writes and expresses his displeasure at it, and, in doing so, makes use of an expression about the expense which very strongly attracted the attention of the court in the first instance. He says, "Surely you ought to have told me with whom you were staying" (that is when he finds that she is staying in Dublin). "If you knew before you started of this" (that she was going to stop at Dublin) "you ought to have informed me. If, on the other hand, this is a new scheme, surely you ought in your letter to have told me with whom you are staying—if a friend's private house, I might not see so much objection; but at an hotel, to allow other people to incur expense is very wrong, for I of course assume that you are not reckless enough to incur such expense yourself." The natural suspicion that crosses the mind of the court on reading that passage is this: He knew she had been there with Capt. Farquhar; and who else did he think was paying the expenses except this man with whom she had gone? But that may not have been, I think, what he meant, although it is open to that construction. The court ought to see its way very clearly before it comes to an adverse conclusion on that matter, and when I look at this letter by the light of his subsequent conduct, I see nothing to induce me to believe that he at that time knew that she was under the charge of Capt. Farquhar, and that he was paying her expenses, although, of course, he might have suspected it, and probably did suspect it, from what he afterwards said. He goes to Dublin, and then took place those various meetings that have been referred to at length in the evidence. The sum and substance of them is this: that his wife had before he got there pressed upon her father the necessity for a separation—that appears most distinctly from the father's letter, written at the time. It is equally plain from the father's statement, and from the statement of the petitioner himself, that he opposed a separation. He went to the father, and with the father he went to the hotel and saw his wife. The account he gives of that interview sheds a pretty strong light on the temperament and nature of this lady, and the terms they were upon. The father said that he found upon consideration, and after talking with his son-in-law, that there was no need for a separation, upon which the wife called him an "old weathercock," and got very angry with him for having changed his opinion. When he burst out crying, she said he was an old fool, and that his tears were very near his eyes. That seems to have been a somewhat boisterous meeting, and in the course of it no doubt the petitioner ascertained, by finding a great coat in the room, that Capt. Farquhar had been there. Afterwards he saw Capt. Farquhar. The question is upon all that took place between them, was there anything to lead the court to the conclusion that the petitioner either knew of the adultery, or so strongly suspected the adultery of his wife on sufficient grounds, that he could be said to have connived at or acquiesced in it? It seems to me that the whole tendency of the evidence is the other way. He wanted her back—he was averse to a separation. The father and the co-respondent both tried to persuade him, and succeeded in doing so, that nothing wrong had taken place. He went down stairs to ascertain whether his wife and the co-respondent had been living at the hotel as man and wife, and was told that they had not, that they had separate rooms; and he tried also to ascertain whether the co-respondent had undertaken to pay for his wife, and could get no satisfactory answer about that. The result of the whole is, that there was a good deal of weakness on his part and want, as I said before, of proper spirit and determination in the matter, but I do not think that there was connivance. Well, then, the rest of the history is soon told. He gets his wife back to London, and endeavours, but in vain, to withdraw her from this man, the co-respondent. He more and more suspects her guilt, and charges her with it. At first she admits it, and declares that she will give him the proofs. Afterwards she retracts the confession, and leads him to believe that there was no guilt; and then at last there comes the meeting at Maidenhead, where she and the co-respondent openly and unblushingly tell him that they had been guilty over and over again, placing the first occasion of their guilt at Stafford. Now, here again, if I am asked whether there was connivance—whether all this was taking place with the consent of the husband, I say here is a letter of the co-respondent written on the 8th May, which dissipates the possibility of any such conclusion; because it is an answer to a letter in which the petitioner had charged this man with being guilty with his wife, and in terms desired that he would cease all correspondence with her; and here is the manner in which that communication was answered:—"Cambridge-house, Piccadilly, May 8, 1867. Dear Sir,—I am only just in receipt of your letter dated Maidenhead, 6th May. In answer I beg to say I have no intention to explain what you ask, as I have nothing to explain. For, as an intimate acquaintance with your wife and yourself, and until you give me some reason to withhold correspondence in a friendly way with your wife, I shall always act as I have hitherto done. I can but ascribe your ridiculous epistle as an after-dinner ebullition of temper, and as such I treat it. If your lucid memory had been of any service to you when you penned your epistle, you would have remembered that in Dublin (of which time you speak) you asked me to assist you in inducing your wife to return to England. I consider your conduct somewhat strange, especially as you yourself had made arrangements for me to escort your wife to Ireland. Did not I treat the insinuation in your letter with the ridicule it deserves, I should take matters into my own hands." A high-handed impudent letter, in which the co-respondent is repudiating the slightest insinuation against him, and openly telling the petitioner that inasmuch as he has nothing with

which to charge him, nothing which he can put on paper and prove, he shall continue to carry on his correspondence with his wife. It is impossible, unless the court believes that letter to be part of a plan or a scheme to defeat the ends of justice, or to cause a false complexion to be put upon this case—treating that as genuine, it is impossible to imagine that the husband who wrote the letter to which that is an answer, was all the time conniving at the wife's adultery. It seems to me, therefore, that upon the whole facts of this case, neither the charge of collusion nor connivance has been made out against this gentleman. As I have said before, there was much in the case that the court might reprehend. There was much in his conduct in 1867 which, if it had been followed for the first time by his wife's adultery, might have led to a very different result to that at which the court now arrives. There was much in his conduct in the spring of 1867—the visit to Dublin, his conduct at Dublin, and even in his subsequent conduct, which, if it had led to the first adultery and loss of virtue by his wife, might have induced the court to come to the conclusion that the wife's sin had been caused by the husband's neglect or carelessness; but bearing in mind the respondent's adultery, if not seduction, the real loss of virtue by the wife was a whole year before this, of course I can only look upon the matter in this light, that the two people who were principally concerned successfully contrived to throw dust in the eyes of a very weak and not very wise man. It only remains for the court to state what its finding is in the several issues which the Queen's Proctor has put forward. His Lordship then went through the several pleas and found that the petitioner had not been guilty of collusion, connivance, the suppression of material facts, or of conduct conducing to the adultery of the respondent, but added that the Queen's Proctor had done right in bringing the matter before the court.

Attorneys for the petitioner, Messrs. *Purkis* and *Co.*

Attorneys for the co-respondent, Messrs. *Chilton* and *Co.*

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and JOHN FONBLANQUE, Esqrs. Barristers-at-Law.

Monday, Aug. 30.

(Before Mr. Commissioner WINSLOW.)

Re EVANS and EVANS.

B.A. 1861, *sect.* 192—*Deed of assignment—Inequality—Partnership-deed—Computation of assents.*

The trustees of a deed of assignment made by two partners contracted with certain of the creditors to deal with both the joint and separate estate of the debtors in such a manner as to pay all the creditors, both joint and separate, 5s. in the pound; and creditors were induced by the prospect so held out to them to assent to the deed. From the accounts annexed to the deed, it appeared that if this contract were carried into effect the joint creditors would gain an advantage over the separate creditors of both partners, and the separate creditors of one partner an advantage against those of the other:

Held, that such a deed could not be sustained against an adjudication in bankruptcy against the debtors.

The facts are set forth in the judgment.

Mr. Commissioner WINSLOW.—This is an application on behalf of the trustees of a deed of assignment made by the above-named debtors, to dismiss a petition for adjudication of bankruptcy against them. The grounds of the application are that the petition was presented after the execution by the debtors of a deed of assignment of their estate to trustees for their joint and separate creditors which has been duly registered, and that the deed being binding on all the creditors, the petition should be dismissed. Very many objections to the validity of the deed were made on behalf of the petitioning creditor, but I think it sufficient to express an opinion with regard to one only. That objection is, that some of the creditors were induced to assent to the deed by the prospect of obtaining an unfair advantage over other creditors. The deed being dated the 14th May, the trustees, before the deed was registered, entered into contracts to sell a portion of the estate, both joint and separate, and arranged to collect and realise a second portion, and then they, in the month of July, contracted to sell the remaining, or third, portion to the debtors themselves for a sum of 12,500*l.*, or such further sum as should be sufficient, together with the proceeds of the first and second portions of the estate, to pay all the creditors, joint and separate, 5*s.* in the pound by certain instalments. This was proposed at a meeting of creditors, and, it is said, agreed to by the creditors present with only one dissentient. The accounts, filed by the debtors as required by the Act of 1868, show the estates of the debtors divisible under the deed to be as follows: The joint debts amount to 92,452*l.*, and the joint estate to 15,815*l.*, or sufficient to pay about 3*s.* in the pound, after deducting expenses. The separate creditors of J. C. Evans amount to 12,215*l.*, and his separate estate to 3522*l.*, or about 4*s.* 6*d.* or 5*s.* in the pound, and the separate creditors of R. P. Evans amount to 10,395*l.*, and the separate estate to 768*l.*, or less than 1*s.* 6*d.* in the pound. It is manifest that by this contract for a sale to the debtors, if it were carried into effect, the joint creditors would obtain a greater advantage than the separate creditors of J. C. Evans, and the separate creditors of R. P. Evans a still greater advantage than the other classes of creditors, and the evidence shows that creditors were induced to assent to the deed by the existence of this contract. It is contended on behalf of the petitioning creditor that the registration of a deed, which is obtained by the inducement of an unequal advantage given to a class of creditors is invalid, upon the same principle as it would be if the advantage were obtained by a single creditor. This must very much depend upon whether the assents of the separate creditors can be counted as against those of the joint creditors, and thus bind them; and this again depends upon the manner in which the assents to a deed are in the case of partners to be computed. Notwithstanding that there have been so many deeds registered under the provisions of the Bankruptcy Act 1861, there has not, so far as I am aware, been any direct determination of this important point by any Superior Court. It is a point which it must have been of the greatest importance in many cases to ascertain, but it could not be judicially determined before registration, and the only thing the parties could do was to obtain a sufficient number of assents to render the deed binding, whatever might be the mode of computation, a course which necessarily involved great additional expense. It has always appeared to me desirable that there should be some provision by which a judicial determination in such cases could be obtained, the expense being paid, if necessary, out of the court funds, and the same observation applies to matters which, though of constant recurrence, and always giving rise to difficulties, yet are not sufficiently important in any particular case to render it worth the while of any individual suitor to go to the expense of having them determined.

But although the mode of computing the assents has not been directly decided, yet it would appear to follow as a consequence upon the principles laid down in *Ex parte Glen*, L Rep. 1 Ch. App. 670, and *Tomlin* v. *Dutton*, L. Rep. 3 Q. B. 466, 18 L. T. Rep. N. S. 815, namely, that one of two partners cannot register a deed between himself and his separate creditors alone, but must include the joint creditors, and that two or more partners must in like manner include each of their separate creditors. The 192nd section makes no distinction, the words are, "a majority in number representing three-fourths in value of the creditors of such debtor," shall assent to or approve of the deed, and the word "creditors" there means the joint and separate creditors, it follows that such creditors must be included in the computation. Then there is no provision for counting each class by itself, but the majority must be the majority of the whole. If that be so, then the members of one class are affected by the assents of members of another class, and a majority obtained by the promise of some advantage to creditors of a class which is not shared equally by other classes, can no more be supported than a majority in the case of a debtor not in partnership, obtained by an undue advantage given to any of the creditors. One case will show the way in which this works. The executors of a former partner of the debtors have assented to the deed as creditors on the two separate estates for a sum of about 10.000*l.*, and they will be entitled under the arrangement to additional dividends, amounting to 4*s.* in the pound, whereas, if they were creditors on the joint estate, the additional dividend would only be 2*s.* in the pound; which would make a difference of about 1000*l.* I am of opinion that a majority so obtained cannot be supported, and that the petitioning creditor is not bound by this deed. It is said that the arrangement was made by the trustees after the execution of the deed by the debtors, and that they cannot be affected by the act of the trustees, but the debtors are parties to the arrangement, and are the purchasers from the trustees, and it would be a mischievous precedent to allow a bonus of this kind to be concealed under the disguise of a purchase by the debtor or his friends of his property. I do not wish it to be supposed that there is any evidence in the present case of a desire to do what was unfair. The trustees, probably considered they were making a good bargain for the creditors, but the principle, if allowed, would be undoubtedly the means of working great injustice in other cases. The deed not being duly registered, the motion to dismiss the petition for adjudication must be dismissed.

Application refused.

Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

NORTHALLERTON ELECTION PETITION.

April 12, 13, 14, *and* 15.

(Before WILLES, J.)

Scrutiny—Procedure—Bribery—Intimidation—Influence—Promises—Evidence.

Where several points are reserved on a scrutiny, and the scrutiny, allowing that all the votes concerning which decision was reserved in favour of the petition, nevertheless is abortive, it is open to the judge to withhold altogether his decision at his discretion.

It was alleged against the respondent H., that he bribed personally by promising the wife of a voter land and a cow if her husband voted for him. This was denied by the respondent.

Held, that under such circumstances it must be assumed that the wish of the woman was father to the thought, and that she construed the ordinary politeness of a candidate towards the womankind in the house to be an assent not to anything she asked for, but to something that she had very strongly in her mind a desire to get.

It was attempted to prove that a promise had been made to a ragman by an agent that he should have his rags; and general evidence was given of various promises as to land.

Held, that in deciding upon such evidence the judge ought to have reasonable assurance that there really was a bribe held out, or promise of some particular benefit to the voter in case he voted or abstained from voting; and he ought to be sure that general, and very often exaggerated commendations of the wealth and liberality and other qualities of the candidate have not been tortured by the particular witness into a promise of some special benefit for himself.

Everything is corrupt which has a tendency to influence a man's mind with reference to mere lucre.

An unsuccessful attempt to intimidate will defeat an election.

It was alleged that C., a member of the congregation of a dissenting minister, told the latter that he should give up his pew unless the minister voted for the respondent.

Held, that had this been made out, it would have been intimidation within the 5th section of 17 & 18 *Vict. c.* 102.

Where the agency of any person is disputed, and there is a scrutiny, it should be put forward prominently in the course of the scrutiny, and not left vague, to be considered by the judge subsequently.

This was a petition against the return of Mr Hutton.

For the petitioners there appeared *O'Brien*, Serjt., and *Hugh Shield*.

And for the respondent *O'Malley*, Q. C., and *Sleigh*, Serjt.

The following are the cases which arose on the scrutiny:—

THOMPSON'S AND STEVENSON'S CASES.

Agreement by voters to pair off—Fraudulent contrivance.

It was agreed between two voters of different politics that neither would vote. Late on the polling day it was falsely represented to one of them that the other had voted and he accordingly went and voted.

By the 5th section of the 17 & 18 *Vict. c.* 102, *anyone who shall by any fraudulent device or contrivance . . . compel, induce, or prevail upon any voter, either to give or to refrain from giving his vote at an election, shall be deemed to have committed the offence of undue influence:*

Held, that pairing amongst voters is not contrary to law, and that there did not appear to have been a fraudulent contrivance within the above section:

Semble, the device or contrivance must be one by which a man is prevented from voting or induced to vote contrary to his opinions.

Two voters, named John Thompson and James Stephenson were employed together, and on the morning of the election, not wishing to lose their day's labour, they agreed, it was said, to pair

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off, Stephenson being in favour of Johns and Thompson in favour of Hutton. Stephenson kept his promise, and Thompson, *O'Brien, Serjt.*, said, would have done so also, but about two or three o'clock he was called upon by three or four men, who, representing falsely and fraudulently that Stephenson had voted, got Thompson to vote for Mr. Hutton. He called attention to the 5th section of 17 & 18 Vict. c. 102, in which are the words, "who shall by abduction, duress, or any fraudulent device or contrivance, impede, prevent, or otherwise interfere with the free exercise of the franchise, or shall thereby compel, induce, or prevail upon any voter, either to abstain from voting or to vote." It was a fraudulent and false pretence that Stephenson had voted that induced or prevailed upon Thompson to vote.

O'Malley said it was not under the head of objections as a fraudulent device.

WILLES, J.—Is there any precedent for this, Brother O'Brien?

O'Brien, Serjt., was not aware there was a precedent, but he hoped his Lordship would not hesitate to make one.

WILLES, J. said he should hesitate very much. Although he was prepared to go as far as he could under that section, he understood that the fraudulent contrivance under the section must be a fraudulent contrivance by which a man was prevented from voting, or induced to vote contrary to his political opinions. He had heard of many exaggerations and rumours in electioneering matters, but he had not heard of a single case of that description brought before a committee on elections.

O'Brien, Serjt. put his claim forward on the ground that there had been an agreement not to vote, and the persons who induced Thompson to poll were ware of it.

In the course of a long conversation on the case, it was admitted that the vote tendered was legal, and his Lordship considered that the case was one of a variety in which the man so voting might be regarded as a shifty fellow, but could not legally be punished for his breach of promise. His Lordship agreed to accept the evidence, and if by-and-by the vote should come to decide the election he would ask the counsel to give him further information on the case.

Stephenson and Thompson were then called, and when the latter was giving evidence as to the manner in which he recorded his vote, his Lordship stated that it brought to his mind the case of Sir Frederick Thesiger, where a voter when asked for whom he voted said, "Sir Frederick Thesiger be ——," and before he could give utterance to the curse he intended to utter it was transferred into a blessing, and the vote entered on the poll-book for Sir Frederick Thesiger. That vote turned the election, and was kept on the poll-book before the Parliamentary committee. His Lordship, however, was not satisfied as to the vote in this case, and put a query for after consideration on his notes. He thought there had been a contrivance, but not a fraudulent contrivance under the Act. He gave it as his opinion that pairing off amongst voters was not recognised, and a breach of any such agreement was merely a matter of honour.

JOHNSTON'S CASE.

Residence.

A voter lived at York, but rented a farm in the borough in which he allowed his sister to live. He had rooms at the farm, and owned part of the furniture, paid the rent, and visited the house three or four times a year:

Held, a good vote.

The vote given by George Johnston, who has a farm at Brompton, was questioned, on the ground that he resided for the most part at York. Evidence was given by John Scurr, one of his servants, who said that the farm at Brompton was kept by a sister of his master, and that his master visited it three or four times a year. The voter was called. He said:

He was a legalised citizen of the United States, where he had some property. He lived at York, but had a farm at Brompton, where his sister lived. He paid for the rent of his farm, and allowed his sister to live on the farm for the benefit of her health. He had rooms at the farm, and he owned part of the furniture. The man Scurr managed the farm, and witness paid him his wages. His sister was a widow; when her husband was alive he managed the farm, but did it for his own pleasure, and paid no rent. His nephew occasionally managed the farm now.

WILLES, J. said it was quite as much a residence as that of a nobleman who had a lodge in the Highlands.

The vote was allowed.

It is doubtful whether non-residence after the 31st July is a disqualification. Votes will be retained where the non-residence was before the 31st July, and was not dealt with by the revising barrister.

O'Brien, Serjt. took another class of objections—that of non-resident voters whose names had been retained on the register by neglect of the overseers. These votes he objected to under the Registration Act, because if they had their qualification on the 31st July, and parted with it after that time, they were not entitled to rank as voters.

WILLES, J. pointed out that the decisions given in such cases had been inconsistent, and he referred to the *Cambridge* case, where it was decided that if a man was non-resident before the 31st July, so that his name might have been struck off by the revising barrister, such votes should be retained. The decisions of committees were that non-residents after the 31st July might be retained, but there appeared to be some inconsistent decisions as to non-residents before the 31st July. On this subject he had consulted with Blackburn, J., but had not had an opportunity of seeing Martin, B. on the question. It might turn out worth considering by and bye. Serjt. O'Brien's contention was that the fact of being wrongfully upon the register on the 31st July could not be a reason why a voter should obtain an advantage which he would not obtain were he rightfully on the register at the time, and afterwards lost his qualification.

In a subsequent case, that of *Francis Barker*, it was contended that the vote was invalid because the house he held at Romanby had been vacated on the 22nd July. One witness called by *O'Brien*, Serjt. said, however, that Barker came from Leeds to Northallerton in October last. Francis Barker, who at first could not be found, was at last put in the witness-box, and he admitted that he had left his house on the 22nd July, and had afterwards worked in Leeds for three months, and then came back to Northallerton in October.

WILLES, J. said this raised the question as to non-residence before the 31st July, and he resolved upon reserving his decision, but said his impression at present was against the distinction between non-residence before and after the 31st July.

No decision was given, the scrutiny proving abortive.

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Residence by a wife.

A vote where the wife only resided in the house sustained.

With regard to a voter named Joseph Bilton, it appeared that Bilton had gone to Lanchester as a platelayer; but it transpired in cross-examination that his wife lived in the house for which he voted, and

WILLES, J. observed that the objection must fail, and that committees had retained votes on far less reasonable grounds. Residence by a wife had been construed to be rightful residence.

The vote was retained.

Parochial relief.

The receipt of relief after the 31st July, and before the election, incapacitates.

It appeared with reference to the class of voters incapacitated by reason of their receiving parochial relief, that some of them had received relief during the qualifying year, between July 1867 and July 1868, and others received relief between the 31st Aug. and the time of voting.

WILLES, J. observed that his present impression was that, with respect to relief received before the 31st July nothing could be made of that on the part of the petitioner; but with respect to relief received between the 31st July and the date of election, that might be relied upon as a legal incapacity.

ROBERT SMITH'S CASE.

Cowhouse and land—Separated by fields.

A vote was claimed in respect of a cowhouse and land, the cowhouse, however, being quite cut off from the land by intervening fields. The revising barrister disallowed the vote:

Held, that the decision was right.

In this case Robert Smith wanted a reversal of a decision by the revising barrister. He has a cowhouse and some land, and he had claimed a vote in respect to his occupation under the old Reform Act, but as the cowhouse and the land are separated by intervening fields, Smith's vote was not allowed by the revising barrister, and it was refused for Mr. Johns at the election.

O'Malley contended that there was no right of way across the fields, and that the claim could not be sustained.

WILLES, J. thought the revising barrister was right in his decision, because the house and the land were so far separated that the one part of the qualification was of no use to the other.

HUNSLEY'S CASE.

Parochial relief.

A voter's wife and children were in the workhouse, and the wife had committed adultery:

Held, that this was a good answer as far as concerned the wife, but not as regarded the children.

Objection was taken to the vote of Peter Hunsley, who had supported the respondent, and whose wife and children were said to have been in the workhouse at the time of the election. The answer to the case was that the wife had committed adultery, and that the husband was not, therefore, chargeable in respect of her having received parochial relief.

WILLES, J. said this was a good answer, but it did not apply to the children, for whom the father was by the common law, as well as by the law of nature, responsible.

Sleigh, Serjt. undertook to prove that the husband had sought to retain the children, but that they would not be given up; and

WILLES, J. said this would be a complete answer, but nothing short of it would.

The voter himself was called to give this answer. He said:

His wife's name was Sarah Frances Hunsley, and that he was a farmer. He had four children, aged about fifteen, twelve, seven, and three. He had put away his wife because of adultery, and when she went away she took two of the children. He afterwards ascertained that his wife and the two children had been admitted to the workhouse, and he had endeavoured by letter to obtain his children from the workhouse authorities, but had received no answer.

WILLES, J. said he could not satisfactorily decide the case without seeing the letter. If the man sought to obtain his children to support them himself, then, under the peculiar circumstances, the vote must be allowed. He must say that he could find no satisfactory account of the origin of the law with regard to the bearing of pauper relief upon voting. It seemed to him to be a sort of excrescence upon the law, introduced by the good sense of the House of Commons, but when introduced he could not make out. It was settled, however, by the Reform Act, and he must treat it as a positive rule of law.

Subsequently the letter demanded was produced, but it did not clear up the doubt that existed, and his Lordship suspended judgment.

We here give, as perhaps the attempt most nearly successful to prove corruption against a member personally, the evidence of Jane Causfield, the wife of a voter. She said:

That she lived at Brompton, and that in 1868 a piece of land, which her husband had occupied, was taken from him by the owner, Jackson Spiers. Previous to the election last year Mr. Hutton, Capt. Robertson, George Clarke, and Ralph Faucit, came to witness's house. Mr. Hutton asked whether her husband would give him his vote, and witness replied that she would not promise that. Clarke led Mr. Hutton up to witness, and said, "This is the woman that has acted blue; she has got two or three people's votes before, and she will very soon fetch him round." Witness declined to accede, but Mr. Hutton took her hand and said, "Mrs. Causfield, if you fetch him round I will give ye a bit o' land and a cow too." Witness said, "I don't know how my husband will vote;" and she turned to Mr. Clarke and said, "George, do ye want another trip to London?" She had heard that Mr. Clarke went to London on the occasion of the former petition. He replied to her that "it would have to be settled in Northallerton this time."

As to this evidence the respondent was subsequently called and said:

He had never held out any promise to anyone to vote for him; nor had he authorised any person to do this, and was not aware that any person had done so. He remembered calling upon Mrs. Causfield at Brompton, and Mr. Clarke was with him. Mrs. Causfield seemed to be labouring under some grievance, and she tried to draw him into a room as if she wanted to talk it over privately, but he would not go. He did not recollect Mr. Clarke saying, in introducing him to Mrs. Causfield, "This is the woman that is blue; she has got us two or three blue votes before;" and he had never told her that if she would fetch her husband round he would give her a bit of land and a cow too.

In cross-examination, the respondent stated that he dared say Mrs. Causfield might have said that she thought her husband would not vote at all, in consequence of the way in which he had lost a bit of land; but he had never offered to give them a bit of land in return, nor had he made a promise of any kind to them.

George Clarke, farmer, who was present at the interview with Mrs. Causfield, corroborated the

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evidence of the respondent as to what then took place. He stated positively that no promise was ever made to Mrs. Causfield to induce her to influence her husband.

The other evidence sufficiently appears in the judgment:

WILLES, J.—The scrutiny is over in favour, so far, of the sitting member, and it only remains to determine whether the election is void or not. I do not know that I am called upon to go through all those points which were reserved upon the scrutiny, because I have given credit for the purpose of determining whether it would be useful to proceed further with the scrutiny for all the votes that could be obtained by the petitioner upon the most favourable view of the cases presented. I believe that I should not be assisting anybody if I were to express an opinion upon them, although during the evening I passed through my mind the cases, and looked up again those cases before the committees bearing upon them; but I think it would be pedantical to give an elaborate judgment upon a scrutiny which has turned out to be abortive. I can only say, assuming that I were in favour of the petitioner upon all the cases presented in the course of the scrutiny, there would still remain a balance in favour of the sitting member, and the only question is whether the election of the sitting member was void upon any of the grounds which vitiate Parliamentary elections. It is now so well settled, and I think I may say accepted by the profession and the public, that a Parliamentary election is void if the member or any agent of the member is guilty of any corrupt practice in the course of the election, that it is only necessary to state that that is the principle upon which the person sitting here ought to decide the prayer of the petition, that the election should be held to be void. I have already stated my opinion that it is not proved that Mr. Hutton was guilty of any corrupt practice. The corruption charged against him was a promise attributed to indiscretion, but which I could hardly characterise by so mild a name if he really gave it to Mrs. Causfield, that she should have land and a cow if she got her husband to vote for Hutton. Of course, if that promise was given it was grave misconduct, and such as Mr. Hutton, even at his age, I think, must be perfectly aware was grave misconduct, and would defeat the election. But I may say with respect to Mrs. Causfield, that I am perfectly satisfied that her wish was father to the thonght, and not anything that she really heard from Mr. Hutton. The most charitable view towards her would be to suppose that she construed the ordinary politeness of a candidate towards the womankind in the house where he went to canvass, to be an assent not to anything she asked for, but to something that she had very strongly in her mind a desire to get, and either has persuaded herself she asked for, or has made up her mind to assert that she asked for. Her evidence is either evidence inaccurate or evidence false; I am satisfied that it was one or the other, and that the charge against Mr. Hutton of personal corruption in the election altogether failed. Then there was a variety of charges of bribery against agents of Mr. Hutton, beginning with the case of the ragman, who spoke of being promised by a person named George Clark that he should have his rags; and there followed a variety of witnesses who spoke with more or less clearness, either in affirming or in denying, for some of them denied that which they were called upon to affirm, that promises or hopes were held out that benefits might be obtained from Mr. Hutton in the way of land. One of the witnesses was Ann Mark, whose case was disposed of incidentally in the course of the day. But I think with respect to evidence of that class that the judge before defeating an election ought to be very sure. I ought not to say very sure, but ought to be sure; he ought to have reasonable assurance that there really was a bribe held out, or promise of some particular benefit to the voter in case he voted or abstained from voting; and he ought to be sure that those general, and, very often, more often than not, exaggerated commendations of the wealth, and the liberality and other qualities of the candidate, have not been construed or tortured by the particular witness into a promise of some special benefit to himself. Of course the whole constituency ought to choose the best man for their member, and yet they have a right to choose the best man, not only for the council of the nation, but also with reference to the neighbourhood itself, and with reference to the special interest, I may say, of a paternal character, which the member may take in his constituency, which a member often takes, and which displays itself in various ways; in the way of pecuniary benefit for public objects, subscriptions to charities, looking after poor people, and so on; a general benefit to people, whether they were blue or yellow, as soon as the excitement of the election is over; and the judge ought to be satisfied in his own mind that the conversation out of which a bribe is sought to be extracted, the promise of some valuable consideration for voting or not voting, really had a special character; that it was not a mere general commendation of the member as being a good man for the place. I must say, taking the evidence upon the one side and upon the other together, I cannot bring my mind to the conclusion that in any one instance an agent of Mr. Hutton did make a promise of a corrupt character to a voter at the election; it certainly has not been proved to my satisfaction. When I say of a corrupt character; I call everything of a corrupt character that has a tendency to influence a man's vote with reference to mere lucre, instead of honest considerations, including considerations of that legitimate influence which I have already stated it is impossible to exclude, and which the attempt to remove by law I believe would probably turn out, I am sure would turn out, to be very ineffectual, because it is part of the nature of things, which the law has to deal with and to regulate, and which it cannot alter. Then I pass over the head of corruption, which one has had to consider in other places, that of treating, by saying that in only one instance has there been a suggestion of any treating in this place; that glass of beer and cigar which we heard of to-day I think were the only bodily forms which the treating took. There was a suggestion of it at one period of the proceedings, I think, but only a suggestion, in order to withdraw any charge founded upon it. Now I must be allowed to say upon this, that there is moderation in all things, and there ought to be a moderation even in one's desire to sweep away the corruption which is alleged to be so prevalent, but which in many of the places I have visited, certainly including Northallerton, has been rather thought of by the suspicious than established by any proof. There is some moderation, and I think if I were to take serious notice of the cigar and glass of beer given some time before the election, I should not leave a good character for wisdom behind me in Yorkshire. It was no corrupt treating. Then I go on to the case of intimidation, and I quite agree with what was said by my brother O'Brien, as to intimidation. It probably is not the most dangerous form of corruption, because if it is carried into effect, it is sure to be proved by the victim of it, and in two signal instances in the course of these election proceedings, the elections have been set aside upon the ground of intimidation, in the form of workmen being turned away because they chose

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to have different political opinions from their masters, or from the managers under their masters. That, of course, the law will not tolerate. The law will not tolerate that a man should tyrannise over the opinions of others; and if an agent of the candidate is guilty of the misconduct of doing so, the candidate cannot retain his seat, even though he himself be entirely innocent of any interference in the matter, and even though it should turn out that it had no real effect upon the majority. Corruption in any form is odious, corruption in that form is detestable. Only a rogue, as a rule, can be bribed; he is a rogue by accepting the offer, but an honest man may be intimidated. It is sufficient, however, to say that the law is such that if you prove intimidation by an agent you defeat the election. In this case intimidation is said to have been practised upon the voter, Mr. Stubbings. Mr. Stubbings does not appear to have been intimidated. He appears to have given his vote, as he finally made up his mind to do, for the yellow party. But if a person who tried to intimidate him turned out to be an agent of Mr. Hutton, even though the intimidation were not successful, it would defeat the election. The real question is, whether Curry or any of the other persons who formed part of the congregation of Mr. Stubbings, did cast intimidation upon him. Curry did canvass for Mr. Hutton.

O'Malley.—There is no proof of Curry canvassing.

In reply to the judge, Mr. Hutton said that Curry did not canvass.

WILLES, J.—I suppose I rather assumed it in consequence of the evidence not being stopped; but in the view I take it is not material, and probably in the view Mr. O'Malley took it is not material. Certainly this is the first time I have heard that the evidence as to Curry was objected to on the ground that he was not an agent. I was rather assuming him to be an agent, and I thought one of the witnesses had stated that he canvassed.

O'Malley.—It would not be an objection to his evidence.

WILLES, J.—What do you say was the evidence?

O'Brien, Serjt.—I do not say that we affected Mr. Hutton with any agency upon the part of Curry.

WILLES, J.—Then this ought not to have been introduced at all into the first part of the case. This really is disposed of with the scrutiny. It would have been a serious error on my part if I were going to deal with the act done as being an act affecting the election, to take it even upon the silence of counsel that Curry was agent; but I have been rather assuming, as Curry was not stated point blank not to be the agent in the previous part of the case, that he was one of those persons who was said to have gone about canvassing with Mr. Hutton. Then it passed *sub silentio*. I will finish what I have to say upon the assumption, for argument sake, that he was the agent, because that is the view I have been taking of the case. I have excluded Goldsborough from the case, because I think Goldsborough, upon Stubbings's own account of the matter, did not intimidate him in reference to his vote at all. He objected to his allowing the schoolroom to be used by one political party whether that was a reasonable or an unreasonable objection—I am inclined to think it was a reasonable objection—it certainly does not appear to me to come within the 5th section. But with respect to Curry, assuming that he were an agent for Mr. Hutton, I am called upon to decide that Mr. Stubbings's account of the matter is correct, that Curry, without any reason whatsoever, except the desire to serve the political party to which he belonged, threatened Mr. Stubbings that he would give up his pew in the chapel if he voted, according to his conscience, for the yellows, if he did not sit still. If that were so, I desire to say, as at present advised, I should have held it to be a case of intimidation within the 5th section, and should have thought it necessary to go back through the notes for the purpose of satisfying my mind whether there was, as I had supposed, any evidence which would justify me in holding Curry to be an agent (I think not after Mr. Hutton's statement, to which I give entire credence), or whether, on the other hand, I should take Curry's account of the matter, and conclude that what passed between him and Stubbings was not really an act of intimidation on the part of Curry, or so intended; that it was not a tyrannical interference with another man's vote, but that it was a resolution come to by him in honest anger at Stubbings' for having changed his mind as to sitting still which Curry alleges he had undertaken to do. Curry states that what took place was no intimidation at all on his part, but that it was a thing done in anger, whether reasonable or unreasonable, in consequence of Stubbings, as he thought, behaving in a shifty manner. And without justifying Curry, because a man has quite a right to change his mind as to whether he will vote or not up to the last moment; but without justifying what Curry did, I do not think I ought to come to the conclusion against him that he really meant it as intimidation. It was, I must use the expression, a squabble in the congregation, without any thought of intimidation upon the one side or upon the other. I must deem and determine that John Hutton, the member whose election is complained of by the petition, was duly elected and returned. I must report, that no candidate at the election is shown to have been guilty of any corrupt practices, and that there was no corrupt practice at the election with the knowledge and consent of either candidate. And I must further report that no corrupt practices extensively prevailed, and that there is no reason to suppose that corrupt practices extensively prevailed at the election. With regard to costs, I see nothing to exempt this case from the general rule.

Agents: *T. T. Trevor*, Guisborough, and *W. D. Trotter*, Bishop Auckland.

HEREFORD ELECTION PETITION.

March 12, 13, 14, *and* 15.

(Before BLACKBURN, J.)

Treating—"Corruptly"—Agency—Evidence—Municipal election—Bribery—Practice—Costs.

To act corruptly in connection with an election is to do something which is contrary to the intention to the Act of Parliament.

Therefore the giving of meat and drink to be corrupt must be done with the intention of influencing an election generally, as by acquiring popularity, or by inducing a voter to vote or refrain from voting.

There is no precise rule by which agency can be determined; but every bit of canvassing and acting for a candidate is evidence to show agency. If a particular corrupt act does not come within the category of acts done by an agent the candidate would not be affected, though the persons corruptly acting had been canvassing the town or speaking on his side.

H. was asked by the agent of the candidate to canvas two specific persons:

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Held, that that would not make him a general agent, so that for anything else he might do the candidate would be made responsible.

H. gave a breakfast before the polling, to which the whole town was invited. Everybody was invited to come and have drink there, vehicles were provided to carry voters to the poll, and some were actually so conveyed. On the day of the election the candidates wrote and thanked H. (one of them in the warmest terms) for what he had done:

Held, that this went a considerable way, though it was not conclusive, to show that H. had been adopted as an agent to a great extent.

H. was also seen canvassing in company with B., a recognised agent of the candidates:

Held that this, taken in connection with the above facts, was not conclusive to establish general agency.

But it was further proved that committeemen brought voters to H.'s breakfast; that B. had spoken of him after the election as having done much good service. And it was

Held that all those circumstances taken together so connected H. with the candidates as to cause their election to be voided by reason of the corrupt treating by H.

R., a town councillor gave sums of money to voters who had supported him at the municipal contest. But it appeared that they intended to vote as they did vote.

Held, that although this was an improper practice, it could not be said that the votes had been bought for the Parliamentary contest, and that it was not bribery.

At a meeting of Parliamentary electors held at a public-house, R. gave a quantity of drink. He said that he gave it because he was asked for it and because he had been recently elected councillor of the ward:

Held, that had this stood alone, the conclusion must have been that R. acted with a corrupt intention.

In the bribery particulars 184 *cases were put down. On five only was evidence given, and they failed. It was, therefore,*

Held, that although the petitioners had succeeded, each party should bear their own costs.

The court refused to separate the costs and to give the petitioners the costs of the cases of treating which had been established.

This was a petition against the return of Messrs. Clive and Wyllie, the Liberal sitting members. Sir R. Baggallay and Major Arbuthnot were the defeated Conservative candidates.

Price, Q. C., *Dowdeswell*, and *G. Browne* were for the petitioners;

Powell, Q. C. and *Chandos Leigh* were for Mr. Clive; and

Parry, Serjt. and *Rathbone* for Mr. Wyllie.

As stated in the judgment the case rested mainly on the allegation of treating, the principal witness being Mr. John Harrison. He said:

He gave a breakfast on the morning of the poll. His marriage occurred on the 25th Aug., when presentations were made to him by the men employed by him, and to his wife by the railway workmen, and on his return in the middle of September he intimated his intention to give the men a feast in return. There was nothing to prevent his giving the feast before Nov. 17, but he fixed that day because he knew it would be an idle day. He told the men they might bring a few friends with them. He expected about forty, but altogether about seventy came. Meat, rum, brandy, and half a dozen of wine were supplied. They began about half-past seven o'clock, and was all cleared away by twelve o'clock. William Lewis was brought to the feast by one of the invited guests. Heard that he got helplessly drunk, but did not see him. The witness added that he ordered a break and three omnibusses on the polling-day and drove some to the poll, remaining on the box of the break while they went into the polling-booth. There were several Conservative voters among his guests. He knew of three who voted for the Conservative party. On his oath he declared that the breakfast was not given to influence the voters to vote for Clive and Wyllie. He was liberal in principle, but did not know either Mr. Clive or Mr. Wyllie personally. Was not on the Liberal committee, and only attended at the committee-room on one or two occasions for the purpose of making inquiries. He received a book from Edwards, the clerk to the Liberal committee, containing the names of such of his men as were voters. He used to refer to it at home to see who were voters, but he did not use the book for the purpose of canvassing. The book had been destroyed some time ago, with other waste paper. He had accompanied Mr. J. Bosley (an acknowledged agent) once or twice when he was canvassing. He received letters from Mr. Wyllie and Mr. Clive, thanking him for the support he had given them at the election. Both letters were destroyed.

Cross-examined:

At the time of the election he employed in Hereford a dozen men, or more, besides those employed out of Hereford (who were more than 100). Besides his own men, some of his private friends joined in the presentation to him on his marriage. One of the vehicles charged to him had been ordered by J. Russell. Witness's brother told him to order it. In everything that he did in reference to the election he acted as a volunteer. Out of the dozen men employed by him at Hereford there were some voters. He never asked the men if they were voters. He wanted to know which of his men were voters, and Mr. Edwards was to ascertain that for him. Besides the letters of Mr. Clive and Mr. Wyllie, he also destroyed two letters of Mr. F. Bodenham on the subject of the election. Drove the break to the Kerry Arms on the day of the poll several times. There were men in the break, and they drank with him there. He did not take them. They were in the break and drove the break. He saw a placard at the Kerry Arms, "Wyllie and Clive's Committee-room," but he did not know that there was a committee-room there. (A photograph of the Kerry Arms with the placard on it produced.) He brought a lot of voters to the poll at half-past nine, a second batch at 11, and took each lot, first to the Kerry Arms and then to his house at Holmer. He took a third lot to the poll, and then took them back to his own house. His house was cleared by 1 o'clock. With regard to the letters from the sitting members after the election, the witness admitted that something like the following passage occurred in Mr. Wyllie's letter:—"If there is one person more than another that I am indebted to for my return, it is you." Mr. Clive's letter was more moderate in character.

Re-examined:

There were about a dozen non-voters at the breakfast. He never received a circular to attend any committee meeting.

Mr. Bostock, foreman to Mr. Harrison, gave some corroborative evidence as to the breakfast.

John Baldwin, one of Mr. Harrison's workmen, said Mr. Bostock told him of the day when the "blow out" was fixed for. He took another man with him.

George Roche, another workman, took friends with him to the feast and did not know their names. They were lodgers.

Two other witnesses gave similar evidence.

George Prosser added to the facts already narrated that at the breakfast the healths of the bride and bridegroom, and of all the election candidates, were given.

The two sitting members were then called to explain the origin of their letters to Mr. Harrison.

Mr. Clive, M.P., said that after the election Mr. Bodenham (his agent) gave him a list of persons who had been active in promoting his election. Mr. Bodenham represented to him that there were some eighteen or twenty persons whom he ought to thank for taking an interest in the election. Mr. Clive asked him for a list of those persons, which Mr. Bodenham supplied, saying it was a list of persons to whom he was under obligation for assistance—"active assistance if you like." He (Mr. Clive) had not paid one farthing more than what had been returned as his election expenses, nor did he intend to pay more.

Price disavowed any intention of imputing personal corruption to the sitting members.

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Mr. Wyllie, M.P., said:

He never heard of the breakfast at Mr. Harrison's until after the petition was started. He came down to the Hunt Club ball in January, and next day Mr. Bodenham told him that this breakfast was the basis of the petition. He knew nothing of the breakfast at the time that he wrote to Mr. Harrison. The circumstances under which he wrote to Mr. Harrison were different from those when Mr. Clive wrote. After the polling was over there was a dinner at the Green Dragon. At that dinner he heard that a man named Harrison had done him good service, and he was much struck with the fact, as he had never heard of him before. His idea was that he had done it for love of the Liberal cause, and he wrote to him a very warm and very enthusiastic letter.

Cross-examined by *Price*:

He only heard that he had brought up voters to the poll. That was the only kind of service that he had heard Mr. Harrison had performed.

March 15.—BLACKBURN, J.—I do not think that I need take any further time to consider, because I have had an opportunity of looking over the notes, and having had my attention called to a considerable part of the evidence now on each side in detail, I am now as fully prepared to express my opinion upon this case as I should be at any other time. First of all, I will state at once that there has not been any attempt to show that the candidates, personally, have been parties to anything that has been wrong here whatever; and, indeed, the evidence leads me to the conclusion that this is one of the cases where it is not so much the fact that the candidate comes down to the borough, as that the local interest in the borough brings forward the candidate; so that this really is, as it seems to me, a case in which the candidate is standing on the local influence, and for those who bring him forward, and who are active for him in that way, the candidate is as much responsible as if they were his agents; but, perhaps, it is a more accurate phrase to call them his constituents than to call them his agents, though "agent" is the phrase which has been always used, and which we must therefore take. Now, first, there are complaints made here on the ground of *bribery*, on the ground of undue influence, and on the ground of treating. As to those complaints relating to bribery, I think that no case of bribery has been made out in a way which would at all justify me in acting upon the belief that bribery has been committed by an agent of the candidate. I qualify it in that way, stating it simply, that I do not think it is made out in such a way as would justify me in acting upon it, because there is evidence, and evidence of great suspicion I think, and in reference to two cases of very considerable suspicion indeed of it, but not such as would justify me in acting upon it. [Having considered the evidence in these cases his Lordship proceeded:] Now, there comes the other matter, which is the really serious matter in the case, and that is as to the treating. Upon that the terms of the Act of Parliament regulating the matter now are clear and distinct: "Every candidate at an election who shall corruptly" (the word "corruptly" means contrary to the intention of the Act, with a motive or intention by means of it to produce an effect upon the election; not going so far as bribery, but with a motive thereby to influence the election), "by himself or by or with any person" (I pass over some words), "directly or indirectly give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay, wholly or in part, any expenses incurred for any meat, drink, entertainment, or provision to or for any person in order to be elected, or for being elected, or for the purpose of corruptly influencing such person, or any other person, to give or refrain from giving his vote," shall be deemed guilty of treating. Now, in that case, as well as in others, a candidate is responsible for the acts of agents when they are so far agents that what they were doing they have been employed or authorised by him as agents to do; he is answerable for their corrupt acts although he may be no party to them. Then comes a question which is always a difficult one in such cases; it is a double question. One is, was the meat, drink, and entertainment given with what the statute calls corruptness? I have already said my explanation of that word is, given with the intention of influencing the election—with the intention of influencing an election generally, as by acquiring a popularity, or with the intention of influencing a particular voter to vote or refrain from voting. Another question is, is it given in such a way that the agents of the candidate, those who can be considered as identified with the candidate, were, in the comprehensive language of the Act, either the persons who gave it or were accessory to it? That, of course, raises a very difficult question. What is the degree of agency? What is the relation between a candidate and a particular person which would make the candidate responsible to the extent of losing his seat if that particular person has given meat or drink corruptly? Here we have both questions raised on the two great points to which I have recently directed the attention of counsel. The most important case, the great case, has reference to what took place at Mr. Harrison's break fast, and there I need not say that, as I think, it would be idle to attempt to go through the evidence to show that I am justified in coming to the conclusion, that what Mr. Harrison did give there was given with the intention which the statute calls corrupt, namely, with the intention to produce an effect upon the election. The town is invited, everybody is invited to come who will on the morning to have drink there, and there are breaks and vehicles to carry the people to the poll, and they are actually driven to the poll; and really it struck me that the attempt to say that that was not done with the purpose of influencing the election was not very candid on the part of the witnesses, and did not convey a very high compliment as to their estimation of my common sense. I can entertain no possible doubt upon that point. Now comes the other important question, which is, the amount of agency. That is a difficult question of law and of fact. I have never been able myself to get a precise definition that satisfies my own mind of what is the degree of relation that would constitute a man an agent. Almost everything is evidence of it tending that way, and all that one can do, I think, is to look at the particular acts that are done, and to remember the reasons for which the Parliamentary law differs from the common law in that respect. In the common law a man is not responsible for the act of his agent, except where it is done directly according to an authority which is given to him. In Parliamentary law it is otherwise. A candidate, who has really meant that his agent should not commit a corrupt act, is nevertheless responsible to the extent of losing his seat if the agent does commit a corrupt act. And for that difference in the law so established by Parliamentary committees formerly, and now recognised by statute, it seems to me that there are two principal motives. I will not say that they are the only ones, but they are two principal motives. It would not be possible to unseat a person for corrupt practices if he were permitted, by the means of persons who acted for him, or who brought him forward, either one or the other, to obtain the benefit of their aid, if he were not to be also responsible to the extent of losing his seat for the corrupt practices that were done by them for his benefit. That is one of the great reasons for which, as a matter of public policy, it was thought neces-

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sary, in order that it might check corrupt practices, to establish that principle. Another, and a very considerable reason no doubt, was that in all elections where extensive corrupt practices, bribery and the like prevailed, great care was always taken that the candidate should be ignorant about it. The men who had corrupted, who paid money, carefully kept the candidate from knowing anything about it till after the election was over; then they would come forward and say, "Of course, when I advanced this money I took care that you should not know of it. I have spent 5000*l.* or 6000*l.* on your behalf, and now, as a matter of honour, you must repay me, because I was acting for you." And from the loose morality which formerly did prevail at elections, and which I do not say is completely got rid of, candidates did think themselves bound in honour to pay, and did pay. Consequently the Parliamentary election law became established, that a person was responsible for the acts of his agent in that way; and the question very much was, was that agent, when doing the thing in such a position that there would be that claim on the candidate, according to the false morality of Parliamentary election matters, to recoup him for what he had done? Now those are two reasons for the Parliamentary law differing from the common law. They were not the only ones, but they do give two very good guides and assistances. And I apprehend that in a case where corrupt practices are shown which the candidates themselves are not cognisant of, you must bear these two principal reasons in mind; and then exercising what may be called common sense you must see, does the particular corrupt act come within the rule as an act done by an agent? If it does not, then, though the person may have been canvassing the town, or speaking on one side or the other, still we could not say that the candidate should be unseated on that account. Every bit of canvassing and acting for a candidate is evidence to show agency; but the result cannot depend upon any precise rule that I could define. It comes to be a question of degree, of more or less, and of common sense. It happens that from the nature of things when you come to a question of degree, of more or less, and of common sense, and leave it in that way to a jury, if there were a jury, the jury would determine it sometimes in one way and sometimes in another. Unfortunately, where judges are obliged to be judges of that question of degree and of common sense, there is this unavoidable uncertainty, because it is quite clear that the common sense of one judge will differ from the common sense of another. To use the old simile that was used by Mr. Selden many years ago, and which is none the worse for being old, the standard of common sense as determined by a judge's common sense would be as uncertain as a measure of length, the unit of which should be the judge's foot, because one judge's foot would be longer and another's would be shorter. We cannot help that. I wish with all my heart that the Legislature would find out some test to relieve us from that uncertainty. I can only say I have not been able to invent a test; and if I could I would not make it law. I should be excessively glad if anyone else having the power to make it law, would invent it. That being so, let us see what we are to say as to whether Mr. Harrison's breakfast is shown to have been known, and to have been done in such a way as to be fairly considered an act for which the candidates should be responsible. And remembering that in this case, as I have said before, the candidate must be considered as brought forward by the local people rather than the candidate coming forward and standing himself, we have first of all what Mr. Harrison was himself. He is not a voter. I do not think it has been affirmatively proved that he was any more in direct personal communication with the committee than this; that he did go to Edwards at the committee-room on two occasions; that he saw Edwards there, and that he having given Edwards a list of the names of the people connected with the railway, and of those in his own employment, Edwards gave him a list of the names of those who were voters; and I come to the conclusion from that, that Harrison got that book, and that Edwards gave it to him with the intention that Harrison should ask these men for their votes. Then, of course, Edwards filled a very subordinate position, and I am not by any means prepared to say that if Edwards in his subordinate position had asked a person to canvass that would make the candidate responsible for what that person did. It appears also, however, that Mr. Bodenham, who certainly was almost the head of the affair, did ask Mr. Harrison to canvass two particular persons, and wrote to him to that effect; and that goes further to say that Harrison was asked to canvass; but I do not think that being asked to canvass two distinct and specific persons would make him a general agent, so that for anything else he might do the candidate would be made responsible. But then we have to deal with a much more serious matter—that he is seen in company with Mr. Bosley, who is certainly one of the leading men who bring forward the candidates, and one of the persons for whose acts they would be responsible. To what extent Bosley knew that Harrison was acting we have not very definitely shown, Mr. Bosley himself was not pointedly asked upon it; and if, at the time, my recollection had served me, I would have asked him the question myself. I suppose that neither side liked to ask the question for fear they might get an unfavourable answer, and I take some blame to myself for not recollecting that. What Mr. Bosley did know about it we do not distinctly know; but this much does appear, that Mr. Bosley did speak to Mr. Wyllie as to what Mr. Harrison had done, in such terms as to draw forth from Mr. Wyllie the very glowing letter we have heard of, in which Mr. Wyllie thanks him for his services; and that for some reason or other somebody did so speak to Mr. Bodenham, upon which Mr. Bodenham did the same thing to Mr. Clive, though Mr. Clive, having received his information from a lawyer, in a very business-like manner wrote a cooler letter than Mr. Wyllie's. We have this very clearly, that in both cases Harrison's services were, on the very day of the election in the one case, and in the other case the day after, acknowledged by the leading men, and that for these services he was thanked in letters from the candidates themselves. That goes a considerable way, though it is not conclusive, to show that Mr. Harrison had been by them adopted as an agent to a great extent. Then we have this, that he had gone on one occasion with Mr. Bosley (that in itself is not very much), he had been in company with Edwards when he was asking the railway men for their votes; and it was exactly the railway men whom Mr. Harrison would be likely to influence. Then comes what took place at the breakfast. The invitation seems to have gone forth to everybody and everybody's friends; it was the whole town, and everybody that liked to come was to come; that is what it comes to. We have shown that Edwards invited people, and brought them up; that Williams, of the "Sawyer's Rest," who is a committeeman, invited them, and brought them up; that Rowlands, a committeeman, though not a very active one, brought them up; Henry Davis, who has been marked as being a captain, was also shown to have brought them up, and Lloyd, who is a committeman, was shown to have been there; and probably there were others. John

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Russell was there at the time. John Russell I do not so much rely upon, for although he had been originally appointed a captain, yet, at the first meeting at the "Saracen's Head," he seems to have been the worse for liquor, and after that, according to his own account, he kept aloof from them, and he seems to have taken offence; and according to Bodenham's account he kept aloof from Mr. Russell. I do not think that any active agency has been shown on his part for which he was peculiarly responsible. I do not say that any one of these things would satisfy me that Harrison was an agent. Taking simply the fact that he gave this breakfast, or merely that he had gone with Mr. Bosley to canvass, I do not say that that would satisfy me, though it goes strongly to prove it. Nor would the fact that Bosley had spoken of him afterwards as having done such good service; nor yet do I say that the fact that Williams being a committeeman brought people to his breakfast would satisfy me; nor yet that Edwards, who had been employed about these railway men to some extent, brought people up to the breakfast; nor yet that Lloyd was there, nor yet that Henry Davis was there. No one of these things by itself satisfies me that Mr. Harrison's breakfast was one for which the party who were bringing forward Mr. Clive and Mr. Wyllie are to be considered responsible. Yet taking them altogether, a number of little pieces of evidence do produce an effect upon my mind which leads me to say that, according to the usual rules in Parliamentary matters (that this which is certainly an act of corruption is so clearly brought home to the agents and persons in authority as to constitute them accessories to it, and for which the candidates ought to be responsible), I cannot do otherwise than come to the conclusion that this act is one which avoids the election. I am very sorry for both Mr. Clive and Mr. Wyllie, who had no intention to sanction anything which was corrupt. I am sorry also for many of the leading persons connected with them, for I have no doubt that both Mr. Bodenham and Mr. Jay, the unpaid agents, wished very much to prevent such occurrences, and were very much annoyed at them. Still I cannot say that that should affect my decision here. Then there remains to be considered a matter of much less consequence, and which need not be dwelt upon so much, namely, what Mr. William Russell did, and what he is shown to have done, which is, that being a town councillor he did upon the day of the election for the town council, when there certainly had been something of a formal contest, give money to such of his friends as had come to the election to support him, which it would appear was a bad practice prevailing in the city. Such a thing, if it were done in a Parliamentary election, would at once be considered bribery, and would avoid the election. I trust that the Legislature will take steps to prevent its being done in future at municipal elections also. Here it comes to be a question of fact; was the money that was paid to men for their wages for coming to the municipal election, intended to produce the effect of inducing those men to vote in a particular way at the Parliamentary election? In a case which I tried at Taunton, there were very analogous payments made for the registration, and the evidence satisfied me that that money was given with the intention to induce the voters to vote in the Parliamentary election. In the present case there was a smaller scale, and there were fewer of them, and the day's wages seem to have been given without reference to politics. I think most of the witnesses who were called were men who actually did vote upon the Conservative side, and moreover seem always to have intended to do so; they were not bought over, nor were they told that they were behaving ill or treacherously, or anything of that sort, in voting on the Conservative side; and, consequently, I come to the conclusion that so far as regards the payment of the money, though a very wrong and improper practice, it could not be considered as purchasing a vote; it was not (putting it in homely language) saying "If you will vote yellow at the municipal election, I will pay you for it, and then I shall expect you to vote yellow at the Parliamentary election also." I do not think it amounted to that, and consequently it is not bribery. Then comes what took place at the Greyhound inn. That seems to be much more unconnected with the municipal election. There, I think, that if that stood alone I should pause and hesitate. I should be afraid almost to act upon it if it stood alone, but my impression is that if it stood alone I should on that ground also vacate the election; I do not say that I would have done so if it had stood alone, because I should have hesitated a good deal: but I think I should for this reason. It appears that when a Parliamentary meeting was held at the public-house (and all these Parliamentary meetings at public-houses have been followed by treating afterwards, and that is one of the reasons why they should not be held there), Mr. Russell having been at that meeting, came down to where there were people, some who had been at the meeting and some who had not, but people who were all more or less connected with voters, and he did give them a quantity of drink. He states that his reason was that they asked him for it, because he had just been appointed councillor for the ward; but it is impossible not to see that any such thing given at that time, by a leading partisan and supporter of the candidates whose meeting had just taken place, must have had a tendency to influence the votes of those persons. Mr. Price pointed that out in his argument very well, and I think he was quite justified in arguing that it must have had that tendency, and I think it scarcely possible to believe that Mr. Russell was not aware of that tendency. I therefore think that if that had stood alone, I should have been obliged to come to the conclusion that Russell did intend, as a natural consequence of giving that drink, in that manner to influence the election. However, had it not been for the matter of Mr. Harrison's breakfast, I should have felt very much difficulty about it. It is very possible that if I had found such important consequences as the denermination of an election to depend upon it, I might not have avoided the election upon that ground; but at present the result I think is, that owing to these two acts the election is to be declared void. There is one thing further to remark upon. As a general rule, I have in every case considered that the costs of the election ought to abide the result. As a general rule, that is right, and it is particularly right where the petitioners have been successful in avoiding an election, and have therefore done a public service. But in this particular case there is a reason why I think that I cannot do it. When the Parliamentary Election Committees sat they were a tribunal which met on the particular case for the first time, and nothing could be done till they met. The consequence was that they had no control over what happened before, and then the petitioner came before the Parliamentary Committee with such a case as he pleased; and for the first time, when the counsel for the petitioner got up and spoke, the respondent heard what cases would be brought against him, what were relied upon, what votes were to be impugned, and so on. It was also a consequence that followed from that, that a very vicious practice arose on the part of those connected with Parliamentary elections, that they never got up their case, or considered their case. Counsel went before

Parliamentary Committees with a loose statement that such and such people were likely to say something, and they were instructed from hour to hour and from minute to minute as they went on. A Parliamentary Election Committee was a tribunal which did not sit constantly, and therefore after the particular occasion had no power to control other cases. Those evils afforded a great reason, as I believe, why Parliamentary election committees did not give general satisfaction. I think that they were quite as competent to decide the questions of facts submitted to them as the judges are; but I do not think that they were so competent to bring the matter to the proper point. Now, in making the rules we took those things into consideration; we had this before us, that it was the very essence of justice and fair play that every man who was accused of anything should have due and sufficient notice of what it was that he was accused of, and of that that only, so that his attention should not be distracted to immaterial matters, but that he should really know what it was of which he was accused. For that reason, and for that purpose, we have established the practice that particulars should be given, stating what it is that the respondents will be required to meet. Those particulars were not required to be given long before. Three days before the time came the other side might know what they were to meet, so that they might then be prepared to meet the case, and might not waste time and trouble in hunting up different matters on which the petitioners did not rely; the object being, as I have already pointed out, partly to secure fair play and partly the saving of waste of costs. And a very important further point is, that fifteen working days' notice of trial having been given, and it not being required till the twelfth of those had gone by, that the petitioners should give those particulars; they should make use of those twelve days in in ascertaining and sifting their evidence; that they should really conduct the case as we do in an ordinary trial, with as much as can be done towards fair play and precision. These being the objects, and the particulars being required for those objects, how have they been complied with here? 184 cases of bribery have been put down, which the respondents must have had to look into. Of those there are five on which evidence has been given, and of those five the petitioners have not succeeded in establishing one to my satisfaction. There are five cases that have come to nothing, with 184 charges in the particulars. It is obvious that that could not have been done except for the purpose of baffling the objects of giving the particulars; and it is obvious that it must have given the respondents a great deal of unnecessary trouble.

Price.—Will your Lordship allow me to mention that all the municipal bribery cases were included?

BLACKBURN, J.—Then it is not so large a proportion as I thought it was; though undoubtedly it was stated by Mr. Powell, and I never heard it disputed till this moment, that the proportion was so. It is impossible not to see that the respondents must have been put to a great deal of useless trouble and useless expense in getting up the defence. It is justice to the petitioners to say that, although I have not known quite so gross a case as this before, yet generally the particulars have been used very much as if they were intended to give no information at all; and the only way to check that is to say, that where that is done we shall follow the spirit of the Act of Parliament, which says that the costs shall be in the discretion of the judge, who shall direct how they shall be allotted, bearing in view whether or no there has been useless expense and vexation caused; that is the meaning of the Act. That being so, I can only say, that though here the petitioners have succeeded, I do not think that it would be right to make the respondents bear their costs. The respondents having failed will not get their costs. In this particular case, and under the particular circumstances, I direct that each side bear their own costs.

Price.—All I wish to ask your Lordship is, whether you would make a distinction as to some of the costs. We proved some of the treating.

BLACKBURN, J.—No, I cannot do that. If we attempted to separate the costs it would require very much investigation, and I cannot do it.

Agents: *Jones* and *Starling; G. J. Durrant.*

WIGAN ELECTION PETITION.

March 4, 5, and 6.

(Before MARTIN, B.)

Illegal acts not vitiating an election—Accumulation—Political association—Effect of subscription to on question of agency—Payment of rates.

Some acts may be done at an election of which the judge disapproves, but which do not vitiate it. These may be looked to, however, to explain other acts which are ambiguous, and if upon a future election petition arising out of another election at the same place, acts similar to those of which the judge had expressed his disapproval were proved to have been repeated, the judge who tried the second petition might well take them into consideration to aid his conclusion that the act upon which the validity of the election depended was a corrupt and dishonest act.

There is no partnership privity between the parties subscribing to a political association; nor does the fact of subscribing confer any authority upon the person who manages it to make them responsible for an illegal act done by the manager.

S. was the acting agent and sole representative of a Liberal association, and evidence was given to show that he paid the rates of voters to enable them to be registered. The respondents were Liberals, and subscribed to the funds of the association, but did not interfere personally.

Held, that they were not responsible for the acts of S.

Semble, it is necessary in order to establish that a person had corruptly paid a rate when the rate was in fact paid by a third person, to show that that person was authorised by the person sought to be charged to pay the rate.

Where the candidature has been honest the strictest proof of illegal acts by agents is required.

This was a petition against the return of Messrs. Woods and Lancaster, and contained all the usual allegations, the principal being that they had corruptly paid rates through the agency of the manager of a Liberal association to which they subscribed.

Giffard, Q.C., and *Leresche*, appeared for the petitioners.

Parry, Serjt., *Milward*, Q.C., *Murphy*, and *Pope* for the respondents.

On the subject of the payment of rates, *Parry*, Serjt., argued that there must be an actual authorization on the part of the candidate either before or after the act was done, and the payment must be corrupt. A mere payment was not sufficient. A candidate would be liable if an agent of his, within the meaning of the Act of 1854, bribed on his behalf, even though he had prohibited it; yet, under the 49th section of the Act of 1867, no candidate would be liable for the act of a man who paid rates

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even corruptly except it was proved that he had actually sanctioned or approved it before or after.

Milward on the same side, contended that the 49th section was not intended to refer to the time of an election alone, but to all periods of the year, and to all times when registration was being carried on. He, therefore, submitted that to show liability on the part of the candidate it must be proved that he was a party to the act when done. Taking the instance of an election occurring in May or June, was it to be supposed that the validity of that election could be negatived by acts similar to those charged in this petition, done by some individual in the previous July?

Giffard, Q.C., in reply.

MARTIN, B.—The first ground upon which the election is said to be void, is that acts have been done by the agents of the respondents (for no personal misconduct has been imputed to them), which of themselves destroy their candidature, and render their status as candidates not maintainable, and that these acts of themselves have rendered their election void. It is true, that if any act has been done by them or by an agent for whom they are responsible, contrary to the provisions of the Corrupt Practices Act, the operation of the 36th section of the 17 & 18 Vict., and the 46th section of the 31 & 32 Vict., will defeat their election. I have tried several of these petitions, three of which have been similar to the present; that is to say, the candidates were sought to be unseated by reason of such acts as have been alleged. I have laid down a rule to myself, which I have acted upon in all these cases, and upon which, until I am satisfied that it is wrong, I shall continue to act; that is to say, if I am satisfied that the candidates intended honestly to comply with the law, and meant to obey it, and that they themselves did no act contrary to the law, and *bona fide* intended that no person employed in the election should do an act contrary to the law, their desire and object being that the proceedings in reference to the election should be pure and honest, I will not unseat such persons upon the supposed act of an agent, unless the act is established to my entire satisfaction. I will not act upon anything as to which there possibly may be a mistake or error; I will have it proved; but if it be proved to my satisfaction, and beyond doubt, I must obey the law, and I will obey it. But I think I do right, when an election is sought to be impeached, not because of an act done by the candidates themselves, but for an act which they have forbidden, in requiring to be convinced beyond possibility of error, that the act relied upon by the petitioners which is to unseat the members did actually take place. That is the principle upon which I have acted in the *Bradford* case, in the *Cheltenham* case, and in the *Westminster* case, and I shall continue to act upon it until I am satisfied by some higher authority that it is wrong. I apprehend that my function here is simply to act upon the law as if I were trying a case at Nisi Prius. I have no discretion in the matter; I must act upon the law and the Act of Parliament which imposes the disqualification, and read it according to what its words import. I have no right to go beyond those words. So also it is not because things may have been done at an election of which I do not approve; for instance, having committees at public-houses, hiring a number of carriages, which now, in borough elections is prohibited, or hiring roughs. None of these things of themselves avoid an election, but at the same time they are ingredients which may be taken into consideration. If an act were done by a candidate as to which I was to determine whether it was a corrupt or an innocent act, the conduct of the parties throughout the whole election may be taken into consideration. It may be that evidence is given as to acts done by the candidates which of themselves do not avoid the election. It may be, that although the election cannot be avoided for those acts, yet nevertheless those acts may show what was the real quality and meaning of an ambigious act, which may have one effect or another, according as the judge's mind is satisfied that it was honestly or dishonestly done. It may be that at an election, certain acts may have taken place which the judge disapproves of, but which do not satisfy him that another act upon which the validity of the election depends was corruptly done. But if, upon a futnre election petition arising out of another election at the same place, acts similar to those of which the judge had expressed his disapproval were proved to have been repeated, the judge who tried the second petition might well take them into his consideration to aid his conclusion that the act upon which the validity of the election depended was a corrupt and dishonest act. [Having exonerated the respondents from personal misconduct his Lordship proceeded:]—With respect to the 30 & 31 Vict. it has been argued by the learned counsel for the respondents that the doctrine which has been laid down with regard to the 17 & 18 Vict. does not apply, and that is rather my own impression; I do not mean to give an opinion upon it, because it is unnecessary in this case. The circumstances were these. There is a body in this town called the Liberal Association, and Mr. Giffard has argued that the persons who subscribe to that association are in the nature of a partnership, and that the giving funds to Mr. Stuart for the purpose of enabling him to carry on that association made him their agent, so that the acts done by him would be obligatory upon them, and they would be bound by them. From that view I dissent. There is no similarity to a partnership. It has given to it the collective name of the Liberal Association, but the only person acting is Mr. Stuart. It was stated that Mr. Woods and Mr. Lancaster contribute to it, and that a number of other gentlemen, agreeing with them in politics, also contribute. But this does not make Mr. Stuart their agent, so as to bind them by his acts, either criminally or civilly, no more than the manager of a club to which a gentleman may belong could make him responsible for the acts of that manager. Mr. Giffard, in his observations, referred to the case of *Limpus v. General Omnibus Company*. This case was governed by the law applicable to the relation of master and servant, which is different from that of principal and agent. The relation of master and servant imposes upon the master a liability for an unlawful act done by the servant in the course of his employment. and notwithstanding a prohibition which may have been given to him by the master; notwithstanding that the instant before an accident occurred he had impressed upon his servant or coachman the necessity for driving with the utmost possible care, if the next moment that man disobeys the order received from his master, and inflicts an injury upon another person the master is responsible for it; and why? Because the relation of master and servant exists between them, and creates the liability. But the ordinary rule with regard to principal and agent is, that the principal is only responsible for that which he authorises the agent to do, and in all other cases of which I am aware, except these Parliamentary cases, when you have a man who is sought to be made liable upon the acts of his agent, the question for inquiry is, did the principal give the agent authority to do the act? If that be negatived, the

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principal is not responsible. In my opinion, as at present advised, it would be necessary, in order to establish that a person had corruptly paid a rate when the rate was in fact paid by a third person, to show that that person was authorised by the person sought to be charged to pay the rate. The enactment is, that any person corruptly paying a rate on behalf of a ratepayer for the purpose of enabling him to be registered, is guilty of bribery, and my present opinion is, that in order to make a third person responsible for that act you must prove that he gave authority to the person to do the act. However, it is not necessary for me, as I have already said, to express any opinion upon that. I have pointed out what, in my judgment, is the difference between a partnership and this Liberal association; and there is no partnership privity between the parties subscribing, and no relation of principal and agent. In fact, Mr. Stewart is the Liberal Association, unless so far as the subscribers personally interfere, when of course they would be responsible for their own acts. In my judgment, subscribing to the fund, for the purpose of having the registration attended to in the borough, whether it be a Conservative association or a Liberal association, does not make the subscribers to that fund partners, and does not confer any authority upon the person who manages it, to make them responsible for an illegal act that may be done by the manager. I think, therefore, that the case against Mr. Woods and Mr. Lancaster fails so far as regards the payment of rates. The result is that I am of opinion that Mr. Woods and Mr. Lancaster were duly elected, and I shall so certify to the Speaker. The costs will follow the event. So far as the rates are concerned, it was an experiment, and that is a case in which the courts uniformly give costs. Upon the other grounds the petition has signally failed, and therefore the costs ought to follow the event.

Solicitors, *Sharpe, Parker*, and *Co.; Cunliffe* and *Beaumont.*

In Parliament.

Reported by Frederick Clifford, and Pembroke S. Stephens Esqrs., Barristers-at-Law.

Thursday, April 15.

(Before Mr. St. Aubyn, Chairman; Sir J. Duckworth, and Mr. Rickards.)

Kew and other Bridges Bill.

Objection to *locus standi* of The Hammersmith Bridge Company.

Bridges—Competition—Wine and coal duties—Private Bill to accelerate operation of clause in Public Act—Application of public funds to injury of private company.

A public Act passed in 1868 *contained a clause authorising the application in* 1889 *of that year's produce of the wine and coal duties for the purpose of freeing from toll certain suburban bridges. In the following session a private Bill was introduced to anticipate the revenue of* 1889, *and raise upon that security money which should be applicable to the immediate purchase of these bridges. The Bill was opposed by the proprietors of a toll bridge at H., so situated as to compete for traffic with one of the bridges which it was proposed to purchase:*

Held, that the Bill was not such an execution of the Act of 1868 *as precluded the H. Bridge Company from being heard in order to show that, having regard to the competition to which they would be subjected, the period fixed by Parliament for the purchase of the tolls ought not to be anticipated.*

In 1868 an Act was passed, intituled "An Act to further continue and appropriate the London Coal and Wine Duties," by which the duties leviable by the Corporation of London upon coal and wine imported into the metropolitan police district were continued until 5th July 1889; and by sect. 5 of that Act it was provided that the said duties for the year ending on that date (being the last year for which they were continued) should be applied in the first instance in freeing from toll the following bridges on the Thames, viz., Kew, Kingston-on-Thames, Hampton Court, Walton-upon-Thames, and Staines; and next in making free from toll Chingford Bridge and Tottenham Mills Bridges upon the river Lea; and that if there should be any surplus remaining, the same should be applied as Parliament might thereafter direct.

It appeared that these provisions did not form part of the Bill as originally introduced, but were inserted in committee professedly for the purpose of compensating persons residing beyond the district of the Metropolitan Board of Works, but within the Metropolitan police district for the continuance of duties upon coal and wine consumed by them which would otherwise have been expended entirely upon improvements in the metropolis from which they derived no direct benefit. Moreover, the Bill was introduced and passed as a public bill, without the *Gazette* and newspaper notices required in the case of private bills; and the petitioners did not become aware of clause 5 until long after the Act was passed. The petitioners, the Hammersmith Bridge Company, were incorporated by 5 Geo. 4, and under that Act and 9 Geo. 4 had made and maintained Hammersmith Bridge, and three or four miles length of road in connection with the bridge, in the counties of Middlesex and Surrey, expending on these works the sum of 85,000*l.* They represented that the tolls leviable on their bridge were moderate in amount, while the annual expense of maintaining the bridge and roads was considerable, and the average interest derived upon the capital expended had been less than 2¼ per cent. per annum. They alleged that Kew Bridge (situate next above Hammersmith Bridge) was in direct competition with their undertaking for the traffic between London and Richmond, Kingston, Hampton Court, and the adjacent district; and that clause 5 in the Bill of 1868 would, if acted upon in 1889, divert a large amount of this traffic from Hammersmith to Kew Bridge.

The petitioners further alleged that, although they "are thus prejudiced by the legislation of last session, which they think would not have taken place without provision for protecting their interests if they had had an opportunity of being heard; and although it does not even carry out the principle upon which it was founded, inasmuch as one half of your petitioners' bridge, and the greater portion of their roads, are beyond the district of the Metropolitan Board of Works, and thus in precisely the same position as Kew-bridge and the other bridges specified in sect. 5 of the Act of 1868, yet, as the moneys applicable to the redemption of the tolls on these bridges will not be available under that Act for a period of twenty years hence, your petitioners would during that period have enjoyed a revenue undiminished by the diversion of traffic which would be occasioned by the removal of the tolls leviable on Kew-bridge, and gradually increasing with the ordinary increase of traffic on your petitioners' road and bridge. They would likewise have had full opportunity of representing their case to the Legislature, and of proving that their bridge should have been put on the same footing at Kew-bridge, for which purpose the coal and wine duties leviable in the year ending 5th July 1889 would afford ample funds.

"That a Bill, however, has been introduced into

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your honourable House in the present session, entitled 'A Bill for making Provision for the Execution of the London Coal and Wine Duties Continuance Act 1868, as far as it relates to the freeing from toll of the following bridges on the Thames, viz., Kew, Kingston-upon-Thames, Hampton Court, Walton-upon-Thames, and Staines, and Chingford-bridge, and Tottenham Mills Bridges, on the Lea, and for other purposes;' which proceeds upon a recital of the above-mentioned provision of the said Act of 1868, and on the allegation that it is expedient that the freeing of the said bridges from toll should be accelerated, and that accordingly the revenue to arise from the London coal and wine duties in the year ending 5th July 1889 should be anticipated.

"That the said Bill proposes to incorporate a joint committee of the Corporation of London and the Metropolitan Board of Works, to vest in that committee the said coal and wine duties for the year ending July 5, 1889; to empower the committee at any time after the passing of the Bill to purchase by agreement, or compulsorily under the provisions of the Lands Clauses Act, the undertakings of Kew-bridge and the other bridges specified in the Act of 1868, and for that purpose to borrow 150,000*l.* on the security of the said coal and wine duties for the year ending July 5, 1889; and to provide that, on the completion of each such purchase, toll shall for ever cease to be levied on the bridge so purchased, and the same shall become a county bridge, and be maintainable and repairable accordingly.

"That if the said Bill should receive the sanction of Parliament, Kew-bridge might, and probably would, be immediately purchased at the public expense, and your petitioners would be forthwith exposed to an unequal and unfair competition with a toll-free bridge, which could only result in a very great diminution of their traffic and revenue, while they would still remain bound to maintain the bridge and several miles of road.

"That the injustice thus inflicted on your petitioners would be further aggravated by their being compelled as proprietors of Hammersmith Bridge, which is heavily rated as real property in the counties of Middlesex and Surrey, to contribute towards the cost of maintaining the Kew and other bridges which are made county bridges by the said Bill, but which would under the Act of last session have remained repairable for the next twenty years at the cost of the persons using them. One of the effects of the Bill thus is, that your petitioners will actually be taxed for the support of an undertaking directly competing with their own.

"That it would be unjust to your petitioners to apply the public funds in question to the acquisition and freeing from toll of the Kew Bridge, without at the same time either compensating your petitioners for the loss thereby occasioned to them, or acquiring their undertaking on similar terms.

"That the effect of the Bill would be further injurious to your petitioners by diminishing so materially the value of their bridge as to enable the promoters hereafter to acquire it at a much diminished price, in the probable event of a demand on the part of the public that it too should be freed from toll. It is an admitted principle of legislation that public funds should not be employed in acquiring the undertaking of one private company so as to depreciate by an unequal competition the value of another undertaking of the same kind, and thus to pave the way for the acquisition of the latter at such depreciated amount."

The following were the objections to the *locus standi*:

1. That the only object of the Bill is to afford the means of accomplishing what was agreed to and sanctioned by Parliament in the last session by the 5th section of "'The London Coal and Wine Duties Continuance Act 1868"—namely, the freeing from toll of the several bridges named in the said section, Kew Bridge being one, and the objections of the petitioners to the freeing of Kew-Bridge ought to have been made when the said Act of 1868 was before Parliament, and cannot now be raised.

2. That the effect of an opposition by the petitioners would, if allowed, amount to a repeal of a public Act, namely, the said London Coal and Wine Duties Continuance Act 1868.

3. That Kew and Hammersmith bridges are not competing bridges.

4. That if it be admitted that the bridges are competing bridges, it is against the established practice of Parliament to allow the owners of one bridge to object to an Act of Parliament the effect of which may be to render that competition more effectual.

5. That Hammersmith Bridge, having been constructed afer Kew Bridge, became a competing bridge with the latter. The petitioners can have no *locus standi* to object to a reduction or total abolition of the tolls on a bridge with which they first entered into competition.

6. That the petitioners have no such interest in the provisions and objects of the Bill as will confer a *locus standi*.

Mundell, Q.C. for the petitioners.—The precedents are uniform to show that where a new bridge seeks to compete with an existing bridge, or any Bill is promoted which interferes with an already existing bridge, sanctioned by Parliament, a *locus standi* will be given to the latter to oppose the Bill: (*Northampton and Banbury Junction Railway Bill* 1866, *on Petition of Trustees of the Tewkesbury Severn Bridge and Roads*, Smeth. 158; *Thames Subway Bill*, Smeth. 162.) The case of the Albert Bridge (not reported) is a very cogent one. There a bridge was proposed to cross the Thames below Battersea, and the proprietors of Battersea Bridge were allowed to be heard against the Bill.

Mr. RICKARDS.—Did that case occur before the Referees?

Mundell.—No; it occurred before their time; but I have the facts from Mr. Cripps, who was counsel in the case. We have got, therefore, to this point, that competition would be a ground for a *locus standi* in the event of this being a new bridge. It is not denied that, assuming the Bill of last year to have been a private, not a public, Bill, if the promoters had then sought to throw Kew Bridge open by means of public money, we should have had a right to appear. Again, supposing that a Town Council seeks, by means of the municipal rates, to establish new gasworks, either it must make terms with the company with which it is competing, or the company must be allowed to appear. Or suppose there were two existing gasworks, and a municipal corporation proposed to buy up one of these, the other company would have a right to be heard against such a proposal, and to say, "No; you shall not apply your public funds so as to imperil our interests." If, therefore, the legislation of last year had been by private Bill, we should have been entitled to be heard, to say that public money shall not be so applied. Of course we bow to the decision of Parliament, as embodied in the public Bill, but now that the promoters seek to supplement it by private legislation, and to accelerate the Bill of last year by twenty years, we are certainly entitled to be heard. The money to be devoted to the redemption of the tolls on Kew-

Bridge is public money obtained by taxation over the district of the Metropolitan Board of Works, and as soon as ever Kew Bridge is free our revenue will decrease. The question is, whether we do not sustain such an injury from this legislation as will entitle us to say to the committee that one bridge ought not to be freed from toll unless the other is freed also. As to the objection that we are really asking for the repeal of the Act of 1868, we do not seek to interfere with the throwing open of Kew Bridge twenty years hence; but we object to its being thrown open twenty years before the term fixed by Parliament. It is alleged that Kew and Hammersmith are not competing bridges; but everyone knows better.

Mr. RICKARDS.—What is the distance between the two bridges?

Mundell.—Two miles. Then it is said that, assuming the two bridges to be competing, it is against the established practice of Parliament to allow the owners of one bridge to object to an Act of Parliament the effect of which may be to render the competition more effectual. This is not the case of a railway company doing something to make their route more convenient or shorter. No doubt, if the proposal were merely to shorten or improve the road to a particular bridge, you would not allow the proposers of a competing bridge to be heard. But here this Bill will put it out of our power to compete at all, because everybody will go by the toll-free bridge. Then as to objection 5, no doubt if the trustees of Kew Bridge were to say of their own mere motion, "We will abandon tolls," we could not be heard; but there is all the difference between such a proposal and the application of public money for an object which we say will destroy our property. The effect of the Bill will be that we shall lose the interest on capital expended under a Parliamentary guarantee, and Parliament will not allow our interest to be so prejudiced by means of public money. The tolls are higher on Kew Bridge than on ours. Therefore, if the public go by that route now in preference to ours, they will use it much more frequently when Kew Bridge is toll-free. Private interest is not to be sacrificed to public convenience in this way. Parliament has only said that Kew Bridge shall be thrown open in 1889. We wish to show the committee that it should not be thrown open without compensation to us before 1889.

Mr. RICKARDS.—Was the Bill of last year referred to the examiners? Public Bills sometimes are, when they affect private interests.

Mundell.—No; it was not referred to the examiners, nor did we petition against the clause, for we never heard of it till the Bill was passed.

Shrubsole (Parliamentary agent).—The Act of last year was a public Act. It was brought in at the instance of the Metropolitan Board of Works, the City of London, and Government as represented by the Chief Commissioner of Works, and its object was to continue the coal and wine duties now applied to metropolitan improvements, and to extend the right of the Metropolitan Board of Works and the Corporation of London to those dues for seven years beyond the time Parliament had limited, namely from 1882 to 1889. It was objected by certain persons who paid those dues, but lived beyond the area benefited by metropolitan improvements, that they ought to receive a *quid pro quo* for this prolongation. Accordingly the clause already mentioned was introduced, and if it had not been so introduced for the benefit of these outsiders, the Bill would never have passed. The only ground upon which Hammersmith Bridge can claim a *locus standi* is competition, and this Bill creates no such competition. The petitioners say that if Kew Bridge were made toll free they would be, as county ratepayers, contributing to the maintenance of a bridge in competition with theirs; but, being only individual ratepayers, represented by a public body, they would have no right to be heard on that ground. The two cases cited are not in point. They are cases in which private companies sought, for their own benefit, to do that which would divert traffic from an existing bridge or ferry. That is the only kind of competition in respect of which a *locus standi* could be allowed. But here, if any traffic is diverted from one bridge to another, it is diverted by a public Act and for the public benefit, not the benefit of a private company. There is no such competition as entitles the petitioners to be heard, and they have mistaken their remedy. They should go to Parliament and ask, through the proper authorities, that clause 5 should be extended to them. We only fulfil the intenions of the parties to the Act of 1868 in coming here and carrying out the bargain made with the public.

Mr. RICKARDS.—But you now seek, by a private Bill, to accelerate the period fixed in the public Act for throwing open the bridge.

Locus standi allowed.

Agents for the Bill, *Dyson* and *Co.*

Agent for petitioners, *Grahames* and *Wardlaw.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

April 17 *and* 19.

(Before the LORDS JUSTICES.)

Re BARNED'S BANKING COMPANY (LIMITED); *ex parte* THE BANK OF LONDON.

Companies in liquidation — Advances — Guarantee to induce payment of the advances by company which had given a counter-guarantee.

The bank of L. had made advances to M'H. upon the security of a guarantee by B. and Co. The loan was from time to time renewed, but ultimately the bank expressed its desire to have the transaction closed. M'H. and B. and Co. then induced the I. Association to grant M'H. a credit enabling him to discharge the debt, B. and Co. giving to the association a similar guarantee. Subsequently the bank gave to the association a counter-guarantee, by which they guaranteed to provide funds to meet the liability of the association in the event of B. and Co. making default; and upon this state of facts the bills given to secure the debt were renewed from time to time, and were ultimately met by the bank. All the companies were ordered to be wound-up, and upon the claim of the bank it was

Held (reversing the decision of the M. R.), that B. and Co. were liable to the bank for the amount paid, inasmuch as the guarantee given by them entitled the bank which had paid the money to stand in the place of the association to whom it was given, a right which the bank had not in any way released by its counter-guarantee.

The position of the bank was not, by reason of its having been the original guarantor, at all affected; but it stood exactly as any third independent company, from which the association might have obtained such a guarantee would have stood on paying the amount of the advances.

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This was an appeal by the liquidator of the Bank of London (Limited) against a decision of the Master of the Rolls disallowing a claim made by him as a creditor for 160,000*l.* against the estate of Barned's Banking Company (Limited), which is also in liquidation.

The circumstances were these:—

A gentleman named James M'Henry was, in the year 1864, and antecedently thereto, the financial agent of a railway in the United States of America, called the Atlantic and Great Western Railway Company; and in the course of large transactions between him and the appellant's company they accepted bills drawn by him for 200,000*l.* This sum was guaranteed to the Bank of London by the firm of Barned, Mozley, and Co., who were then carrying on business as bankers in Liverpool, under circumstances which are fully stated in the judgments which follow.

The bills were renewed from time to time at maturity, till Oct. 1864, when the Bank of London expressed their desire that the bills then about to become due should be met, and the transaction closed. Mr. M'Henry then applied to the Imperial Mercantile Credit Association, who agreed to advance him 200,000*l.* to meet the bills, Barned, Mozley, and Co. giving to the association a guarantee to the same effect as that which they had given to the appellants. The circumstances of this guarantee, and the instruments by which it was effected, are fully stated in the judgments.

In the autumn of 1864 a counter-guarantee was given by the Bank of London to the Imperial Mercantile Association, by which the bank agreed that if Barned, Mozley, and Co. made default in repayment of the advances for which their guarantee was given, they (the Bank of London) would provide the association with funds as if the engagement were their own. This counter-guarantee was from time to time renewed, when the bills current under the original guarantee were, on becoming due, renewed; and when the bills finally drawn became due, they were met and paid by the appellant bank out of their own funds, and they debited the Imperial Mercantile Association with the amount of those payments, which was ultimately reduced to the sum of 160,000*l.*

Barned, Mozley, and Co.'s business was in June 1865 acquired by a company incorporated under the Companies' Act 1862, which thereupon continued the old business under the title of Barned's Banking Company (Limited); but that company was in April 1866 ordered to be wound-up. Similar orders were made in the following months of May and June, in the matters of the Bank of London, and the Imperial Mercantile Credit Association. The former of these then carried in its claim for 160,000*l.* against Barned's Banking Company, and the claim was in the first instance admitted, and a dividend upon it was paid, but without prejudice to the right of Barned's Banking Company to dispute the claim altogether. Accordingly when a second dividend became payable, the official liquidator took out two summonses, one of which was to exclude the payment to the Bank of London of that contemplated dividend, and the other absolutely to expunge the admitted claim.

Upon these summonses it was argued on the part of the official liquidator that the counter guarantee was a release by the Bank of London of the original guarantee; and that, inasmuch as this company had given its guarantee, not to the Bank of London, but to the Imperial Association, and as that association had in fact never been called on to pay anything, Barned's Banking Company had not become liable for any amount whatever.

The Master of the Rolls disallowed the claim of the Bank of London, whose liquidator now appealed.

Sir *Roundell Palmer*, Q.C., and *Robinson*, supported the appeal, and

Sir *Richard Baggallay*, Q.C., and *Kekewich*, his Lordship's order.

Sir *Roundell Palmer*, Q.C., having replied.

Lord Justice SELWYN said:—In this case there is no substantial difference or dispute between the parties now before us, with respect to any of the facts in the case, although there appears from the shorthand writer's notes of the judgment of the Master of the Rolls, either to have been some mistake in that shorthand writer's report, or some misapprehension on the part of his Lordship with respect to the facts, for his Lordship says in one part of his judgment: "It was in point of fact a mere paper transaction as far as they were concerned, to make the books of the Bank of London look more favourable in respect of the advances to Mr. M'Henry." And then his Lordship says, in another part of the judgment, "And now the Bank of London, who have paid nothing, and although they could recover nothing from the association, seek to enforce one of the guarantees given to the association against one of the guarantors viz., Barned's Banking Company."

Now, that which was the foundation of the whole of this transaction, appears very clearly from the 4th paragraph of Mr. Mozley's affidavit, in which he says, "My said firm was in Oct. 1864 liable for 200,000*l.* under certain guarantees which it had given to the Bank of London on account of Mr. M'Henry." Therefore, so far from this having been a paper transaction, and so far from nothing having been paid by the Bank of London, the substance of the transaction is that, whereas in Oct. 1864 the firm of Barned and Co., afterwards transformed into Barned's Banking Company, the limited company, was liable for the 160,000*l.* under the guarantees given to the Bank of London on account of James M'Henry (he having been unable to pay), by means of money paid by the Bank of London that liability on the part of Barned, Mozley, and Co., and the limited company, has been got rid of, and this was a substantial benefit to them in respect of the guarantee given by them, and we have now to decide whether the subsequent transactions have relieved them of their liability.

They being, in Oct. 1864, under the liability so stated by Mr. Mozley in his affidavit, it appears that in Nov. 1864, Mr. M'Henry, the person ultimately liable, writes a letter in which he says, "I shall be obliged by your opening a credit for this railway" (that is the Atlantic and Great Western) "to the extent of 200,000*l.*, for which I engage to lodge securities of this company, at 50 per cent., with the guarantee of Messrs. J. Barned and Company, bankers, of Liverpool, as well as the guarantee of the Bank of London, for the due payment of the amount." That was the proposal upon which was based the subsequent arrangement, and that proposal was carried into execution by letter of the 9th Nov. 1864, in which Messrs. Barned and Company give a guarantee to the Imperial Association. "In consideration of your advancing to James M'Henry the sum of 50,000*l.* (say fifty thousand pounds) on loan for six months, repayable on May 5th, 1865, on the deposit of securities as per note at foot, we guarantee the repayment of the said loan to you at maturity, it being understood that, on the said loan being repaid, you are to hand the said securities to us." That is a clear plain guarantee to the Imperial Association for that sum of 50,000*l.* There

were three other sums of 50,000*l.* advanced, making an advance altogether of 200,000*l.*, and, in point of fact, that 200,000*l.* was advanced to Mr. M'Henry, and was so advanced by the Imperial Mercantile Association, or by the Bank of London, at the request of the Imperial Mercantile Association, on the faith of the guarantee.

It is unnecessary to pursue, in detail, the subsequent renewals. On each of those occasions a guarantee was given in the same form, and on each occasion the counter guarantee was given by the Bank of London, with which I will deal presently. That brings us to the last transaction which was with reference to the bills upon which the claim is now made, and which were paid by the Bank of London. That was on the 5th Feb. 1866, which was the date of the last guarantee. That letter is a letter signed by Mr. Charles Mozley, the managing director of the limited company, and it says, "Referring to our letter of the 5th Aug. 1865, guaranteeing four several advances of 50,000*l.* each made by you to Mr. James M'Henry against certain securities deposited with the Bank of England, in consideration of your continuing such advances to the extent of 160,000*l.* for a further period of six months from the date on which each advance matures, say 10,000*l.* due Feb. 5th continued to Aug. 5th 1866; 50,000*l.* due March 9th continued to Sept. 9th; 50,000*l.* due March 27th continued to Sept. 27th; and 50,000*l.* due April 4th continued to Oct 4th; in all 160,000*l.*, we guarantee the repayment of such renewed advances on the dates they respectively become due. Annexed we specify the securities deposited at the Bank of England, and it is understood that against these securities, or such other securities as may be created in respect of them, say certificates of debenture, equipment mortgage bonds, or consolidated bonds, we hereby give you full lien thereon to secure payment of the amounts at maturity. The securities are to be delivered to us on the said securities being repaid." There again is a clear express guarantee given by the limited company; in fact, a renewal of that guarantee which had existed, as stated in Mr. Mozley's affidavit, in Nov. 1864 and previously; and, in point of fact, it appears that by reason of some of these transactions, that original liability had been considerably reduced. All that the limited company did was to give this guarantee for 160,000*l.*

Then the question which we have to decide is a question of fact, viz., was a sum of money advanced by the person to whom that guarantee was given on the faith and by virtue of that guarantee? Upon that I entertain no doubt whatever. In fact, his Lordship the Master of the Rolls, in another passage of his judgment, says: "The bills were paid, and it was the Bank of London who paid those bills." In point of fact, the bills were paid. By whom were they paid? They were paid, it is admitted, not by the Imperial Association by their own funds, but, at their request, by the Bank of London, and they were debited by the Bank of London for every shilling of that 160,000*l.* As I suggested in the course of the argument, supposing the Imperial Mercantile Association, instead of going to the Bank of London, who had been mixed up in these transactions before, had gone to another company, or some private bank, and had requested them to accept and to meet these bills for 160,000*l.*, and that had been done at their request, and they had been debited with that sum of money, could it then be said that the Imperial Association were not entitled, having in fact found the money, in consequence of their request, to sue Barned's Banking Company upon that? I think they would be entitled to sue in that way. It is admitted that there is no distinction to be drawn between the proof made nominally by the Bank of London and the Imperial Association. If the Imperial Association is entitled to such proof, then the proof of the Bank of London ought to be allowed to stand.

The only remaining question is, whether the existence of the counter guarantee which was given by the Bank of London to the Imperial Association makes any difference? It fortunately happens that that transaction has been four times repeated in four different forms. We have no difficulty, therefore, in ascertaining what was the real object and intention of that transaction and the real meaning of the parties; because, although these letters are written in a mercantile form, they are free from ambiguity. Take, for instance, the first one, which is the counter guarantee given at the date of the 9th Nov. 1864, and is in these words: "We guarantee to you the due fulfilment of the enclosed obligation." On the second occasion, on the 13th May 1865, it is in these words, "In default of repayment by Messrs. Barned and Co. of the several amounts specified in their guarantee, endorsed hereon, on the several days of payment on which the same become due, we hereby undertake to provide you with funds as if the engagement were our own." On the third occasion, which is on the 5th Aug. 1865, it is expressed in these words, but exactly to the same effect: "In the event of Messrs. Barned and Co. failing to pay the various instalments of the above advance of 200,000*l.* at the dates at which they severally fall due, we hereby undertake to do so." And on the last occasion, that being the most material as being the one actually in existence, the 10th Feb. 1866, it is expressed thus: "In the event of Messrs. Barned and Co. failing to put you in funds to meet the several sums, amounting in all to 160,000*l.*, on the dates they severally fall due, as detailed in this letter of guarantee, we hereby undertake to do so."

It being, as I have already said, clearly established that the money was paid at the request of the Imperial Association, and that, if they had obtained that money from any other bankers, they would be clearly entitled to sue in respect of the moneys so obtained and so paid, we have to decide whether this counter guarantee is a release of Barned's Bank. So far from there being any sort of intention to release them from the obligation, in each one of the counter guarantees, in the four forms in which they appear, the existence and continuance of that obligation on the part of Messrs. Barned and Co. is most plainly and clearly expressed. So far from there being any intention to put an end to it, it is the foundation of each of these counter guarantees that that liability is to continue; but in the event of that liability becoming incapable of being enforced, either wholly or in part, there is a counter guarantee given by the Bank of London. There is no agreement to release Messrs. Barneds, and there was no intention to release them. The existence of such guarantee by the Bank of London was wholly unknown to Messrs. Barneds; for Mr. Mozley says, "I and my said firm were in no way party to, and knew nothing of, the subsidiary arrangement, which, I have since learnt, was made between the Imperial Association and the Bank of London." There was, therefore, no intention or agreement to release them, and no communication of the instruments which are supposed to amount to a release.

The only remaining question is, Is there in point of law any such release? No such rule of law has been referred to, and I am at a loss to imagine how it could be supposed to exist as applicable to such a case. A counter guarantee was given by the Bank of London. It was a transaction they might have put an end to; it was not communicated to Barned's Banking Company at all, and cannot amount to a

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release of the obligation previously existing on the part of Messrs. Barned and Co.

Therefore, the whole of the case appears to me to be in accordance with what my learned brother has, during the argument, called the substance of the case. Messrs. Barned and Co. having come under serious liability, and that having been continued and undertaken by the limited company succeeding Messrs. Barned, they have been released from that to a very considerable extent at the expense of the Bank of London, who advanced this sum of money at the request of the Imperial Association. I think the proof ought to be allowed to continue, and that, therefore, the order made by his Lordship upon this application should have been, and must now be by us, an order refusing both the applications on the part of Barned's Bank with costs. There will be no costs of the appeal.

Lord Justice GIFFARD said:—As to the facts of this case there is no dispute whatever, and, so far as it is necessary to advert to them, they may be stated shortly. [Having stated the facts he proceeded:] Assuming that there had been no counter guarantee by the Bank of London, I cannot conceive any question could have been raised, because there was the simple transaction tion of the Imperial Mercantile Association requesting the Bank of London to make advances, which would, in point of law, be advances by the Mercantile Association to Mr. M'Henry, and there is no question but that those advances were made. Can such a transaction as that be affected by the fact of there being this counter guarantee. For that is really the substance of the case. The counter guarantee (I read only the last one, for they are in substance all the same), is in these words: "In the event of Messrs. Barned and Co. failing to put you in funds to meet the several sums, amounting in all to 160,000*l.* on the dates they severally fall due, as detailed in this letter of guarantee, we hereby undertake to do so." I confess I cannot by possibility understand how that guarantee could have prevented the Mercantile Association from recovering from Barned and Co. every sixpence which had been advanced at their request by the Bank of London and M'Henry. It seems to me that the transaction is precisely the same as though no such guarantee as that ever existed; and, that being so, the result, of course, must be that the application on the part of Barned's Bank must be dismissed, and must be dismissed with costs; and I have no hesitation in saying that a contrary decision would be most unjust. It would in point of fact be releasing Barned and Co., from a liability under which they were beyond all question (I mean the original liability for 200,000*l.*, when they gave the direct guarantee to the London Bank), although they have got the full benefit of all the subsequent transactions, and although the intention of every party was that they should be liable.

Solicitors for the appellants, the Bank of London, *Cotterill* and *Sons*.

Solicitors for the official liquidator of Barned's Banking Company, *Freshfields*.

April 24 and 26.

(Before the LORDS JUSTICES.)

HOLLAND v. HOLLAND.

Trustee—Acceptance of trust by deed—Breach of trust—Simple contract debt—Specialty.

Where there is an acceptance of a trusteeship under seal, and nothing more, that does not amount to a covenant by the trustee.

And consequently cestuis que trust of a defaulting trustee who had been appointed by a deed which merely contained a recital that it was desired to appoint him, and in the operative part, his appointment in pursuance of that desire, were

Held, differing from Stuart, V.C., not to be specialty creditors in a suit to administer the trustee's estate.

This was an appeal by certain simple contract creditors of a Mr. Cooke, deceased, the testator in the cause, against an order of Stuart, V.C., which decided that the respondents, who were interested in a trust estate to which Mr. Cooke was a defaulting trustee, were entitled to such as specialty creditors against his estate.

The hearing before His Honour is reported *ante* page 58, where all necessary statements will be found.

Charles Hall and Speed supported the appeal, and

Dickinson, Q. C. and *Davey* supported the order of the Vice-Chancellor.

The authorities referred to were
Adey v. *Arnold*, 2 De G. M. & G. 432;
Wynch v. *Grant*, 2 Drew. 312;
Isaacson v. *Harwood*, L. Rep. 3 Ch. App. 225; 18 L. T. Rep. N. S. 622;
Giffard v. *Manley*, Cas. temp. Talbot, 109;
Turner v. *Wardle*, 7 Sim. 80;
Wood v. *Hardisty*, 2 Coll. Ch. Cas. 542;
Benson v. *Benson*, 1 P. Wms. 130;
Richardson v. *Jenkins*, 1 Drew. 477;
Marryat v. *Marryat*, 28 Beav. 224; 2 L. T. Rep. N. S. 531.

Lord Justice SELWYN said: The first question which arises in this case is a question upon the construction of the deed of the 10th Dec. 1859, by which the testator, whose estate is being administered in this suit, was appointed trustee; and the question is whether that deed is to be construed as containing anything more than an appointment of the testator to a certain trusteeship on the one hand, and an acceptance by him of that trusteeship on the other, or whether it ought to be construed as containing a covenant, or words equivalent to a covenant, on his part to do some special act, or to perform some duty. It has been argued that, as the acceptance of the trust is twice referred to in the deed, it must be construed as if something more than a mere acceptance of the trust was intended, and that something more than such a mere acceptance must be implied. If that acceptance had been twice referred to in the recital, or twice in the operative part of the deed, there would have been considerable force in that argument. But we find that it is only mentioned once in the recitals and once in the operative part of the deed, the effect of the recital being that the parties beneficially interested under the trust were desirous that Frederick Cooke should be appointed a trustee in the room of Millington, the deceased trustee, and that Frederick Cooke had consented and agreed to become a trustee; and then the operative and the material part of the deed is "that the said Frederick Cooke did thereby testify and declare his acceptance of the trusteeship."

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We find, therefore, in this recital one and the same thing referred to as a thing proposed to be done, and then, according to the usual form adopted by conveyancers, that one and the same thing is witnessed to have been done by the operative part of the deed. I think that both the recital and the operative part have one and the same object and effect—viz., the appointment to the trusteeship on the one hand, and the acceptance of it on the other. But there is no express covenant to do any special act nor to perform any duty, and I think that no such covenant can be implied. The case of *Courtney* v. *Taylor*, 6 M. & G. and the case of *Marryat* v. *Marryat* (*sup.*) are the authorities which go in support of this conclusion.

Assuming then this to be the true construction of the deed, the next and the only remaining question is whether, in consequence of the acceptance of the trusteeship by an instrument under seal, the present debt and (as the argument has been properly and necessarily put) every other debt which could be proved against Cooke's estate, in respect of this trusteeship, ought to be considered as a specialty debt. In my judgment it is concluded by authority. The case of *Adey* v. *Arnold* was decided by Lord St. Leonards in 1852 when sitting in the Court of Appeal, and it therefore possesses, as I need not say, very great weight. In that case the deed was executed by the trustee, and therefore in my judgment that clearly amounted to an acceptance of the trust by him under seal, and that decision, so far as I know, has never since been questioned. But in the present case the learned Vice-Chancellor has not in any degree impugned the authority of *Adey* v. *Arnold*; for his Honour appears to have been misinformed upon a matter of fact, and to have supposed that, in the case of *Adey* v. *Arnold* the deed was not executed by the trustee; and, but for that misapprehension, I think it probable his Honour's decision would have been opposite to what it has been.

On the other hand, the decision of *Adey* v. *Arnold* has been followed by Kindersley, V. C. in the case of *Wynch* v. *Grant*, by the Lord Chancellor of Ireland in *Newport* v. *Bryan*, 5 Ir. Ch. Rep., and by Lord Cairns in the case of *Isaacson* v. *Harwood* (*sup.*). I think that the case of *Wood* v. *Hardisty* cannot be considered as an interruption to the line of authorities, nor as in any degree questioning the authority of *Adey* v. *Arnold*; for in that case there was this express declaration, as appears in page 542 of the second volume of Collyer's Reports: "Subject to the trusts aforesaid, the said William Forbes, his executors, administrators, and assigns, shall stand possessed of the said policies of assurance, and of the moneys, bonuses, and accumulations to be received in respect thereof, and of all others the premises hereby assumed, or intended so to be, upon trust for the said Susan, her executors, administrators, and assigns, for her and their own absolute use and benefit." In that case *Adey* v. *Arnold* does not appear to have been cited, but the able counsel who argued the case for the defendants is stated simply to have argued that "a breach of trust generally created a simple contract debt: *Vernon* v. *Vawdrey*, *Cox* v. *Bateman*; but he was not prepared to say that it might not be otherwise when the trust was declared by an instrument under seal." And in that case the learned Vice-Chancellor says: "Unless any further authorities were cited for the defendants, he should yield, though somewhat reluctantly, to those which had been cited for the plaintiff." *Wood* v. *Hardisty* was before *Adey* v. *Arnold*, but I think that, under the circumstances which I have mentioned, it cannot be considered a case in opposition to *Adey* v. *Arnold*; and if it were, of course the previous decision of the Vice-Chancellor must be treated as subordinate in point of authority to the subsequent decision of the Lord Chancellor sitting in the Court of Appeal. I think, therefore, that we may take it that since the decision of *Adey* v. *Arnold*, there has been a stream of authorities flowing in the same direction, never in any way interrupted or questioned.

I think, therefore, both upon principle and authority, that it must be held that the mere fact of a trustee being a party to and executing a deed by which he is appointed trustee, and accepting the office, is not of itself sufficient to justify the court in holding that the debt is of such a character as to constitute a specialty debt. I am of opinion, therefore, that the order of the Vice-Chancellor should be discharged, and we must reverse it with the costs of the application in the court below to vary the certificate of the chief clerk. I think also that the costs of the application ought to be costs in the cause, but the respondents to this appeal must bear their own costs.

Lord Justice GIFFARD.—This case has been very ably argued, and I am quite satisfied that we have heard everything that could be said in support of the decision of the court below, and the utmost that ingenuity could have imagined; but I must say that to me it appears a very plain case, both upon authority and upon principle.

Now, as regards the authorities, I do not think it necessary to refer to more than two cases—the one before Lord St. Leonards, and the other before Lord Cairns. I quite agree that the case which was before Lord Cairns is not a case similar to this; but he laid down the principles which are applicable to these cases, and he put it simply in this way, namely, that you are to inquire what it was that the parties meant. In *Adey* v. *Arnold* what Lord St. Leonards said was that the court would not raise a covenant without necessity, which I apprehend meant this—that if, from the nature of the transaction, you infer that a covenant was intended, you will raise it, although there are not apt words such as are usually found when a covenant is intended. But, on the other hand, if from the nature of the transaction, you do not infer that a covenant was intended, then you will not imply it.

Now, what is it we have to deal with in this case? First there is a power to appoint new trustees in the ordinary form, and then there is a power (these being tenants for life) to consent, and the continuing trustee is to appoint. That power is executed in this way. There is a deed to which the tenants for life are parties, to which the continuing trustee is a party, and to which the intended new trustee is a party; and the object of that deed is twofold—first of all, to appoint a new trustee, and, secondly, to convey the property to him. It has no other object or purpose whatever, and if you look at the deed I must say that anything less likely or less to be inferred from the deed than that the one trustee should covenant with the other, I never saw on the face of any deed. That was not by any means the purpose of the deed: it was simply the appointment of a new trustee, and a simple conveyance of the trust property to that new trustee; and I cannot see that the witnessing part of the deed goes at all further than the recital. There is a recital that the new trustee has consented and agreed to become a trustee, and the witnessing part of the deed is that the trustee testifies and declares his acceptance of the trust; and these, in my opinion, amount to nothing more or less than that, by executing that deed, he precludes himself from saying afterwards that he did not consent to become a trustee.

Well, then, what is the clear conclusion to be drawn from the case of *Adey* v. *Arnold*? It is simply this and nothing else: that where there is

an acceptance of a trusteeship under seal that does not amount to a covenant. Here this deed, if you look at it fairly to see what the object and intent of it were and what was really done, amounts, you will find, to nothing more or less than the mere acceptance of the trusteeship under seal, and that being so, no covenant is to be implied, and I am satisfied that no covenant was intended.

For these reasons I am of opinion that the decision of the court below must be reversed. The costs, as my learned brother has said, of the appeal as regards the appellants will be added to their costs in this cause; the respondents will have no costs of the appeal, and they must pay the costs in the court below of this application.

I have only one word to add: It has been suggested that there may be such a thing as a specialty in equity which is not a specialty at law; but I do not hesitate to say in the plainest possible language that if there be not a specialty at all, and not a state of things such that an action at law can be maintained, in equity all debts rank *pari passu*, and there is no distinction between one description of debt and another, whether they be or be not specialty debts.

Solicitor for the simple contract creditors appealing, *Alger*.

Solicitor for the respondents, *Kearsey*.

Friday, July 9.

(Before Lord Justice GIFFARD.)

Re THE JOINT STOCK DISCOUNT COMPANY (LIMITED);

DR. FYFE'S CASE.

Winding-up—Transfer—Non-registration at commencement of winding-up—Delay of transferror.

F., on the register of the company for twenty shares, executed a transfer of them to S., by whom it was also executed, and it was left at the company's office for registration on the 15*th Feb.* 1866. *A board meeting was held on the* 1*st March, but from some unexplained cause the transfer was not then registered. On the* 7*th March* 1866 *a petition to wind-up the company was presented, and on the* 17*th a winding-up order was made. F.'s name continued on the register, and he was summoned in June* 1866 *to show cause why his name should not be placed on the list of contributories. According to his affidavit he "successfully resisted" the summons, but his name was not removed, nor did it appear to have been settled on the list, as in April* 1869 *a summons to settle him finally on the list was served on him on the part of the official liquidator. Upon this he applied to have his name removed, and it was*

Held (reversing the decision of the Master of the Rolls), that as the delay in registering the transfer was the fault of the company, and as it was not incumbent on F. to procure the substitution of S.'s name for his own, and as there had been no delay at all on the part of F., his name must be removed from the list.

This was an appeal against a decision of the Master of the Rolls, whereby the name of Dr. Andrew Fyfe, the appellant, had been settled on the list of contributories of this company, which is now being wound-up in his Lordship's chambers, in respect of twenty shares.

The main circumstances upon which the liability of Dr. Fyfe depended were brought before the court on the admissions by the parties to the following effect:—

That on the 7th March 1866 a petition to wind-up the company by the court was presented, and that an order in conformity with its prayer was made on the 17th March. That Dr. Fyfe was, prior to the winding-up, the duly registered holder of twenty shares, and that before the commencement of the winding-up, he executed a proper transfer of them to one James Strawbridge, by whom the transfer was also duly executed. That this transfer was lodged with the company for registration on the 15th Feb. 1866, but that it was never in fact registered. That James Strawbridge had died on the 28th June 1867 intestate, and that no administration to him had ever been taken out.

It also appeared that on the 1st March 1866 a meeting of the board had been held, at which, in the ordinary course of business, the transfer ought to have been registered, and it was not explained why this was not done.

In June 1866 a meeting was held to settle the list of contributories, and according to Dr. Fyfe's statement, he attended that meeting, and "successfully resisted" the insertion in that list of his name. From that time he took no steps in the matter, and was not applied to again on behalf of the official liquidator, until he received notice of a summons for the 22nd April 1869, calling on him and numerous other alleged contributories to show cause why they should not be finally settled on the list. He then applied by summons to have his name removed, and the summons was adjourned into court, when, on the 11th June, the Master of the Rolls decided that his name must be retained on the list. His Lordship came to that conclusion on the ground that in June 1866 Dr. Fyfe was aware that his name, the transfer notwithstanding, was still on the register of members, and that he had done nothing to substitute the name of Mr. Strawbridge for his own, although Strawbridge had not died for upwards of a year after that time.

The articles of association of the company provided (8) that until substitution on the register of a transferree, the transferror should continue to be deemed a shareholder, and (10) that the directors should have power to refuse to register a transfer presented to them for that purpose.

Jackson, for Dr. Fyfe, contended that it was by default of the company that the transfer was not registered in the first instance; that there was no delay on the part of Dr. Fyfe, who had, as he believed, resisted with success the insertion of his name in June 1866, and was entitled to rest content with that; that it was no part of his duty to procure substitution of another name when he sought to remove his own.

Lord Justice GIFFARD.—Has the court ever removed one name without substituting another for it?

Dickinson, Q. C. as *amicus curiæ*, referred to *Re The Asiatic Banking Corporation; ex parte The Royal Bank of India*, 19 L. T. Rep. N. S. 805.

Jackson also contended that the summons in April last of the official liquidator showed that the matter was not concluded against Dr. Fyfe, and consequently that he had not acquiesced in the insertion of his name.

Locock Webb (with him *Jessel*, Q. C.) supported his Lordship's order, relying principally upon the above mentioned clauses of the articles of association, on the delay from June 1866, and on the absence of any representative of Mr. Strawbridge. He contended that it was Dr. Fyfe's duty if he claimed immunity for himself to procure the substitution of the name of his transferee.

The authorities cited were,

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Nation's case; Re Joint Stock Discount Company, L. Rep. 3 Eq. 77; 15 L. T. Rep. N. S. 308;
Hill's case, unreported;
Shepherd's case; Re The Joint Stock Discount Company, L. Rep. 2 Ch. App. 16; 15 L. T. Rep. N. S. 198;
Shercell's case; Re Mexican and South American Company, L. Rep. 2 Ch. App. 387; 16 L. T. Rep. N. S. 194;
Sichell's case; Re Joint Stock Discount Company, L. Rep. 3 Ch. App. 119; 17 L. T. Rep. N. S. 363;
Shipman's case; Re Joint Stock Discount Company, L. Rep. 5 Eq. 219.

Lord Justice GIFFARD said:—I am of opinion that in this case Dr. Fyfe's name ought not to be on this list of contributories. Reference has been made to the 8th article and the 10th article of the deed of settlement of this particular company. Those articles would, I think, have affected *Hill's* case, if not *Nation's* case, but it is enough for me to say this, that as this transfer was made on the 15th Feb. 1866, and there was a meeting on the 1st March, at which this transfer ought to have been registered, unless objection was made, and no objection was made, and bearing in mind besides that Mr. Strawbridge was actually a shareholder in this company, I do not think that those articles have any application. There was plain delay and plain *laches* on the part of the company in not registering the transfer on the 1st March. I cannot doubt that, if this application had been made immediately after the winding-up, the Master of the Rolls would have considered that this case would have stood on the same basis as *Nation's* case and *Hill's* case, and he would have taken Dr. Fyfe's name off the list of contributories. The ground on which he proceeded was Dr. Fyfe's delay. In my opinion there has been no delay whatever on the part of Dr. Fyfe, nor do I think this case in the least degree affected by *Sichell's* case. I take *Sichell's* case to be this, and nothing else—that if you have a name on the register it may be the name of a person who has a right to have some other name in its place; but if that person is content that his name shall remain on the register, the official liquidator cannot come forward and ask that that name shall be taken off the register, and to substitute some other person's. That is the whole of *Sichell's* case, and it does not at all follow from *Sichell's* case that, if two persons went to the official liquidator without any improper delay at all, and said, "This case comes within *Hill's* case or *Nation's* case," that the official liquidator must necessarily have an order for the purpose of removing the name of the transferror.

When we come to the facts of the case the matter seems to me to be entirely concluded by the course taken by the official liquidator himself, because by his summons as late as the 22nd April 1869, he calls upon a number of persons, and amongst others on Dr. Fyfe, to show cause why his name should not then be settled on the list of contributories. If that is so, can I hold because Dr. Fyfe's name was, owing to the *laches* of the company, on the list of shareholders, that, therefore, it was on the list of contributories up to the date when that summons was served? Clearly it was not on the list of contributories, because, if it had been, this summons would have been wholly erroneous; but this summons was made the foundation of the proceedings, and is the summons upon which Dr. Fyfe's name has been put on the list. That being so, there being no delay, I hold this case to be precisely in the same situation as if Dr. Fyfe had made this application immediately after the date of the winding-up. If he had made this application then, it would have been impossible to raise any distinction between this case, *Hill's* case, and *Nation's* case, and the principle laid down in *Shepherd's* case. I consider those cases binding, and that the question raised by them is not now open to be considered by this court, and, that being so, that Dr. Fyfe's name should not be on the list of contributories.

The only other point is the absence of Strawbridge's executors. That is not material. It is not essential to Dr. Fyfe's case that he should put any other name on the list: it is enough for him to say, "I have been put improperly on the list." I am of opinion that he is improperly on the list. As regards the costs Dr. Fyfe will have his costs in the court below, and there will be no costs of the appeal, but the official liquidator will have his costs below, and in this appeal out of the estate of the company.

Solicitors for the appellant, *Walker* and *Sons*.

Solicitors for the official liquidator, *Lawrence*, *Plews*, and *Boyer*.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Thursday, June 24.

Re MORLEY.

MORLEY *v.* SAUNDERS.

Set-off—Charge for younger children—Tenant for life in possession—Legacy left to him—Interest on charge unpaid.

M., being entitled (as a younger child) to a portion of a charge upon an estate, the tenant for life only partially kept down the interest, and M. by her will left him 1000l. On his death more than that sum was due to M.'s estate in respect of the unpaid interest, and the question was whether there was a right of set-off:

Held, there was not.

This suit was instituted by administration summons by a legatee under the will of Mary Morley, the question being, whether Mary Morley, being entitled to a charge on property of which Francis Morley was in possession, and of which he had not kept down the interest, and she having left him 1000*l.* by her will, as between her representatives and his, there was a right of set-off. The matter came on upon a claim by Charlotte Morley, administratrix of Francis Morley, as a pecuniary legatee of Mary Morley. The chief clerk by his certificate found that the defendant, William Allen Francis Saunders was the executor of Mary Morley, whose debts and funeral expenses were paid, and who by her will gave the sum of 1000*l.* to Francis Morley (her brother), 2500*l.* to her sister Dorothy Saunders (wife of the defendant) and other legacies to be paid out of 4500*l.* to which she was entitled under the will of her father Josias Readshaw Morley. By his will the testator devised to Gabriel Fielding and Octavius Leefe, their heirs and assigns, the Marrick estate, in the county of York, to the use of the testator's brothers, John Readshaw Morley, and Matthew Morley, their executors, administrators, and assigns, for the term of 500 years, and subject thereto to the use of his son Francis Morley (who was then sixteen years old) for his life, with remainder to his children in tail, with remainders over. The trusts of the term of 500 years were to raise by mortgage, sale, or otherwise, 9000*l.* with interest at 4*l.* per cent. from the date of the testator's death, and to receive the rents of the said Marrick estate, and after keeping down thereout the interest on the said charge of 9000*l.*, to pay an annuity of 100*l.* to the testator's son, John Morley for his life, and an annuity of 300*l.* to the testator's wife, Jane Morley, for life, and to permit the residue of the rents to be re-

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ceived by the person or persons for the time being entitled to the reversion expectant on the determination of the said term of 500 years. And the testator declared that the said sum of 9000*l.* so directed to be raised should be for the benefit of the testator's son Thomas Morley (since deceased), and his daughters, the said testatrix Mary Morley and Dorothy Saunders, in shares of 3000*l.* each, to be vested interests, on their attaining twenty-one, or, as to the daughters, on their marriage under age, with benefit of survivorship.

John Morley died in March 1829, and his annuity then fell in. Thomas Morley died on the 9th Nov. 1855, under age and intestate, and his share of the 9000*l.* accrued to the testatrix Mary Morley and Dorothy Saunders. On the death of the testator, Josias Readshaw Morley, in Feb. 1827, the trustees entered on the Marrick estate, but the 9000*l.* had never been raised. In 1832 the eldest son, Francis Morley, attained twenty-one, and was allowed to enter into possession of the estate by the trustees of the term as tenant for life. He made some payments to Mary Morley on account of interest in respect of her share of the 9000*l.*, but did not pay it in full, and at her death there was due to her from him more than 1000*l.* Francis Morley died in Aug. 1854, and his eldest son succeeded as tenant in tail. Under these circumstances, the administratrix of Francis Morley claimed the legacy of 1000*l.*, and the question was whether, there being more than 1000*l.* due to Mary Morley in respect of his default in paying the interest on the 9000*l.*, one could be set off against the other.

Cotton, Q. C. and *Joliffe*, for the executors of Francis Morley, insisted that there was no right of set-off. The remedy of Mary Morley's representatives was against the estate, and whatever question there might be as between the executors of Francis Morley and those entitled in remainder, there was none as between them and the estate of the testatrix. There must be two parties to a set-off; and there being a clear right on the part of the executors to the legacy, if the doctrine of set-off applied, there must also be an equally good legal and equitable right by the representative of Mary Morley, which there was not. It might be said, perhaps, that there was a moral obligation to keep down the interest on the part of a tenant for life who was in the possession of an estate upon which there was a charge, but it was nothing more; and admitting that Francis Morley was in the possession, clothed with that obligation, that did not confer a right of set-off nor retainer, and the claim for the legacy must be sustained.

Glasse, Q. C. and *North*, for the representative of Mary Morley, contended that although this might not be a case of set-off proper, there was a right of retainer. The obligation must be taken to have been known to the trustees and to Francis Morley: (*Courtney* v. *Williams*, 3 Hare, 539; 15 Jur., N. S.) The object here was to throw the executor of Mary Morley upon the remainderman, when he would get nothing, the statute having run. What had been done was a breach of trust, and a bill might have been filed, and a decree made for the payment of the money, therefore it was a personal demand, which would extend even to an agent. It was not the case of an outsider, but a direct trust to raise 9000*l.* with interest at 4*l.* per cent., and to receive the rents after keeping down the interest, and paying annuities, and permit the residue to be received by the reversioner of the term:

Dixon v. *Peacock*, 3 Dr. 288;

Makings v. *Makings*, 1 De G. F. & J. 358.

The whole rents were received with notice of the trust and bequest in favour of younger children.

Cotton, Q. C. in reply.

The VICE-CHANCELLOR.—This question involves a claim by the legal personal representatives of Francis Morley to a legacy of 1000*l.*, given to him by the will of Mary Morley, and it is rested on the ground that Mary Morley had a charge of 4000*l.* on a real estate in Yorkshire, of which Francis Morley was tenant for life. As soon as Francis Morley came of age the trustees of a term of 500 years, who were in possession, let Francis Morley into possession, and it is admitted that that was clothed with the obligation upon the part of Francis Morley to keep down the interest of 9000*l.*, a charge created by the term, of which Mary Morley was entitled to 4000*l.* The chief clerk has found that Francis Morley made some payment on account of such interest, but that there was more than 1000*l.* due on such account at the time of his death. Now, if Francis Morley had been indebted to Mary Morley for the amount of arrears of rent so received and retained, instead of being applied in payment of the interest, it would necessarily follow that being so indebted, and having a claim on her estate, one can be set-off against the other, and the legacy of 1000*l.* would be thereby annihilated. But was he indebted to her estate? if so, the consequence would be, if he owed her 1000*l.* his claim, whatever it was, must be 1000*l.* less. But it is clear on principle that Mary Morley not having received interest on the charge of 4000*l.* to which she was entitled, was an incumbrancer on the estate for the 4500*l.* and arrears of interest found due to her and not paid. It is clear on the principle which I must have acted on, even if the chief clerk had not found 4500*l.* due to her and all arrears of interest, that if she was entitled to the whole 4500*l.*, her estate has not been diminished by this claim against her estate, nor did Francis Morley receive money to her use; my opinion is that he did not, merely because he was let into possession. It is true that the trustees of the term being in possession let him into possession; but as tenant for life in possession, who does not keep down the interest of a charge, cannot be sued either at law or in equity by the person entitled to the charge, for this reason, that he may be stopped from receiving the rents, and a bill may be filed to restrain him from so doing, without keeping down the interest on the charge. But a person who has a mortgage on an estate cannot sustain a personal demand, and money due to him cannot be sued for either at law or in this court. In the present case there was no debt of Francis Morley's. It was a charge created by the original testator, for which, therefore, there can be no mere personal liability, although there may be a moral obligation to keep down the interest of the charge; but I am unable to see that the representative of Mary Morley can sustain any claim either at law or in equity against Francis Morley or his representative for rent received by him. With respect to the suggestion as to *Courtney* v. *Williams* (*sup.*) having decided that an executor has a right of retainer, there there was once a debt, and that being so, there was still a debt, although not recoverable at law by reason of the statute. But here there was no debt at all, although morally, as Mr. Cotton admitted, it might be said that there was some claim in respect of the 180*l.* which ought not to have been received, on the result of the account, but as the estate of Mary Morley does not suffer, although I regret having so to decide, on the technical point, I cannot regard Francis Morley as indebted to Mary Morley, nor his estate to her estate, there being, I am of opinion, no case of set-off, or even a right to retain. There will therefore be a declaration to that effect, namely, that the 1000*l.* legacy and interest are still payable to the

executors of Francis Morley. It is certainly very much like the case of a mortgagee allowing the mortgagor to receive the rents.

Solicitor for the claimants, *Tomlin*.

Solicitors for the representative of Mary Morley, *Norris* and *Allen*.

Wednesday, July 7.

BOWERS *v.* BOWERS.

Will—Construction—Period of distribution—Direction to divide the whole equally—"In case they shall die."

A testator gave all his property to trustees absolutely, and to divide the whole amongst his four children equally, with benefit of survivorship, in case any of them should die without issue: and in case any of them should die leaving any child or children, the shares original and accruing to be divided between such children equally, if more than one, and if only one, then the whole to such one. All four survived the testator, attained twenty-one, and three had families:

Held, that the period referred to was the death of the testator, and the four children took absolutely as tenants in common.

The question in this case arose upon the construction of the will of Richard Bowers, dated the 25th Sept. 1855, whereby, being at the time of his death possessed of leasehold houses in London and elsewhere in Middlesex, and personal property of considerable amount, and seised in fee of freehold houses in Northamptonshire, and other real estate, he directed payment of his debts, funeral and testamentary expenses, out of his personal estate. The testator then devised all estates vested in him by mortgage or otherwise, to his two sons, William Bowers and Henry Bowers, and his son-in-law, John Haigh, to hold to them, their heirs, executors, administrators, and assigns, upon trust, to convey, assign, or dispose of the same, so far as he was beneficially interested, as part of his personal estate; and, after a specific gift, he gave, devised, and bequeathed unto his trustees, their heirs, executors, administrators, and assigns, all other his real and personal estate whatsoever and wheresoever, and of what nature and kind soever, to hold to them, their heirs, executors, administrators, and assigns, upon trust, to collect and get in such part of his personal estate as should consist of money and securities for money, and other his debts and effects, and he proceeded as follows: "And then to divide the whole unto, between and amongst my four children, William Bowers, Elizabeth, now the wife of the said John Haigh, and Henry Bowers and Richard Bowers; share and share alike, as tenants in common, and not as joint tenants, with benefit of survivorship, in case any of them should die without issue; and in case any of the said children should die leaving a child or children, then I direct that the share, whether original or accruing, of him, her, or them so dying, shall go, belong, and be divided between such children in equal shares, if more than one, and if only one, then the whole to such one and only child." And he appointed his trustees executors. The testator died on the 1st Feb. 1856, and all his children survived him, and were now living. John Haigh took upon himself the active execution of the trusts, paid the debts, and received and admitted assets. William Bowers, the eldest son and heir-at-law of the testator, had two children; Henry Bowers had been married for ten years, and had none; Richard Bowers had two children; and Elizabeth Haigh, had four; and all the eight grandchildren were infants. A question having arisen whether the gift to the testator's children was absolute, or gave a life interest only, the bill was filed by Richard Bowers for the administration of his father's estate, and that was the point now to be decided.

Shapter, Q. C. and *Vincent* for the plaintiff, contended that it was an absolute gift.

J. Pearson, Q. C., for some of the grandchildren, insisted that according to the authorities, and on the construction of the language, nothing but a life interest was given. If there had been a gift simply to the children equally, with benefit of survivorship in case they should die without issue, there might have been an absolute gift; but there was a gift over providing for the event of either of them dying with or without issue or leaving children, and that cut it down to a life interest:

2 Jarm. 730, 3rd edit.

Shapter, Q. C. referred to

Gee v. *The Mayor of Manchester*, 17 Q. B. 737; 21 L. J. 242, Q. B.;

Whitworth, for parties in the same interest, referred to *Gosling* v. *Townsend*, 2 W. R. 23. *Woodburne* v. *Woodburne*, Ib. 131; 19 L. J. 88, Ch., was no authority, because there was a decision of the Court of Appeal the other way:

Farthing v. *Allen*, 2 Mad. 316.

Hardy, Q. C. and *Humphrey* appeared for two of the trustees.

Brodrick for the acting executor.

The VICE-CHANCELLOR (without hearing a reply).—The question in this case is whether the four children of the testator who survived him took life estates originally, or in substitution for the gift to their children, or an absolute interest. The facts that have happened are these: At the testator's death he had four children, who are all now living, and have all attained the age of twenty-one, and are therefore competent to give effectual discharges to the executors for their shares, if they are absolutely entitled. The words of the will are few. [The Vice-Chancellor read them.] There is a gift of the whole *corpus* of the estate to the trustees, upon trust to collect and get in such part of his personal estate as shall consist of money and securities for money, and other his debts and effects, and to divide the whole (there being a gift of the whole to the trustees) unto, between, and amongst his four children (living then), share and share alike, as tenants in common, and not as joint tenants. No one would dispute that if he had stopped there that would have been an absolute gift to the four children as tenants in common. But he goes on, "with benefit of survivorship in case any of them should die without issue, and in case any of my said children should die leaving any child or children, then I direct the share, whether original or accruing, of him, her, or them so dying shall go, belong, and be divided between such children in equal shares, if more than one, and if only one then the whole to said one and only child." Now, there are two views to which this will is open. If it means that there shall be a gift over whenever any child dies without leaving issue, to the survivors; or dying leaving issue to their children, that would be inconsistent with the absolute gift which precedes it; and instead of the trustees dividing the property according to the direction in the will, they can do nothing but pay the interest of the fund representing the shares of those who are dead to those who survive for their lives only; if the word "die" means dying generally. On the other hand, if it is meant to operate at the death of the testator, and

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therefore an absolute gift, the testator having clearly given the whole to the trustees to divide and pay it to the children, then the whole is consistent by reading the words if any of them shall die "in my lifetime," because here are the parties competent to receive their shares; and this will be a rational construction, the further words being merely a provision against lapse, for the words are "in case any of them should die without issue," or if they died leaving issue, that such children should be substituted for their parents. That makes the whole clear, and that is the conclusion at which I should have arrived in the absence of authority, and if I found such cases as *Farthing* v. *Allen* (*sup.*) only in my way, I should have decided in direct opposition to them, in order that the law might be put upon a rational footing, instead of such an irrational one as they have put it upon, whereby the intention of the testator is defeated. But I am happy to say that it does not rest upon that class of cases; for in *Gee* v. *Mayor of Manchester* (*sup.*), where the testator directed a division of his property into shares, and gave to each of his children a share absolutely, and provided that if any of them should die without issue, he gave it over, that was held to mean dying in his lifetime. That was also the decision of the court in *Woodburne* v. *Woodburne* (*sup.*), before Stuart, V.C., and in *Ware* v. *Watson* (*sup.*), where the Court of Appeal decided precisely the same thing, and in that case every authority upon the subject was cited, commented upon, and dealt with. I consider, therefore, not only that these cases decide the question, but *Home* v. *Pillans*, 2 M. & K., where the bequest was to the testator's daughter at twenty-one, and if she should die without issue under twenty-one, to other persons, if that referred to dying generally, it was inconsistent with the previous language, but if it meant under twenty-one in the testator's lifetime, that would be consistent and rational. Therefore I desire to lay it down as a rule, that wherever there is a bequest of property to children or a class in terms, showing an intention that the capital shall be paid, simply to one or divided into many shares with benefit of survivorship, in case of death without issue, that is merely a provision against lapse, and the bequest is absolute, and that provision fails. Here, there being a gift of the whole capital to the trustees to be divided equally amongst the four children, and all having survived the testator, on his death, they became absolutely entitled.

Solicitors for the plaintiff, *R. Metcalfe*, for *Beck*, Northampton.

Solicitors for the other parties, *Bell* and *Brodrick*.

Monday, July 12.

SOUTHWELL v. MARTIN.

Trustee—Vexatious refusal to hand over fund—Costs.

A testator left all his property to trustees on trust for his wife for life, and all the residue to A. H., daughter of his brother W. H., absolutely. The testator's brother W. had three daughters, E., M., and M. A., the plaintiff, who had long prior to the will been Mrs. S., and on the ground of the doubt of identity the trustees refused to pay over the residue:

Held, that the refusal was not warranted by the circumstances; that the plaintiff's second name being A., and she being a daughter of the testator's brother W., was sufficient, and, on bill filed for payment, decree, with costs.

This bill was filed by Mary Ann Southwell against the trustees of her uncle's will, seeking payment of 340*l.*, representing the residue of his estate, and asking the costs of the suit against them. The will was dated in 1861, and thereby the testator gave all his property to the defendants, in trust for his widow for her life, with various legacies. The testator then gave as follows: "All the rest and residue of the said trust moneys, stocks, funds, and securities upon trust to pay the same to my niece Ann Haslop (daughter of my brother William Haslop), for her absolute use and benefit." The testator's brother, William Haslop, had three daughters, Elizabeth, Martha, and the plaintiff, Mary Ann, who for many years anterior to the date of the will had been Mrs. Southwell. In the events which had happened, the residuary legatee becoming entitled, the plaintiff had made various applications to the defendants for payment, but they had been disregarded on the ground of want of identity. It was said that the testator had several grandnieces, and one of them might have been meant; it being impossible that the plaintiff, known to the testator as Mary Ann Southwell for many years, could have been intended by the words "Ann Haslop." It appeared that the plaintiff had offered her personal indemnity as well as that of one Brett, a cricket bat manufacturer, to the trustees, but that they had refused it.

Ince appeared for the plaintiff, and contended that she being the daughter of the testator's brother William, and one of her names being Ann was quite sufficient. The testator had simply forgotten; it being very common to call a party by her maiden name by inadvertence; and also by the second name instead of the first. There was no justification whatever for withholding the legacy, and the plaintiff ought not to pay one penny for being forced to apply to the court to obtain it.

Glasse, Q.C. and *Busk* for the defendants, insisted that there was quite sufficient doubt to warrant the trustees in refusing to pay over this legacy. Not only was there this discrepancy in the christian name, but the surname, the testator being aware for years that she was Mary Ann Southwell; it was not a trifling but a very serious discrepancy. The testator must be assumed to be almost incredibly inaccurate to entitle the plaintiff to this legacy. The description of the person was probably accurate, but there might be an inaccuracy in stating whose daughter she was, and that would make it intelligible; at all events, the trustees were in doubt and that was enough, and they simply wished to be sanctioned in handing it over, and therefore the court would never under such circumstances order them to pay the costs.

The VICE-CHANCELLOR (without hearing a reply).—This is one of the clearest cases possible in which the trustees ought to pay the costs. Here is a simple gift to the testator's widow for life, and all the residue to the defendants in trust for "my niece Ann Haslop (daughter of my brother William Haslop), for her absolute use and benefit." Now the testator's brother William had three daughters, Elizabeth, who of course could not answer the description, Martha, nor could she, and Mary Ann (the plaintiff) who might very probably have been called "Ann," her second name. It is said that there might be a grandniece or some other person answering the description of "Ann Haslop," it not being pretended that there is. There might be a thousand, but none could take by the description of "daughter of my brother William Haslop;" that is distinct at all events, and the plaintiff is the daughter of the testator's brother William, and her name, or one of her names is "Ann." It is the most absurd objection that I ever heard raised. The testator had forgotten the marriage and still called her by her maiden and second name. A statutory declaration

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was made by one of the other daughters as to the state of the families, and the trustees having employed a solicitor, that ought to have been perfectly satisfactory. If there was any doubt, the trustees, I assume, desiring to do what was right, were bound by their solicitor to know, and he having consulted counsel, that counsel was bound to know, that under that most beneficial statute brought in by Lord Cottenham, the Trustee Relief Act, for the especial relief of trustees, the money could have been paid into court; although I am bound to say that this case is so free from doubt that had the money been paid in under that Act, and the matter had come before me, I should have made the trustees pay the costs of paying it in. There might be cases in which—although as a judge I should see no reason to doubt—there might be a fair case of uncertainty. But this is a most ridiculous question, and it is the duty of trustees to excercise a fair discretion, and not to keep poor people out of their money upon such frivolous pretexts. Not only has the plaintiff been obliged to file a bill, but evidence has actually been gone into, and if I allowed the defendants their costs this 340*l.* would be mulcted down to 100*l.* There must be a decree for payment of the principal with interest, and the defendants must pay the costs.

Solicitors for the plaintiff, *Spyer* and *Son.*

Solicitors for the defendants, *Tompson, Pickering,* and *Styan.*

Wednesday, July 14.

BOUSFIELD *v.* BOUSFIELD.

Will—Construction—Separate use with testamentary power—Absolute interest.

A testator, after giving annuities and legacies, gave all the rest and residue of his property to his three children, naming them, equally, wishing his daughters' shares to be vested in the hands of trustees in Government securities, the interest only to be payable to them, and neither they nor any husband they contracted marriage with, to have any control over the principal, except that his daughters should have power to will at their decease, the son to receive his share on attaining twenty-five, with clauses for maintenance.

Held, that the daughters took an absolute interest.

This suit was instituted for putting a construction upon the will of William Bousfield, dated the 28th Oct. 1848, the question being whether on the terms of that instrument, and in the events that had happened, his children took an absolute interest or for their lives only with remainder over. The will, which was extremely short, was as follows:—

I will and bequeath to my beloved wife the sum of 500*l.* per annum during the term of her natural life, and at the death of my dear mother a further sum of 100*l.* per annum also during the term of her natural life, but should she contract marriage she is only to be entitled to the sum of 300*l.* per annum also for the term of her natural life; which is to be at all times independent of her husband; and at her decease the principal to fall back to and form part of the residue of my property divisible among my children as is hereafter stated. I bequeath to my son William my share of the freehold property in St. Mary Axe coming to me according to the will of my late father. I give unto my dear wife the whole of my household furniture, plate, pictures, horses, and carriages, &c. that may be found at Streatham Hill, &c. at the time of my decease, and as to the rest and residue of my property I bequeath it to my three children, William, Hannah, and Edith Eliza share and share alike. I wish my daughters' shares to be vested in the hands of trustees in the Government securities of Great Britain, the interest only to be payable to them, and neither they nor any husband they may contract marriage with are to have any control over the principal moneys except that my daughters are to have power to will them at their decease. I wish my son William to receive his share of the property on his attaining the age of twenty-five, but should my executors deem it fit for the purpose of his advancement in life, I hereby authorise them to advance any sum not exceeding 2000*l.* for that purpose. I herewith empower my executors to pay over to their mother or their guardian for the time being such proportions of the incomes of the children as may be required for their maintenance and education at their discretion. I wish my executors, as they can get in the money to invest it in the Government securities of Great Britian. I will and bequeath unto my dear wife, Hannah Bousfield, the sum of 500*l.* as soon after my decease as may be convenient to my executors.

The testator died on the 1st April 1851, leaving his widow and three children surviving him, namely, the plaintiff, Hannah Bousfield, the defendant, William Bousfield, and Edith Eliza Bousfield, all infants. The testator at the time of his death was not seised of any real estate, except that specifically bequeathed to the defendant, William Bousfield; but considerable personal estate, which, except a reversionary interest, amounted to about 20,000*l.*, a great part of which had been invested to meet the annuity of 500*l.* a year, and the residue was divisible. Edith Eliza Bousfield died on the 16th Oct. 1858, an infant and intestate and unmarried, leaving her brother, mother, and sister the sole next of kin surviving. In March 1859 the executors were advised that Edith Eliza Bousfield took a life interest only in one-third of the testator's residuary estate, and that he died intestate as to the ulterior interest in such one-third, which therefore became divisible amongst the widow, the two children, and the personal representatives of Edith Eliza Bousfield deceased, according to the statute, and that the share of Edith Eliza Bousfield such one-third, as next of kin of the testator was divisible amongst her mother, brother, and sister as her next of kin. William Bousfield attained twenty-one on the 9th July 1863 and the plaintiff on the 1st Jan. 1865. On the 29th May 1865 the widow, son, and daughter executed a release to the executors on the footing of the said Edith Eliza Bousfield taking only a life interest, and of the consequent intestacy, which were recited, and the deed dealt with the property, having regard to the provisions of the will, and on the footing of Edith Eliza Bousfield only having taken a life estate and never having been able to execute the power of appointment, in detail, and the deed was acted upon as to said details. The plaintiff, however, and the other parties having been since advised that the testator's children took an absolute interest, the bill was filed to determine that question, it being stated that both said conflicting opinions had been given by counsel of the highest eminence. The bill alleged that the indenture of release having been executed under a common mistake, was not binding in equity, and should be set aside. The widow had administered to the estate of her deceased daughter, and one of the trustees being desirous of retiring, and there being no power in the will to appoint a new trustee, such appointment was also prayed by the bill; and that it might be declared that the children took absolute interests, and to set aside the release.

Speed, for the plaintiff, contended that in the events that had happened the testator's children took absolute interests, and that the interest of Edith Eliza Bousfield, on her death, went to her legal personal representative:

Coombe v. *Hughes,* 2 De G. J. & S. 663;
Meyer v. *Townsend,* 3 Beav. 443;
Whittel v. *Dudin,* 2 Jac. & W. 279;
Co le v. *Scott,* 1 M. & G. 518.

Wickens, for the trustees, insisted that although up to a certain point there was an absolute gift, that had been cut down by the subsequent words. The testator had given his property absolutely to his three children in equal shares, but he explained that as to the daughters' shares nothing was to go to them, but he vested it in the trustees, the interest

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only to be payable to them, and that neither they nor any husband they might contract marriage with should have any control over the principal. If it had stopped there it was obvious that that was a diminution of the previous gift; and all that he subsequently did was to give a power of appointment to be executed exclusively by will. There could be no doubt that that did not operate to enlarge the life interest, it was a mere power. They were, therefore, tenants for life with a testamentary power of appointment. That construction did not conflict with *Whittel* v. *Dudin*, and the other cases cited.

Streeten, for William Bousfield, took no part in the argument.

The VICE-CHANCELLOR (without hearing a reply).—The object of the testator in this case was to give his property equally amongst his children, a son and two daughters, and he makes his will in these terms [the Vice-Chancellor read the will]:—It is evident that he had no intention to die intestate as to any part of his property for he says, "as to the rest and residue of my property," that is, "all my property," "I bequeath it to my three children," naming them, "share and share alike." Nothing can be clearer, and if he had stopped there the children would have taken the whole property absolutely; and the son at all events without any question does so take it. But then comes the wish as to the daughters' shares. [The Vice-Chancellor read the clause.] The obvious object was to retain the daughters' share to their separate use, with a testamentary power of appointment to them. But, he does not say, if such power is not exercised that it shall go over in default; there is no provision for that event, and therefore the effect is to leave the original gift, which is without any doubt an absolute one, untouched, and it is not a case in which the interest of the daughters is to be diminished, but simply he directs that their shares shall be held for their separate use with a testamentary power of appointment. Therefore the question depending on the original gift, and that, in my opinion, not being cut down by any subsequent provision, the effect is that they took absolutely for their separate use. The case is the same in principle as *Coombe* v. *Hughes* (*sup.*) and *Meyer* v. *Townsend* (*sup.*), and quite as strong as those cases, because there a sum of 5000*l.* was given to the daughter to be invested for her life, and it was argued, therefore, that she took a life estate only for her separate use; and the question was whether it was not a tenancy for life, with power to dispose of the capital by will, but leaving the fund otherwise undisposed of, and it was held that the original gift remained, and was only cut down as between her and the children to a life estate. That was a decision that, subject to the interest given to the children, she took an absolute interest, and as she died unmarried that the personal representative was entitled. In the present case there is not a gift of the capital during her life, but as between her and the estate of the testator the gift is an absolute one. The same principle, therefore, as was recognised in *Meyer* v. *Townsend* applies, and the original gift remains, which was an absolute one. A case directly in point also is *Whittell* v. *Dudin* (*sup.*), which settled the law on the subject, that where there is a gift of a legacy or residue, in terms absolute, and there is a qualification or cutting down as to particular objects, the original gift remains, and the deceased daughter, therefore, in this case took absolutely, and in the events that have happened her interest on her death intestate and unmarried was transmitted to her personal representative.

Solicitors for all parties, *Lindsay*, *Mason*, and *Greenfield*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

Friday, April 16.

Re DAVIS'S TRUSTS.

Practice—Notarial act—Verification of signature.

The signature of a notary to an act done by him in a foreign country must be duly authenticated by a person in England.

This was a petition for the payment of money out of court.

Some of the parties entitled were resident in America.

The affidavit verifying the petition had been written and signed by the deponents and the signatures certified by a notary public in America, headed "United States of America, State of West Virginia, Kanawha County," and it stated that Romeo Freer, a notary public in and for the county and state, thereby certified that the five persons, all of whom were to him well known, had that day personally appeared before him, and each of them had made oath in due form that the affidavits thereinbefore written and subscribed by them respectively were true, and that they were persons to whom faith and credence ought to be given.

This document had the notarial seal affixed, but the signature of the notary had not been verified.

W. W. Lawson called the attention of the Vice-Chancellor to the facts. The question was, whether the affidavit could be admitted, and if it could, whether the signature of the American notary ought not to be verified? Kindersley, V. C., in a case where the sum in question had been only 25*l.*, had dispensed with this formality: (*Mayne* v. *Butter*, 13 W. R. 128.) The present amount was over 400*l.*

The VICE-CHANCELLOR said he thought proof of the notary's signature would be sufficient to satisfy him that the affidavit was made by the deponents therein-named, but that the notary's signature should be verified. The petition stood over to obtain this.

Solicitor, *J. Scott*, for *Harrison* and *Sons*, Kendall.

April 19 *and May* 19.

BADGER v. GREGORY.

Will—Construction—The word "surviving" to be read as "other."

In the construction of a will every word is to have its natural, that is, its ordinary meaning unless there be sufficient reason to the contrary.

Where, therefore, a testatrix devised all her real and personal estate upon trust to sell and convert same, &c., and directed her trustees to stand possessed, the residuary personalty upon trust to invest, &c., and as to one-fourth to pay the income to her daughter F. C. for life, and after her death to "assign, transfer, and make over" same to and amongst her children, to be "assigned, transferred, and paid" at twenty-three, any child attaining twenty-three in the lifetime of F. C. was to acquire a "vested interest." In case of the death of F. C. without leaving "any such child or children," testatrix directed her trustees "to pay, and apply, and dispose of" the income of the fourth to and amongst her (the said testatrix's) "surviving daughters."

As to the remaining three-fourths she made similar dispositions for the benefit of her other three daughters, with particular directions in the event of the deaths of

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all the four daughters without leaving children, for the testatrix's next of kin.

One of the daughters died without having been married.

Another daughter died leaving children, of whom four attained the ages of twenty-three:

Held, that the children of a deceased daughter were entitled to participate in the share of the daughter so dying, and that the word "surviving" in the will must be read as "other."

This cause came on for further consideration on the chief clerk's certificate. It was an administration suit, and the usual decree directing inquiries had been pronounced on the 28th Jan. 1865.

By the certificate it appeared that the testatrix, Elizabeth Heath, widow, made her will, dated the 11th Feb. 1804, and, after directing payment of her debts, &c., she devissd and bequeathed unto her trustees, their heirs, &c., all her real and personal estate upon trust to sell and convert same, and after a disposition of 1000*l.*, part of the residue, she directed that said trustees should stand possessed of the residue and remainder of said moneys and of the investments thereof upon trust, as to one fourth part thereof, to pay the income to or for the benefit of her daughter Frances Cooke, during her life, for her separate use, and after her decease "to assign, transfer, and make over" the same unto and amongst all and every the child and children of the said Frances Cooke, equally to be divided amongst them if more than one, and to be "assigned, transferred, or paid when and as they should attain their respective ages of twenty-three years." She also duly declared that if any such child or children should attain twenty-three in the litetime of Frances, then and thenceforth all and every the right and interest, rights and interests, of such child or children in the said one-fourth, should respectively be, and be considered as, "a vested interest or vested interests," in the same child or children, and should be transmissible as such, notwithstanding the death of such child or children afterwards in the lifetime of Frances. It was also provided that if any such child should die under twenty-three, the share thereby intended for each such child so dying (other than what should have been actually applied and paid for the advancement of any such child) should "go and accrue to the survivor or survivors" and others or other of the same children, and the respective executors, administrators, and assigns of such of them as should be dead, having first acquired a vested interest in their respective original shares, and be equally divided between or amongst such survivors and others of them and the said representatives of those who should be dead (if more than one), share and share alike; and the same should be assignable and payable at such respective ages, days and times as was thereby provided and declared, touching his, her, or their original share or shares. And the trustees were directed after the death of Frances, and until the one-fourth should become assignable and payable, to apply the same for or towards the respective maintenance and education of the same child or children. She also gave the trustees power to advance any part of the "presumptive shares" of any child or children. In case of the death of Francis without leaving "any such child or children as aforesaid," the testatrix directed her trustees "to pay, apply, and dispose of" the income of the fourth "to and amongst" her (the testatrix's) "surviving" daughters in equal shares and proportions during their respective life or lives for their respective separate use, and such last-mentioned "benefit of survivorship" should extend to the "surviving" as well as to the original shares, and the principal moneys of such "surviving" income should, after the respective deceases "of such surviving" daughters "go and belong to and be divisible amongst" the several child or children of such daughter or daughters in such proportions, and at such respective ages, days, and times, and with "such benefit of survivorship," and in such manner and form as were thereinbefore mentioned and set forth in respect of the original share and shares of the child or children of the said Frances Cooke.

As to the remaining three-fourths, the testatrix directed her trustees to stand possessed of the income in trust for her other three daughters, Charlotte, Mary, and Maria, in equal shares and proportions during their respective lives for their respective separate use in the manner thereinbefore mentioned with respect to the interest of the other fourth; and of the principal moneys arising therefrom for their respective children in such and the same manner, and with such restrictions and under such conditions, and with such benefit of survivorship as to the income amongst her said four daughters, and as to the principal amongst their children, "and in such manner and form to all intents and purposes" as she had thereinbefore directed with respect to the other fourth. In case only one of the testatrix's four daughters should die, leaving any child or children who should attain twenty-three, the testatrix directed that after all their deaths, her trustees should "assign, transfer, and dispose of" the whole residue unto and amongst such last-mentioned child or children in equal shares if more than one, and if but one, then to such one child to be vested in him, her, or them, and payment at such and the same ages, days, and times, and with such "benefit of survivorship," and in such manner and form in all respects as was thereinbefore appointed and set forth in respect of the original shares of such child or children. In case of the death of all her four daughters, "without leaving such children as aforesaid," or leaving such they should all happen to die under twenty-three, then testatrix directed her trustees to stand possessed of the whole of the trust moneys and premises in trust for her next of kin.

One of the four daughters, Mary Cooke, died first, viz., on the 5th Feb. 1819 without having been married.

Frances Cooke next died in April 1847, having married and survived her husband, having had children of whom four attained their ages of twenty-three.

Maria died next on 6th Sept. 1855 without having been married.

Upon her death the question arose whether upon the death of the surviving daughter Charlotte, Maria's share should go to Charlotte's children alone as children of the "surviving" daughter, or whether the children of Frances were entitled to participate in the residue.

Charlotte Cooke, the surviving daughter, married one John Wilcox, and survived him, and died on the 7th June 1864, having had eight children, all of whom attained their ages of twenty-three, and five of whom survived her. Up to Charlotte's death the whole income had been paid to the tenants for life, and the survivor, and survivors of them.

The question now to be decided was, which of the children were to participate in the principal of the testatrix's residuary estate, in other words, whether the word "surviving" was to receive its natural construction, or whether the general intention of the testatrix required that it should be construed as "other."

Amphlett, Q.C. and *Millar*, for the plaintiffs, a daughter of Mrs. Wilcox (Charlotte) and her husband.

Wickens, for a son of Frances.

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Speed, for the representatives of one of the children of Frances who attained twenty-three, but died in her life time.

Badcock, for the representative of Mrs. Wilcox (Charlotte).

Druce, Q. C. and *Winterbotham*, for the defendants, the trustees of the will.

The cases cited and relied on were
Smith v. *Osborn*, 6 H. of L. Cas. 375;
Re Keep's Will, 32 Beav. 453;
Hodge v. *Foot*, 34 Beav. 349;
Re Sharp's Estate, 1 De G. & Sm., 343;
Hurry v. *Morgan*, L. Rep. 3 Eq. 152;
Browne v. *Rainsford*, Ir. Rep. 1 Eq. 384;
Hawkins on Wills, p. 202.

Amphlett in reply referred to
Re Corbett's Trusts, John. 592.

May 19.—The VICE-CHANCELLOR took time to consider his judgment and now said: The point which was reserved is the often mooted one as to whether the word 'survivors' is to receive its natural meaning, or whether it is to be construed as 'others.' In the case of *Browne* v. *Rainsford* (*ubi sup.*), the Irish Master of the Rolls is reported to say, "the authorities are very numerous and it is perhaps extremely difficult to reconcile them. In reading some of the cases one would almost suppose that the word 'survivor' loses its proper import when used in a will and becomes synonymous with 'other,' but the modern authorities distinctly define its natural meaning to be 'longest liver,' and generally profess emphatically to approve of the rule that the word shall have that natural and proper meaning unless the will contains some strong indication that the testator intended to use it in a different sense." I am not quite sure that he has not in that sentence unduly depreciated the earlier authorities, but I think he has accurately stated the true canon of construction, which after all simply comes to this—that every word is to have its natural, that is to say, its ordinary meaning, unless there be sufficient reason to the contrary. But in considering what is sufficient reason, it is not immaterial that some particular word is very ordinarily used inaccurately, and that such inaccuracy is common, or not uncommon, in testamentary or other legal instruments. The word "premises" affords an illustration of this. Every one knows the legal meaning of that word, but all would come to the consideration of any document in which that word occurs with a perfect certainty that such legal meaning is not the meaning which it has in the vernacular of lessors, lessees, and house agents. The number of cases before the courts in which they have felt themselves bound or at liberty to construe "survivor" as "other," shows that there is some vernacular not in uncommon use with testators in which the word is used in that artificial sense, or that there is a great liability in testators to fall into the same mistake in using the one word instead of the other. In many of the cases it is utterly impossible to arrive at any other conclusion than that "survivor" meant "other." When for instance Blackacre is given to A. for life, with remainder to his children, and in case either should die without children, then his acre to go to the survivor and his children, the presumption is almost conclusive that the word "survivor" is put in contradistinction to "the one so dying," and means the one that does not die childless. If, in addition to this, the will goes on and says, "and if both shall die without children then the whole shall go to C.," the conclusion that "survivor" means "other" becomes irresistible. If, instead of this simple case, the case be put of a testator giving his property to a class of children, with remainder to their descendants, and if any of them should die without descendants then to the survivors and their descendants, the presumption that the word "survivors" is used to mean "others" is stronger, for it is scarcely possible to attribute to an ancestor the intention that the position of his descendants in the second degree is to depend on the accident of whether their parent dies first or second; and if to this is added a gift over in the event only of all dying without descendants, the conclusion becomes irresistible that what the testator meant was, that so long as there were descendants of any to take, the whole property should go to such descendants, and the only mode by which effect can be given to such intention is by holding that the property was to go between the children and their descendants, with cross remainders between them, wholly irrespective of the particular period of their deaths, by reading for the word "survivors" the word "others," and by considering that the parent has survived in his descendants who have lived to acquire a vested interest. There being, then, this principle of construction on which in numerous cases, modern as well as ancient, the word "survivor" has been read "others," is the particular context in this will favourable or adverse to this mode of construction? In the first place, it is to be observed that the gift over is to the next of kin of the testatrix. In the event of all dying without issue, and only in that event, she says her next of kin were to take. It is quite clear that she must have intended her previous dispositions to provide, and thought that they had provided for every event except the event of all dying without issue, and never could have intended the residue to go to her next of kin if the survivor only died without issue. Again it is to be noted in this will that the word "surviving" is not synonymous with "survivor" or longest liver. It is not on the death of a daughter that the gift over is to take effect, but on the failure of the "issue" of such daughter whether at or after her death, and if the word "surviving" is to be read in its original meaning, it must mean, in this will, persons "living at the time of the failure of such issue to take," so that if the first daughter had died leaving infant children, and then the other had died leaving children, and then all the infant children had died, there would have been an intestacy as to that share, and the children of the survivor would have been deprived of their chance of succession from the accident of their parents having died in the lifetime of their cousins. This is a very improbable, not to say almost impossible, intention to attribute to the testatrix. Now let us read "other" instead of "surviving" and see whether that would land us in any difficulties which should deter us from applying the mode of construction which I have seen my way to extract from the cases. [The Vice-Chancellor here read and commented upon the particular terms of the will from this point of construction.] On the whole, therefore, I am satisfied that there is nothing in the context of this will sufficient to distinguish this case from the many reported cases in which, in favour of the general intent the word "survivors" has been construed as "others." The Vice-Chancellor then again referred to the case in Ireland of *Browne* v. *Rainsford*, of which he approved, considering that although in that case the word "survivors" was to have its ordinary signification, the argument of the Master of the Rolls governed this case.

Minutes to be prepared in pursuance of the above decision.

Solicitors: *Lambert, Hampton*, and *Co.*; *W.* and *H. P. Sharp*; *Vizard, Anstie* and *Co.*; *Norcutt*; *Taylor, Hoare*, and *Co.*

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Common Law Courts.

COURT OF COMMON PLEAS.

Reported by W. GRAHAM and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Tuesday, Nov. 24, 1868.

CUTHBERTSON (app.) *v.* BUTTERWORTH (resp.)

Parliament—Borough vote—Chambers—"House" or "other building"—2 Will. 4, *c.* 45, *s.* 27.

The landlord of the respondent rented a set of chambers in the Temple. Each room was separated from the other and opened into a vestibule which communicated with a landing on a public staircase. The respondent, a barrister, had the exclusive occupation of one of these rooms over the door of which, opening into the vestibule, he had exclusive control:

Held, that this room was not a "house" or "other building" within the meaning of the 2 *Will.* 4, *c.* 45, *s.* 27, *and therefore that the respondent was not entitled to a vote.*

This was a consolidated appeal from a decision of the revising barrister for the city of London.

CASE.

At the court held for the revision of the list of voters for the Inner and Middle Temple in the City of London before me the barrister duly appointed to revise the list of voters for the city of London, in which the said Inner and Middle Temple are comprised, William Cuthbertson on the list of voters for the parish of Saint Peter-upon-Cornhill, and upon the register of voters for the parish of Saint Benedict, otherwise Saint Bennett Fink, both in the said city, duly objected to the names comprised in the schedule hereunder written of the persons who are entitled to vote in the election of members for the city of London, in respect of the occupation of chambers in the said Inner and Middle Temple, when I decided that each of the said voters was entitled to have his name inserted or retained in such list. And the said William Cuthbertson having given due notice of his intention to appeal from such my decisions, and it appearing to me that the validity of the objections of the said voters being so inserted or retained as aforesaid, depended on the state of facts and the same point of law, I did declare that the appeals against such decisions ought to be consolidated, and William Henry Butterworth, of No. 5, Paper-buildings, being one of the persons interested and consenting for or on behalf of himself and all other persons in like manner interested in such appeals, to be the respondent, and to answer the said appeal, I named the said William Henry Butterworth to be respondent in such consolidated appeal.

The landlord of the respondent rented a set of chambers in the Inner Temple.

This set of chambers formed a part of one of the floors of the building in the Temple, which part is so structurally severed from the rest of the building as to be of itself a house.

This set of chambers consists of two rooms and a vestibule; each room is severed from the other, there being no divers communication between the two; each communicated by its own door with the vestibule which communicated with the landing on a public staircase by a door.

The subject of the respondent's occupation was one of these rooms.

The respondent had occupied for the statutory period exclusively, and as sole tenant, this room over the door of which, communicating into the vestibule, he had exclusive control.

Under or by virtue of his tenancy, he had a right of way over the vestibule, and, in common with his landlord, who occupied the other room, perfect control over the door communicating with the landing, so as at all times to command free ingress and egress to and from the room which he occupied, as aforesaid, from and to the said landing.

The respondent was a barrister at law.

The respondent occupied the said room for the sole purpose of transacting the business which came to him in his pursuit of the profession of a barrister, and not for a dwelling-house.

It was objected that, having regard to the above facts, the subject of occupation of the respondent was not sufficient to be qualifying tenant within any of the qualifications enumerated in the 27th section of the Act Will. 4, c. 45.

I held, regarding the above facts, that the respondent occupied as tenant a sufficient tenement to entitle himself to be duly registered to vote in the election of members for the city of London within the meaning of the 27th section of the said Act.

The question upon which the judgment of Her Majesty's Court of Common Pleas is requested is, whether or not I the said barrister did or did not rightly decide that the said voters were entitled to have their names inserted in the register of voters for the said city of London.

Prentice, Q. C., for the appellant, contended that the room in question was not a "separate dwelling-house," or a "house" or "building" within the meaning of the 2 Will. 4, c. 45, s. 27.

The Court called on

Underdown for the respondent.—The respondent is entitled to vote under sect. 27 of the 2 Will. 4, c. 45, as the occupier of a building *ejusdem generis* with "shop," "counting-house," &c., within the meaning of the words "other building" in that section. There are a number of cases to show what may be a "house" within the meaning of the statute. *Wright* v. *The Town Clerk of Stockport*, 5 M. & G. 33; 1 Lutw. 32, shows that a room may be a "building" within sect. 27.

Toms v. *Luckett*, 5 C. B. 23;
Downing v. *Luckett*, 5 C. B. 40;
Henrette v. *Booth*, 15 C. B., N. S. 500;
Brian Kearney's Case, Alcock's Reg. Cas. 22.

[BOVILL, C. J.—If you are right in this case it would not be necessary to have a lodger franchise.] The distinction in the case of a lodger is that the landlord has the control of the outer door. *Wilson* v. *Roberts*, 11 C. B., N. S., 50, was only a question of structural severance. The real question is if there is structural severance and full control of the outer door. *Cook* v. *Humber*, 11 C. B., N. S., 33, is not in point.

Prentice, Q. C. in reply was not called upon.

BOVILL, C. J.—I am of opinion that our judgment should be for the appellant. No case cited goes near the length of establishing that this room is a "house" or other building within the meaning of the Act. The cases have decided that where a set of chambers is structurally separated and used as a separate building, it may be considered as a house, but the very description of this room shows that it is part of a set of chambers and essentially part of a house as distinguished from a house. I am, therefore, of opinion that the decision of the revising barrister must be reversed.

BYLES and KEATING, JJ. concurred.

BRETT, J.—I am clearly of opinion that this is not a house nor such a building as is meant by the 2 Will. 4, c. 45, s. 27, though I am not prepared to say what would come within the meaning of the word "house" in the Act.

Judgment for the appellant.

Attorney for the appellant, *J. R. Bailey*; for the respondent, *Travers, Smith*, and *De Gex*.

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Jan. 12 and 13, and May 4.

BRIDGES v. GARRETT.

Copyhold fine—Payment to deputy steward—Principal and agent—Payment by crossed cheque.

The defendant having purchased a copyhold tenement, the steward of the manor wrote to C., the defendant's attorney, inclosing draft admittance, and informing him that he might admit the defendant as deputy steward. C. accordingly admitted the defendant, the admittance being in the usual form, and stating that the defendant paid his fine. The defendant did not, in fact, pay the fine, and C., by letter, informed the steward that he would pay it in a few days. The steward replied that he ought to have paid it at the time, and he hoped he should receive a cheque in a few days. The defendant afterwards gave C. a cheque for an amount including the fine, fees, and C.'s charges, and at the request of C. crossed the cheque, with the name of C.'s bankers. C. paid the cheque into his bankers, and it was duly honoured; but C.'s account being overdrawn, his bankers refused to pay him the money, and C. not having paid over the fine, the lord sued the defendant:

Held, per Bovill, C.J., and M. Smith, J. (Byles, J., dissentiente), that assuming that C. had authority to receive the fine, he had no authority to receive it otherwise than in cash, or what was equivalent to cash, and that a cheque crossed with the name of C.'s bankers, and including money due to C., was not a good payment as against the lord.

Held, per Byles, J., that such payment was a good payment as between the lord and the defendant.

Declaration: Common count for copyhold fines.

Plea: Never indebted, and payment and issue thereon.

At the trial before Byles, J., at the Spring Assizes at Chelmsford in 1868, it appeared that the plaintiff was lord of the manor of Cressing Temple, and that in Jan. 1867 the defendant purchased Vellums farm, a copyhold tenement parcel of the manor. The first intimation the plaintiff received of this purchase was through a Mr. Portway, an auctioneer, who wrote the following letter to Mr. Mills, the steward of the manor:—

Manor of Cressing.

R. Mills, Esq. 20th March 1869.

Sir.—Mr. Garratt, the purchaser of Vellums farm, late the property of J. Gosling's executors, wishes to take down the timber. What form of notice do you require? I called upon Mr. Gibson, and he has referred me to you.—Yours, &c. A PORTWAY.

To this letter Mr. Mills replied that Mr. Garrett must be admitted before he could give him a licence to take down the timber, and added, "I will send you draft admission of Mr. Garrett in a day or two." On the 25th March 1867, Mills wrote to Portway as follows:—

Dear Sir,—Inclosed we send you draft admission of Mr. Garrett, and we shall feel obliged by your forwarding the same to Mr. Garrett, or his solicitor for their approval. We do not know either of their addresses.—Yours truly,

A. Portway, Esq., Auctioneer. WARD and MILLS.

On the 3rd May following, Messrs. Ward and Mills received the following letter from a Mr. Craig, a solicitor, and then a person in good credit.

The Manor of Cressing Temple,
3rd May, 1869.

Gosling's devisees to Garrett,

Dear Sirs,—I send you absolute surrender from the devisees of John Gosling to Mr. Balls Garrett for enrolment. I also return you draft admission approved.—Yours, &c.

Messrs. Ward and Mills, Solicitors. E. G. CRAIG.

In reply to this, Mills wrote on the 4th May:

Manor of Cressing Temple.

Garrett.

Dear Sir,—I beg to acknowledge receipt of this surrender and draft admission approved by you, and return your copy surrender. You can take the admission as deputy steward at once if you please.—I am, &c.,

RICHARD MILLS, Steward.

E. G. Craig, Esq., Solicitor.

In this letter Mills returned to Craig the admission, of which the following is a copy:

The Manor of Cressing Temple.
June 4, 1867.

Garrett.

Balls admitted on the absolute surrender of Emily Buck and others devisees of John Gosling, deceased.

Be it remembered that on or before the day and year first above written, an absolute surrender was out of court delivered to Richard Mills, gentleman, steward of the said manor.

It then set out the surrender, and proceeded as follows:

Now comes the said Balls Garrett before Edward George Craig, deputy steward of the said manor for this turn only out of court, and prays that he may be admitted the lord's tenant of the said hereditaments, so surrendered to his use as aforesaid, and he was by the hands of the said deputy steward admitted tenant, and seisin delivered to him by the rod thereof, to have and to hold the said hereditaments with the appurtenances unto the said Balls Garrett, his heirs and assigns for ever, pursuant to the said surrender to the lord of the said manor by the rod, at the will of the lord according to the custom of the said manor by the rents, customs, and services therefore due and of right accustomed, *and he gave to the lord for a fine as appears in the margin, and his fealty was respited.* BALLS GARRETT.

Fine 78l. 15s. 0d.
Fees 4l. 11s. 8d.

The words in italics were erased by Mills after the dispute arose which formed the subject of this action

Craig retained the admission and on June 7 wrote as follows to Mills:—

Dear Sir,—I met Mr. Garrett on Tuesday last and admitted him as your deputy. He did not pay the fine, but said he would do so in a few days, and in the meantime requested me to inquire of you on what terms he could enfranchise the property which he is desirous to do.—Yours truly, E. G. CRAIG.

Messrs. Ward and Mills.

On the following day Mills replied as follows:—

Dear Sir,—I am in receipt of your letter of the 7th inst., informing me that you had admitted Mr. Garrett as my deputy, but he ought to have paid the fine and fees at the time. However, I hope he will remit the same at his earliest convenience. As to the enfranchisement it must be compulsory, as my client is only a tenant for life, and has no wish to enfranchise at all.—Yours truly,

E. Craig, Esq. RICHARD MILLS.

Receiving no reply to this, Mills wrote on July 10:

Dear Sir,—I have been expecting to receive the draft, admission, and cheque for fine and fees. The admission cannot be considered complete, nor will it be entered on the court rolls until the fine and fees are paid.—Yours truly,

E. G. Craig, Esq. RICHARD MILLS.

On the 16th July Craig wrote to the defendant as follows:—

My dear Sir,—You need not trouble yourself to attend on Thursday. A circular was sent to you because, owing to the peculiar position I am placed in just now, I have not been able to pay over 83l. 6s. 8d. to the steward of the manor; so that amount stands in the ledger as due to you. Of course, I shall not allow you to be the loser, as the money was with me for a special purpose; but my banking account did not allow of its being paid over. I shall arrange the matter as soon as I can, and you may depend upon me to do so. You wanted to know how this amount was made up: Fine, 78l. 15s.; steward's fees, 4l. 11s. 8d.; costs, E. G. C., 4l. 4s.; total, 87l. 10s. 8d.—Yours truly,

E. G. CRAIG.

Mills received no reply to this letter of the 10th July until the 19th, when the defendant called upon him, and handed him the following letter from Craig:

18th July, 1867.

Dear Sir,—Mr. Garrett has paid me the fine and your fees, but I must ask your indulgence for a little while, owing to being in difficulties in money matters. I shall take an early opportunity of communicating with you again. The money was paid to me on the 17th June last.—Yours truly,

R. Mills, Esq. E. G. CRAIG.

On the same day Mills wrote to Craig as follows

July 19th, 1867.

Dear Sir,—I have to acknowledge the receipt of your letter of yesterday, handed to me to-day by Mr. Balls

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Garrett. In my letter to you of the 8th June last, when I found that Mr. Garrett had not paid the fine and fees on his admission, I expressed a hope that he would remit the amount as soon as he conveniently could, but I cannot recognise his subsequent payment to you at all, or acquiesce in any delay. Mr. Garrett must pay his fine and fees to me, and must recover from you the money he appears to have paid to you for the purpose.—Yours truly,

E. G. Craig, Esq. RICHARD MILLS.

After some further correspondence the fine was duly assessed and a demand of payment made, and this action was commenced. It was proved that Mr. Craig had acted as the defendant's solicitor in the purchase of the property; but, though he had acted for Mr. Garrett in other matters, he was not his regular solicitor. Mills had no other communication with Craig, prior to the admission, than by the letters above set out, and he had no previous knowledge of the defendant or Mr. Craig, except that the latter was a solicitor. The money was paid by the defendant to Mr. Craig, by a cheque for 87*l.* 10*s.* 8*d.*, which was made up of the following sums, viz., fine 78*l.* 15*s.*, fees 4*l.* 11*s.* 8*d.*, and Mr. Craig's charges 4*l.* 4*s.*; and the cheque was crossed by the defendant, at the request of Craig, London and County Bank, branch bank thereof at Braintree, who were Craig's bankers; and Craig paid it into his own account at that bank.

On these facts, Byles, J. reserved leave to either party to move, and left to the jury the question, whether the fine paid to Mr. Craig was paid to a person authorised to receive it, and in a manner consistent with that authority; and the jury found a verdict for the defendant.

Garth, Q.C., in Easter term, obtained a rule calling on the defendant to show cause why a verdict should not be entered for the plaintiff for 78*l.* 15*s.*, pursuant to leave reserved, on the ground that there was no evidence to go to the jury in support of the plea of payment.

Denman, Q. C. and *Cohen* now showed cause.—The question is if there was any evidence to go to the jury on the plea of payment. A payment to a deputy to take an admittance out of court, under the circumstances of this case, is a good payment to the lord; and the letters show that Mills expected and intended that the fine should be paid to Craig. *Williams* v. *Evans*, 35 L. J. 111, Q. B., shows that Craig had authority to receive the money, as the cheque was paid at maturity. A deputy can do all that the steward can. Watkins on Copyhold, 29 and 67, citing *Parker* v. *Kett*, 1 Ld. Raym. 659. The fine is payable on admittance, and the tenant is liable as soon as he is admitted, and if the defendant had failed the plaintiff might have maintained an action for money had and received against Craig. It was a question for the jury whether payment by cheque was good: (*Catterall* v. *Hindle*, L Rep. 2 C. P. 368.) Payment to a broker is payment to the principal, and the receipt in the draft admission, "And he gave to the lord for a fine" led the defendant to suppose that Craig had authority to receive the money. The plaintiff was not called at the trial, and the question was not put to the jury whether he authorised Mills to appoint a deputy. The lord has ratified the admission in the form in which the defendant saw it by bringing this action, and if Mills was not authorised to appoint a deputy, the plaintiff's remedy is against him. The deputy steward is a general agent, and therefore has authority to receive a fine, which is naturally incident to the admission:

Norton v. *Simmes*, Hob. 12;
Story on Agency, s. 14;
Coomb's case, 9 Co. Rep. 76a.

It was a question for the jury whether Craig had authority to receive payment by cheque.

Thorold v. *Smiths*, 11 Mod. 72;
Williams v *Evans*, L. Rep. 1, Q. B. 352;
Fish v. *Kempton*, 7 C. B. 687.

Garth, Q. C. and *Digby*, in support of the rule.—Taking a surrender is purely a ministerial act, but the receipt of the fine is a trust, and therefore the steward had no power to delegate his authority.

Parker v. *Kett*, 1 Lord Raym. 658;
Earl of Shrewsbury's case, 9 Co. Rep. 49 B.;
Shep. Touch. 239;
Vin. Abr. Steward of Courts (K.);
Gilbert's Tenures, 5 Ed. 366;
Watkins on Copyholds, 97;
Fisher on Copyholds, 370;
Seldon's Fleta, Lib. 2, c. 72, s. 11:

(This point was argued at great length, but, as the court gave no opinion upon the point, the argument is not set out *in extenso.*) Assuming that Craig had authority to receive the fine, the mode of payment was unauthorised: (*Williams* v. *Evans*, 35 L. J. 111, Q. B.) Here the right of the lord was tied up while the cheque was passing through Craig's bankers' hands; and it was necessary that Craig should do something before paying the lord, to separate his own charges from the fine and the steward's fees. The crossing is part of the instrument, and restricts the payment to a particular banker.

21 & 22 Vict. c. 79, ss. 1 and 2;
Barker v. *Greenwood*, 2 Y. & C. Ex. 419;
Smith's Merc. Law, 7th edit., 147;
Bartlett v. *Pentland*, 10 B. & C. 771.

The lord could not have maintained an action for money had and received against Craig, because Craig did nothing to appropriate this money to the lord, or showed that he held it on his account; on the contrary, he wrote to the defendant stating that he held it for him:

Baron v. *Husband*, 4 B. & Ad. 613.

Cur. adv. vult.

May 4.—BOVILL, C. J. now delivered the judgment of himself and M. Smith, J.—This case was argued before my brothers Byles and M. Smith, JJ. and myself in Hilary Term last. We have unfortunately not been able to agree in our judgment. The following is the judgment of my brother M. Smith and myself. This was an action brought by the plaintiff as lord of the manor of Cressing Temple, in Essex, against the defendant, the purchaser of a copyhold tenement of the manor to which he had been admitted, to recover the fine due on such admittance. The fine was 78*l.* 15*s.* Mr. Craig, a solicitor at Braintree in Essex, and then a person of good credit, acted as solicitor for the defendant. The steward of the manor, Mills, sent a draft admittance to the auctioneer employed by the seller of the property, who handed it to Craig, as the defendant's solicitor; which draft Craig, on the 2nd May 1867, returned to the steward approved. On the 4th May the steward, Mills, wrote to Craig, acknowledging the receipt of the surrender and draft admittance, and added these words, "You can take the admission as deputy steward at once, if you please." On the 25th May Craig wrote to the defendant: "I have received the authority of the steward to take your admittance as his deputy;" and he appointed a day and place in London for that purpose. Accordingly, on the 4th June, the defendant, the surrenderee, and Craig met in London, and Craig admitted him as deputy steward. The important part of the admittance is as follows: "Now comes the said Balls Garrett, before Edward George Craig, deputy steward of the said manor for this turn only, out of court, and prays that he may be so admitted, and he was by the hands of the said deputy steward admitted tenant and seisin delivered to him by the rod to hold, &c.; and he gave to the lord for a fine as appears in the margin and his fealty was respited."

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In the margin was written "Fine, 78*l.* 15*s.*;" and lower down "Fees 4*l.* 11*s.* 8*d.*" On the 7th June, Craig wrote to the steward, Mills, "I met Mr. Garrett on Tuesday last, and admitted him as your deputy. He did not pay the fine, but said he would do so in a few days." On the 8th June the steward wrote, in answer, "I am in receipt of your letter of the 7th, informing me that you had admitted Mr. Garrett as my deputy; but he ought to have paid the fine and fees at the time. However, I hope that he will remit the same at his earliest convenience." On the 17th June Garrett, the defendant, gave Craig a cheque on his London bankers for the sum of 87*l.* 10*s.* 8*d.*, which sum was composed of the fine, 78*l.* 15*s.*; steward's fees, 4*l.* 11*s.* 8*d.*; and Craig's charges to Garrett 4*l.* 4*s.* Craig informed Garrett how the amount was made up, and requested that the cheque might be crossed with the name of his London bankers, and the defendant accordingly crossed the cheque with the names of Craig's London bankers, and Craig paid it in to the credit of his account. The cheque was duly paid on presentment by the defendant's bankers to Craig's bankers, but Craig's balance being against him, Craig's bankers refused to pay him the money. The objection at the trial was that this payment to Craig did not discharge the defendant, and that Garrett's crossed cheque given to Craig for the sum of 87*l.* 10*s.* 8*d.* was not a good payment of the fine of 78*l.* 15*s.*, as against the lord of the manor; and further that the cheque was received by Craig as solicitor for the defendant and not on behalf of the lord. At the trial the jury found that Craig had authority to receive the fine for the lord, and that the crossed cheque was a good payment to the lord within the authority to pay Craig, and the verdict passed for the defendant. The plaintiff had leave to move to enter the verdict for him for the amount of the fine, and the court were to be at liberty to draw inferences of fact. We are of opinion that there was abundant evidence in the case that the steward might appoint a deputy steward *to take the admittance*, and that he might appoint Craig as such deputy for that purpose. The admittance purports to be, and was in fact taken by Craig in that capacity; and the plaintiff, as lord of the manor, who could have no claim to the fine until after admittance, by now suing for the fine must be taken to have recognised and adopted the admittance so taken by Craig. It was argued for the defendant that from the nature and terms of the form of admittance it was intended that Craig should receive the fine and fees at or immediately after the time of admittance, and that the letter of Mills showed that it was understood, as between him and Craig, that the latter might receive those amounts at a subsequent period. It was contended for the plaintiff that Mills, as the steward, had no power to appoint a deputy to receive the fine for the lord; but in the view which we take of the case it is not necessary to determine these points, because, assuming that he had such power, and that he did authorise Craig to receive the money, such authority, in our opinion, would be only an authority to receive payment in cash, or what was equivalent to cash, and which might be handed over by Mills as it was received to the lord. The general rule of law is, that where a creditor's agent is bound to pay the whole amount over to the principal, he must receive it in cash from the debtor; and that a person who pays such agent and wishes to be safe, must see that the mode of payment does enable the agent to perform this duty. The law was so laid down by Alderson, B. in *Barker* v. *Greenwood*, 2 Y. & C. Ex. 414, 419, and is in accordance with *Russal* v. *Bangley*, 4 B. & A. 395, and has been recognised in many other cases. The reasons for the rule are also well stated by my brother Byles in *Sweeting* v. *Pearce*, 7 C. B., N. S., 485, where he says, "It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to the principal. But if he is allowed to receive it by a settlement of accounts between himself and the debtor, he might not be able to pay it over. At all events it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent, as a general rule, cannot receive payment in anything else but cash. Unless, therefore, there is some usage to control it, payment to the agent must be made in money." The general principle, and also the decision in the last case, were affirmed by the Court of Exchequer Chamber in *Sweeting* v. *Pearce*, 9 C. B., N. S., 534. The payment which was relied upon by the defendant in this case was not a payment in cash, it was not even by an ordinary cheque payable to bearer; but it was by a cheque which, by being crossed, was payable to the bankers of Craig, and the state of his accounts with his bankers was such that he never did and never could receive the amount so as to be able to hand it over to the lord or Mills. The cheque also included money payable to Craig himself for fees as the defendant's solicitor, and it never was intended to be, nor could properly have been, handed over by Craig to Mills or the lord. In fact Craig never received the money, nor was he ever in possession of a cheque or cash that he could hand over to the lord or to Mills, the steward. At the time the cheque was given to Craig he was in fact solicitor for Garrett, he treated the cheque as received on Garrett's account; and his letter of the 16th July clearly shows that he considered himself as debtor to the defendant for the amount. It was not until the 18th July that he informed Mills that he had received the money, and endeavoured to shift the loss from his client, the defendant, to Mills or the lord. The proper conclusion to be drawn from all the facts we think is that Craig received the cheque as Garrett's solicitor and not as agent for Mills or the lord, and that he was the agent of Garrett to hand over a portion of the amount when received to Mills; and until the cheque was paid, or indeed at any time whilst the money remained in the hands of Craig, we think it would have been competent for Garrett to have countermanded the authority to hand over the amount to Mills. We are also of opinion that there was no evidence which could properly be left to the jury of any authority from the lord to Craig to receive payment by cheque crossed with the name of Craig's bankers, and which included money due to Craig himself. We think, therefore, that the rule to enter the verdict for the plaintiff for the amount of the lord's fine, 78*l.* 15*s.* should be made absolute.

BYLES, J.—I state my views with great diffidence and distrust, because I have the misfortune to differ from my Lord and my brother Montague Smith. This was an action brought by the plaintiff as lord of the manor of Cressing Temple, in Essex, against the defendant, a copyhold tenant of the manor, for the fine due on the tenant's admittance to a copyhold. The fine was 78*l.* 15*s.*, and the steward's fees 4*l.* 11*s.* 8*d.* Craig, a solicitor at Braintree, in Essex, had been acting as solicitor for the defendant. The steward of the manor, a gentleman of the name of Mills, sent to Craig a draft admittance, which draft, Craig, on the 3rd May 1867, returned to the steward approved. On the 4th May, the steward, Mills, writes to Craig, acknowledging the receipt of the surrender and draft admittance, and

adds these words: "You can take the admission as deputy steward at once if you please." On the 25th May Craig writes to the defendant, and says: "I have received the authority of the steward to take your admittance as his deputy;" and he appoints a day and place in London for that purpose. Accordingly, on the 4th June Garrett, the surrenderee, and Craig, meet in London, and Craig, as deputy, admits Garrett. The important part of the admittance is as follows: "Now comes the said Balls Garrett before Edward George Craig, deputy steward of the said manor for this turn only, out of court, and prays that he may be so admitted; and he was by the said deputy steward admitted tenant and seisin delivered to him by the rod thereof to hold, &c., and he gave to the lord a fine as appears in the margin, and his fealty was respited." In the margin was written "Fine, 78*l.* 15*s.*;" and lower down, "Fees, 4*l.* 11*s.*" On the 7th June Craig writes to the steward Mills and says, "I met Mr. Garrett on Tuesday last, and admitted him as deputy steward; he did not pay the fine, but said he would do so in a few days." On the 8th June the steward Mills writes in answer, "I am in receipt of your letter of the 7th inst., informing me that you had admitted Mr. Garrett as my deputy, but he ought to have paid the fine and fees at the time. However, I hope he will remit the same at his earliest convenience." On the 13th June Garrett gave Craig a cheque on his London bankers for the sum of 87*l.* 10*s.* 8*d.*, which sum was composed of the fine, 78*l.* 15*s.*, steward's fees, 4*l.* 11*s.* 8*d.*, and Craig's charges to Garrett, 4*l.* 4*s.* Craig informed Garrett how the amount of 87*l.* 10*s.* 8*d.* was made up, and Craig himself requested that the cheque might be crossed with the name of his (Craig's) London bankers, which was done accordingly. The check was duly paid on presentment by the defendant's bankers to Craig's bankers; but Craig's balance being against him, Craig's bankers refused to pay Craig the money. On the 10th July Mills, the steward, writes to Craig, "I have been expecting to receive the draft admittance and cheque for fine and fees. The admission cannot be considered complete, nor will it be entered on the court rolls, till the fine and fees are paid." On the 18th July Craig writes to Mills, the steward, in these words: "Mr. Garrett has paid me the fine and your fees; but I must ask your indulgence for a little while, owing to my being in difficulties." Mills replies, on the 19th July, "In my letter to you of the 8th June last, when I found that Mr. Garrett had not paid the fine and fees on his admission, I expressed a hope that he would remit the amount as soon as he conveniently could; but I cannot recognise his subsequent payment to you at all, or acquiesce in any delay. Mr. Garrett must pay his fine and fees to me, and must recover from you the amount he appears to have paid to you for the purpose." The objection at the trial was, that payment to Craig did not discharge the defendant, and that Garrett's crossed check given to Craig for the sum of 87*l.* 10*s.* 8*d.* was not a good payment of the fine, as against the lord of the manor. It was contended on the part of the plaintiff that Craig, filling the double capacity of deputy steward and defendant's solicitor, the cheque was paid to him and received by him in his character of defendant's solicitor. The defendant on the other hand contended that the cheque was paid to Craig in his character of deputy steward. The question in the case was whether the payment by the surrenderee to Craig, the deputy steward, was under these circumstances a good payment of the fine to the lord. The jury found that Craig had authority to receive the fine for the lord, and that the crossed cheque was a good payment to the lord within the authority to pay Craig. But it is contended that the jury ought to have been directed to find for the plaintiff. That point was reserved. In deciding this question we are to bear in mind that Craig, at the time when he was appointed deputy steward, was an attorney of undoubted credit; and it may be that the steward would have preferred him as a debtor even to the surrenderee himself; and that the cheque given by the defendant to the deputy steward was a *good* cheque, and was duly paid by the defendant's bankers on presentment. The steward of the manor may appoint a deputy to act as steward in his place, and the deputy may do all that the steward himself could have done: (*Parker* v. *Kett*, 1 Ld. Raym. 658; 1 Scriv. Cop. 119.) Here it is plain from the terms of the draft admittance which contains in the body of it a receipt for the lord's fine, and from Mills' letter of the 8th June that the deputy had authority to receive the fine and fees. But the fine is not due until after admittance, and is recoverable by action afterwards as this action shows; and although the admittance contains a receipt for the fine the lord does not in practice, and will not, enrol that admittance until the fine is paid. It appears to me that Craig acted in two capacities, as deputy steward in receiving the 78*l.* 15*s.* for the lord's fine, and 4*l.* 11*s.* 8*d.* for the steward's fees, and as solicitor for the defendant in receiving 4*l.* 4*s.*, being his own charges as defendant's attorney. The defendant must have known that the 78*l.* 15*s.* was paid to the lord, and 4*l.* 11*s.* 8*d.* to the steward, for it will be observed that the draft admittance itself expressly informed the defendant that those two sums were paid to Craig, and received by Craig as deputy steward. Suppose the steward himself had in this case acted instead of employing a deputy, and had been (as often happens) himself solicitor to the copyholder, as well as steward of the manor, and had himself received from the copyholder a good cheque, duly paid by the copyholder's bankers for a sum including the lord's fine, the steward's fees, and his own charges; and suppose the money stopped in the hands of the steward's bankers, or the steward otherwise unable to pay the lord, would not that have been a good payment as between the lord and the surrenderee, although the steward sustained the double character of surrenderee's attorney and of steward when he received the money? I think it would have been a good payment; but it would of course have been no payment as between the lord and the steward. The lord would have had his remedy against the steward as in the case now before us he has his remedy both against the steward and the deputy steward. At lowest from the moment Craig received the money he held it as deputy steward; his only remaining duty being to pay it over to the steward. It was objected that the payment was by cheque. The answer is, that it was not a dishonoured cheque, but a good cheque duly paid on presentment. Moreover it is plain the steward did not object to a cheque, for he afterwards writes to Craig (on the 10th July) desiring to receive a cheque. But whose cheque, or from whom, does not clearly appear. I do not perceive any obligation on the deputy steward to remit to the lord or the steward the identical cheque that he received. Suppose the steward himself had acted in person and had received a cheque, would it be his duty to remit it to the lord? Surely not; for even that cheque would be for two items, the lord's fine and the steward's fees. Here the cheque was for three items, the lord's fine and the steward's fees, and the defendant's attorney's charges. Then it is objected that the check was crossed; but this was done at the request of the deputy steward, and for his own convenience and safety. It matters not, as it seems to me, that the crossing was by the hand of the surren-

deree. The payee or subsequent holder of a cheque may cross it at any time either with the words "and Co.," or with his own banker's name, and the drawer cannot prevent him. Suppose it had not been crossed, but had been paid by Craig into his own bankers in the ordinary course of business after the transaction with the surrenderee had been finished, the result would have been precisely the same. It is as if the deputy steward, after receiving the cheque, had sent it to be cashed by a clerk or servant of his own, who received the money and appropriated the payment to a debt of his own due to him from his master. Craig's banker, for this purpose, is his servant. Or suppose Craig had received the money in cash, and had paid it into his banker's, the money would still have been stopped. If it be objected that the amount of the cheque blended the three sums of 78*l.* 15*s.*, 4*l.* 11*s.* 8*d.*, and 4*l.* 4*s.*, so would a bank note for 100*l.*, or nine bank notes for 10*l.* each. In these cases, and indeed in the case of one payment in coin a separation of sums would have been equally necessary afterwards. With respect to the time when the cheque was given being after admittance, it has been already observed that the fine is not due till after admittance, though the lord or steward are not bound to enrol the admittance till the fine and fees are paid; and it is conceived that the time which elapsed between the admittance and the payment was no more than a reasonable time, and within the limits of Craig's authority, the admittance still remaining in Craig's hands. The facts do not seem here to be in dispute. If, therefore, it be a question of law, I think the payment to Craig a good payment to the steward or the lord. If it be a question of fact, then the jury have found that the payment to Craig, and the manner in which it was made, were within the limits of his authority to receive it as deputy steward. On these grounds, I am of opinion that the rule to enter a verdict for the plaintiff should be discharged, and that the verdict for the defendant should stand.

Rule absolute.

Attorneys for the plaintiff, *Ward, Mills,* and *Witham.*

Attorneys for the defendant, *Monckton* and *Monckton.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Jan. 19 *and June* 10.

THE MAYOR, ALDERMEN, AND BURGESSES OF DORCHESTER v. ENSOR AND MANFIELD.

Ancient market—Action for disturbance of—What amounts to a disturbance—New market held on different days from old market—Evidence of disturbance for jury—Limits of borough—Municipal Corporation Act (5 *&* 6 *Will.* 4, *c.* 76), *sects.* 7 *and* 8.

The corporation of an ancient municipal borough, the limits of which were, for Parliamentary purposes, enlarged and fixed by the 2 *&* 3 *Will.* 4, *c.* 64, *s.* 35, *schedule O, are entitled, under the Municipal Corporation Act* (5 *&* 6 *Will.* 4, *c.* 76), *sects.* 7 *and* 8, *to hold their ancient market anywhere within such enlarged limits, notwithstanding that the same may be without the original limits of such ancient municipal borough.*

An interference in the affairs and management of a new market, as, e. g., receiving rent in the nature of stallage, or any increased rent of the field used for such new market above that which, otherwise, would be obtainable, is sufficient to fix a defendant in an action for disturbance of market (*see* Mosley *v.* Chadwick, 7 *B. & C.* 47, *note*) *and it is not necessary for that purpose that he should have actually sold.*

To hold a new market in a town upon the same da that an ancient market is held there "shall be intended to be a nuisance," and, therefore, amounts in law to a disturbance; but to hold it on a different day is only evidence of a disturbance to be laid before the jury: (*see* Yard *v.* Ford, 2 *Wms. Saund.* 174, *note.*)

So held by the Court of Exchequer (*Channell, Pigott, and Cleasby, BB.*)

This was an action brought by the plaintiffs, the mayor and corporation of the borough of Dorchester, in the county of Dorset, against the defendants to recover from the latter compensation in damages for injuries sustained by the plaintiffs through the alleged unlawful infringement by the defendants of the rights of the plaintiffs to certain fairs and markets within the limits of the borough of Dorchester, by the defendants wrongfully holding within the same limits, cattle and sheep markets on the day on which and at or near to the place where the plaintiffs were of right accustomed to hold their fairs and markets. By the first count of their declaration the plaintiffs charged that they were lawfully and of right possessed of a market for the sale of goods wares, merchandise, horses, sheep, stock, and cattle, holden in the said borough of Dorchester, in the said county, on Wednesday and Saturday in every week, together with the tolls, stallage, rents, and other profits to the said market appertaining, and the defendants disturbed the plaintiffs' said market and prevented their enjoyment thereof, and of the said tolls, stallages, rents, and other profits, by unlawfully, on the market days aforesaid, holding a new market for the sale of divers . . . . sheep, stock, and cattle, within the limits of the said borough, near to the place where the said market of the plaintiffs was holden, whereby the plaintiffs lost the tolls, stallages, rents, and other profits of their said market.

By the second count, the plaintiffs charged that they were lawfully, &c., possessed of a market for the sale of goods, &c., holden at the place and times as in the first count mentioned, together with the tolls, stallages, rents, and other profits to the said market appertaining, and the defendants disturbed the plaintiffs' said market and prevented their enjoyment thereof, and of the said tolls, stallages, rents, and other profits by unlawfully, on the market days in the first count mentioned, exposing for sale, in certain places and premises near and adjoining to the said market divers . . . . sheep, stock, and cattle, within the limits of the said borough, near to the places where the said market of the plaintiffs was holden as aforesaid, whereby the plaintiffs suffered the damage in the first count mentioned.

By the third count the plaintiffs charged that they were lawfully and of right entitled to hold, and were possessed of certain fairs for the sale of . . . sheep, stock, and cattle, holden in the borough of Dorchester, in the said county of Dorset, on certain days, to wit on the 14th Feb., the 6th July, the 6th Aug., and the 25th Oct. in every year, with the tolls, stallages, rents, and other profits to the said fairs appertaining, and the defendants disturbed the plaintiffs' said fairs, and prevented their enjoyment thereof, and of the said tolls, stallages, rents, and other profits, by unlawfully on the fair days aforesaid, holding new fairs for the sale of divers goods . . . . sheep, cattle, and stock, within the limits of the said borough, near to the place where the said fairs of the plaintiffs were holden as aforesaid, whereby the plaintiffs suffered the damage in the first count mentioned.

By the fourth count the plaintiffs charged that they were lawfully and of right entitled to hold, and were possessed of certain fairs for the sale of

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goods . . . . stock, and cattle holden at the place and times as in the last count mentioned, together with the tolls, stallages, rents, and other profits to the said fairs appertaining, and the defendants disturbed the plaintiffs' said fairs, and prevented their enjoyment thereof, and of the said tolls, stallages, rents, and other profits by unlawfully, on the fair days in the last count mentioned, exposing for sale, in certain places and premises near to and adjoining to the said fairs, divers goods . . . . sheep, stock, and cattle within the limits of the said borough near to the place where the said fairs of the plaintiffs were holden as aforesaid, whereby the plaintiffs suffered the damage in the first count mentioned.

The following interrogatories accompanied the declaration and were to be answered by the defendants by affidavit in writing within ten days, to be sworn and filed in the ordinary way, pursuant to the statute in that behalf, and the order of Byles, J., dated 19th June 1868: 1. Did you, or either of you and which of you, sign a certain notice served on James Hooper, collector of tolls for the town council of the borough of Dorchester, or was the same signed by your authority? and state what you or either of you know of the same. 2. Have not you, the said defendant William Manfield, received some portion of the proceeds arising from the tolls, rents, and profits, derived on a certain piece of land and premises within the said borough, and mentioned in the said notice, to the said James Hooper, of horses, pigs, sheep, and other merchandise, or some of them? 3. Of whom is the said piece of land held, and what rent is paid for the same, and to whom?

Pursuant to the before-mentioned order, the following affidavit was filed on the 29th June 1869.

We, John Ensor, of Dorchester, in the county of Dorset, auctioneer, and William Manfield, of the same place, esquire, the above-named defendants, in answer to the interrogatories delivered in this cause, severally make oath and say as follows: 1. That I, the defendant William Manfield, say that I believe I signed a notice, dated the 19th day of Nov. 1867, but whether the same was served on James Hooper, collector of tolls for the town council of the borough of Dorchester, or any one else, of my own knowledge I know not. 2. That in the absence of information as to the particular piece of land referred to in the second interrogatory, I state that I have not received any tolls, rents, and profits from any sales on any piece of land and premises within the said borough of Dorchester. 3. Referring to the second paragraph of this affidavit, we decline to state our title to any land we may hold within the said borough of Dorchester.

The defendants pleaded—1. Not guilty. 2. To the first and second counts of the declaration that the plaintiffs were not lawfully and of right possessed of a market for the sale of goods, wares, merchandise, horses, sheep, stock, and cattle as in the said counts alleged. 3. To the third and fourth counts that the plaintiffs were not lawfully and of right entitled to hold certain fairs for the sale of goods, wares, &c., as in the said counts alleged. Issue was joined on all the above pleas.

At the trial before Channell, B. and a special jury, at Dorchester, at the Summer Assize 1868, amongst the documents put in evidence by the plaintiffs were a writ *ad quod damnum*, of the date of 28th March in the eleventh year of Edw. 3, directed to the sheriff of Dorsetshire to inquire whether it would be to the loss or prejudice of the Crown, or of others, or to the diminution of the power of the county of Dorset if the king should grant to the burgesses of Dorchester to hold to them and their heirs and successors, burgesses of the same borough, together with the liberties, free customs, and all other things to the same borough howsoever belonging to the Crown and its heirs at fee farm for ever, or not, and how much the aforesaid borough is worth by the year, and in what the profits of the same borough consisted, &c. Then followed the inquisition thereon, returned in obedience to the above writ, by which it appeared that the profits of the borough consisted in (amongst other things) "three fairs at the feast of the Holy Trinity, the nativity of St. John the Baptist, and St. James the Apostle, and three markets weekly, on each Wednesday, Friday, and Saturday. A grant or charter of the 11 Edw. 3, 1327, was also in evidence, by which, in pursuance of the said inquisition, the Crown granted the said borough with the appurtenances unto the said burgesses, to hold to the said burgesses, their heirs and successors, with all liberties and free customs to the same borough belonging at fee farm for ever, rendering therefore 20*l.* by the year, and it was proved that this rent was paid to the Crown at the present time.

By letters patent of 19 Ric. 2, 8 Hen. 6, and 5 Edw. 4 respectively, this charter was inspected and confirmed, each in succession confirming all things therein contained.

By a charter of 8 Jac. 1, the former charters and grants were confirmed, and new and extended powers and privileges were conferred on the corporation, and it prohibited, under penalty, anyone except a free burgess or free inhabitant to exercise any "art, occupation, or mystery" within the town and its limits, or to have any "shop, place, or station therein for sale of any wares, &c., in the said town, *excepting at the time of fairs and markets in the town*," and it confirms to the bailiffs and burgesses the use and enjoyment thenceforth for ever of all their juries, *fairs*, liberties, &c.

By a charter of 5 Car. 1 all the before mentioned charters were confirmed; and by sect. 29 thereof it was granted that no person using any art, occupation, or mystery, or any other person who, not a free burgess or free inhabitant, should exercise any art, occupation, or mystery within the borough, "*unless only in the time of fairs and markets within the borough;*" and by sect. 32 it was granted that "the mayor and his successors should have toll of grain brought to the market within the borough to be sold, *as there before this time have been used.*"

In addition to the three fairs above mentioned, held by express grant, the plaintiffs claimed also to hold a fourth fair on the 14th Feb. in every year by immemorial user and prescription, and they gave evidence at the trial of the actual holding of it for a considerable period of time. But as the court, in their judgment, were of opinion that there was no evidence of any disturbance of the fairs, it becomes unnecessary to make any further allusion to the question of the fairs, or of the plaintiffs' right to them.

With regard to the markets, it appeared from the evidence that no market had been held in recent times on a Friday, but that on every Wednesday and Saturday a small market was held for the sale of some articles; and that with regard to the markets for horses, sheep, and cattle, the practice for many years had been to hold a "great market," as it was called, fortnightly for that purpose.

Up to 1834 the markets and fairs were held in the streets of the old municipal borough, but at that time a local Act passed enabling the corporation to remove the fairs from the streets to a field in an adjoining parish, which they purchased, and to hold the Trinity Monday fair from thenceforth on the 25th October, and reserving to the corporation all their previous rights.

The limits of the borough were, for the purposes of Parliamentary representation, enlarged by the Reform Act (2 & 3 Will. 4, c. 64), s. 35, sched. O, and by the Municipal Corporation Act (5 & 6 Will. 4, c. 76,) ss. 7, 8, the old municipal boundaries were, in 1835, extended to the same limits as the Parliamentary boundaries, and thereupon the corporation resolved to move the sheep and cattle market to the same field.

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Although for many years the cattle market had been held on every alternate Saturday, there was some evidence showing that it had also been open on every Saturday to persons who chose to bring cattle there for sale. The corporation received tolls on certain articles brought and exposed for sale at these fairs, namely, 1*s.* 6*d.* a score for sheep, and 6*d.* a head for horses. Previous to 1862 the defendant Ensor had held sales in the corporation field by licence from the corporation, and had paid the regular tolls. In 1864 Ensor commenced selling sheep, &c., in a piece of ground of his own within the borough, but refused to pay any toll. In 1866 he commenced his cattle and sheep sales in another piece of land adjoining, alleged by the plaintiffs to be the property of the defendant Manfield, and to be let by him for the purpose to the defendant Ensor, or to be occupied by the two defendants jointly for the same purpose, and still refused to pay tolls to the plaintiffs, and it is in respect of the sales there held that the present action is brought. To fix the defendant Ensor, there was the evidence of three witnesses (one of them being the collector of the market tolls), who proved that on certain Saturdays in May and Nov. 1867, and Feb. 1868, Ensor was in the field, and that on those occasions there were, on one occasion 719 sheep, and on another 570, and on another 400 sheep penned; that a sale was going on, that Ensor was selling, and many persons were bidding; that there was a regular market of the plaintiffs', although not their great fortnightly cattle market, held on the same days.

The evidence by which it was sought to fix the defendant Manfield was, that the field was generally called and known as "Mr. Manfield's field." That Manfield had been seen at the field on more than one occasion, while Ensor's sales were going on, and that on Saturday, the 23rd Nov., upon the witness (a policeman) going to the field by order of the plaintiffs, to see what was going on, and to count the numbers of sheep, &c. there, the defendant Manfield said to him, "We don't want any Bobbies here, it is my own private property, and you leave my field," and that Manfield took him by the arm and turned him towards the gate, saying, "if you don't leave the field, I'll have some men to put you out," whereupon the witness, who had not counted all the sheep that were there, was obliged to quit the field.

In addition to this, there was given in evidence a notice in writing under the hand of the defendant Manfield, which he had caused to be served upon the plaintiffs' collector of tolls, the 19th Nov. 1867, to the following effect:—"I hereby give you notice not to trespass on the land and premises *belonging to me*, the same being in the joint occupation of myself and J. T. Ensor, situate in the parish of Saint Peter."

There was no proof and no pretence for saying that there was any other field in the joint occupation of the defendants except the field in question.

Thereupon at the trial, before Channell, B., at the Summer Assizes for Dorsetshire in 1868, a verdict was entered for the plaintiffs with damages, under his Lordship's direction, leave being reserved by the learned judge to the defendant's counsel to move to enter the verdict for the defendants on the counts claiming a right to hold the markets, if no evidence to go to the jury in support of those counts; and the like leave as to counts claiming a right to hold the fairs. Also to enter a verdict for the defendants if no evidence to go to the jury of a disturbance of the fair or market for the defendant against whom there was no evidence of a disturbance. His Lordship ruled as a point of law that the defendants, if otherwise guilty were so though the disturbance was not on the day on which the plaintiffs were entitled to hold and held their market, but on a day shortly after.

A rule was accordingly obtained in Michaelmas Term last by *H. T. Cole*, Q. C. for the defendants to set aside the plaintiffs' verdict and to enter the verdict for the defendants; and also for a new trial (unless the plaintiffs consented to a special case being entered) on the ground that there was no evidence to show that the plaintiffs were possessed of the right to hold markets and fairs at the times or places alleged, or at any time or place. Nor was there any evidence of any disturbance of any such fair or market by the defendants or either of them.

Jan. 19.—*Mellish*, Q. C., *Kingdon*, Q. C., and *Lopes* for the plaintiffs, showed cause against the above rule.—The documentary evidence clearly established the right of the plaintiffs to hold three fairs in the year, at Christmas, on St. John Baptist's Day, and Michaelmas Day, and three markets every week, on Wednesdays, Fridays, and Saturdays. Three fairs only are mentioned in the charter, but the plaintiffs claimed the right to hold a fourth fair on the 14th Feb. yearly. By the 65th section of the Local Act (4 Will. 4, c. 16), the fairs were removed from the old site to the corporation field, and the fair days were altered, and in that sect. the fair on the 14th Feb. is mentioned, which is a confirmation of its parol origin. In pursuance of that Act the corporation in 1835 purchased the present fair field outside the limits of the old borough, and there the fairs have since been held. It is difficult to see what objection there can be to the evidence showing the existence of three fairs and three markets. The evidence of old witnesses to the existence of the fourth fair went back for sixty years. Its omission from the inquisition is immaterial, for it need not have an immemorial origin, the Crown has always the power to grant a fair *De facto* a sheep market was held every alternate Saturday prior to 1862, though the right existed to hold one every Saturday. The defendant Ensor, by agreement with the corporation, held a sheep auction in the market place on every alternate Saturday, and paid the same toll for sheep sold by him as was paid by others on the other Saturdays, which amounted to an admission of the plaintiffs' right to a weekly market. Upon some graziers complaining that the corporation had no right to give to Ensor this exclusive privilege of the use of the market on alternate Saturdays, the market for cattle was in 1861 thrown open every Saturday. The right of the corporation to hold the market every Saturday was undoubted; but even if only to hold them every other Saturday, could it be doubted that the defendants' sale would be an injury; the proof being that sometimes 500 and sometimes 700 sheep were brought for sale to Ensor's market. As matter of common sense it must have caused a diminution in the plaintiffs' market. Nothing specific was proved with respect to an infringement of the fairs, but, if the plaintiffs prove their right to the fairs and the markets, and an infringement of the markets, that it is submitted would be a sufficient infringement of the fairs. It was a question of fact. In *Yard* v. *Ford* 2 Wms. Saund. 174, it is said in a note that it shall be put in issue whether the holding of a market in such a case is a nuisance or not. (He cited also Fitzh. Nat. Brev. n (b); 3 Bl. Com. 219.) Then, next, was there any evidence to fix the other defendant, Mr. Manfield? First, it was said to be his field. It was clear that he claimed to be in possession of it, and he ordered off the bailiff who came in to number the sheep. That was sufficient to show that he had not demised it to Ensor, but had only given the latter licence to hold his auction there. Had he demised

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it, it would not be contended that he would be answerable for the acts of his tenant. Then there was the notice given by him not to trespass on the field in the joint occupation of himself and Ensor. [CLEASBY, B.—Was there a corporation market going on on the 23rd Feb.?] Yes; the market was open. Whether any sheep were there or not is immaterial—nay, if there were none, that only shows that Ensor's market was working the greater injury. They referred also to sects. 66, 76, and 77 of the Local Act (4 Will. 4, c. 16).

H. T. Cole, Q. C. and *Bere*, for the defendants, *contra*, supported their rule.—The proof affirmatively of the existence of a fair and of its disturbance by the defendants, was on the plaintiffs. No evidence had been given fixing Manfield's liability. Supposing the court holds that there was a grant of the markets, there was no evidence of any distinct licence either of the fairs or markets. But we contend the right has been lost. There is no evidence of a continuous user of the market on the particular Saturdays on which the disturbance is alleged. In 1806 occurs the first notice of a market, in an entry in the corporation books of a resolution to hold a fortnightly cattle and sheep market for the public convenience. Before 1806, there were no cattle markets at all. The Friday's market is admitted to have been given up. The alleged disturbances were on the alternate Saturdays, and there is no case to show that holding a market on a different day is a disturbance. [PIGOTT, B.—In the case cited from Saunders, it is not made a question whether the market complained of was held on the same day as the plaintiffs' market, or on some other day.] The grant of the market does not enable the grantee to exclude another person from his own field. Nor does the right to the market carry the right to toll. It was clear from sect. 32 of the charter of Charles I. that, prior thereto, though grain had been sold, no toll had been taken. In 1640 no toll was taken on the sale of sheep, but 1*s.* 6*d.* a score was paid for penning them. Toll is not incident to a fair or market, and the grantee shall not have it without a special grant: (Com. Dig. title "Market, Toll," &c.) [CHANNELL, B.—May there not be a disturbance of market even if there be no grant of toll?] It is contended there cannot be. There would be no nuisance, no deprivation of aught to which the plaintiffs were entitled. [CLEASBY, B.—Without reference to toll, direct your attention to this: There is a grant of a market, which gives a right to take money for stallage; may there not be a disturbance of that market?] Not if there is no right to take toll. [CLEASBY, B.—Then the grant of a market as a franchise comes to nothing?] That is so, unless there be a disturbance which amounts to a nuisance. The sum here paid was not toll at all. There was no evidence for the jury showing any disturbance of the market in the legal acceptation of the words.

The Earl of Egremont v. *Saul*, 6 A. & E. 924 6 L. J., N. S., 205, K. B.;

Mosley v. *Walker*, 7 B. & C. 40; 5 L. J. 358, K. B. Even if what was done by Ensor on his own land amounted to setting up a market, it was no infringement of the rights of the plaintiffs, and was not actionable. No proof was given, as might have been done, whose cattle they were. But assuming them to have been Ensor's or Manfield's, it was not shown that if not sold at Ensor's auction they would have been sold in the plaintiffs' market; and it is only fair to assume that they were cattle in excess of what could be sold in the plaintiffs' market. There was no evidence of the sale of any sheep here, but merely the statement of a man that so many sheep were in the field. In *Yard* v. *Ford*, (*ubi sup.*) cited *contra*, substantial loss and damage were found affirmatively, and that question should have been put to the jury here. In *The Mayor, &c., of Brecon* v. *Edwards*, 6 L. T. Rep. N. S. 293; 31 L. J. 368, Ex.; 1 H. & C., a good definition of a market and what amounts to an infringement of it is given by Wilde, B. Again, the defendant, Ensor, was the son of a resident free burgess, all whose rights were reserved by the charter of Charles I., and confirmed by the Municipal Corporation Act (3 & 4 Will. 4, c. 76) s. 2. As such, therefore, he had a right to sell at his own shop or in his own field on the market day, a proposition clearly laid down in *Bridgeland* v. *Shapter*, 5 M. & W. 375; 8 L. J. N. S. 246, Ex.; and in *The Mayor, &c., of Macclesfield* v. *Chapman*, 12 M. & W. 18; 13 L. J., N. S., 32 Ex., Parke, B. says, that there does not appear to be any authority that the mere possession of a market implies the right, as a matter of law, of preventing individuals from selling marketable articles in their own shops within the limit of the market on market days. In the case of the *Bailiffs of Tewkesbury* v. *Diston*, 6 East, 438, there was a special exception in the declaration of the defendant as not being a freeman of the borough, and it was assumed in argument that if he had been one, the case would have been different. There was the same exception also in the *Bailiffs of Tewkesbury* v. *Brickwell*, 2 Taunt. 120. [CHANNELL, B.—The present case differs materially from the cases that have been cited. Here the defendant is an auctioneer, he is on the spot, and several hundred sheep are there to be sold. Surely that was evidence for the jury that he was there selling them, unless you had shown that they were his own sheep, and also that it was his own field.] What case is there showing he was not entitled to carry on the business of an auctioneer? In *Wiltshire*, app. v. *Willett*, resp., in the Common Pleas, 5 L. T. Rep. N. S. 335; 31 L. J. 8, M. C., which was an appeal from justices raising the question whether the sale of certain goods by the respondent in an auction room in a house in the borough of Cardiff, was or not an infringement of the Local Market Act, Erle, C.J., said, "then came the question whether the auctioneer selling them is within the exception" (in the Act). "I do not see why a person may not in his own shop dispose of his goods by auction, private contract, or commission." Moreover, also, the site of the plaintiffs' market had been moved from without the ancient municipal limits to a spot where they had no right, under their charter, to hold it.

Cur. adv. vult.

June 10.—The judgment of the court (Channell, Pigott, and Cleasby, BB.), was now delivered as follows, by

CHANNELL, B.—We are of opinion that the verdict entered for the plaintiffs at the trial cannot stand; also, that the rule obtained by the defendants to enter a verdict for them ought not to be made absolute, but that, for the reasons hereinafter stated, the defendants, if they desire it, are entitled to a new trial. This would be sufficient for the disposal of the rule now pending. The rule to enter the verdict for the defendants did not, as it ought to have done, specify the grounds on which that verdict was claimed; but, on the rule being called on for argument, it was agreed that all points open to the defendants on my notes should be raised, and the rule was accordingly argued on that footing. As we have already stated, we think that there ought to be a new trial. Still, as on the argument of the rule, questions were discussed which may arise again if a second trial takes place, it may be an assistance to the parties, and may possibly prevent the necessity for a second trial, if we state the opinion which we have formed on these various

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points, although in the result they do not affect our present judgment that there ought to be, if the defendants desire it, a new trial. The declaration contained four counts, in two of which the plaintiffs allege that they were possessed of a market in the borough of Dorchester, and that the defendants disturbed that market, by holding, as alleged in the first count, a new market, and by exposing goods, &c., for sale near to the plaintiff's market, as alleged in the second count. The other two counts complained of similar disturbances of the right, which the plaintiffs alleged they had, of holding four fairs in the year. The defendants pleaded "not guilty," and they also traversed that the plaintiffs were possessed of the market, and entitled to hold their fairs. At the trial the plaintiffs put in evidence a writ *ad quod damnum*, of the date of 11 Edw. 3, and the inquisition returned by the sheriff to that writ, by which it appeared that the profits of the borough of Dorchester at that time included three fairs, on certain named feast days, and also three markets every week, on Wednesdays, Fridays, and Saturdays. There was also put in a grant of Edw. 3, founded on that inquisition, by which those franchises and customs were granted and confirmed to the mayor and burgesses of Dorchester in fee farm for ever, at a rent of 20*l*. It was proved that this rent was paid at the present time. There was also a charter of Charles I. put in, confirming the privileges of the corporation. We think that there was abundant evidence of the right originally to three markets in the week, and to at least three fairs in the year. As to the fourth fair, that which the corporation claim to hold on the 14th Feb., evidence of the actual holding of the fair for a considerable time was given, which was, we think, sufficient to show the existence of the right to that also. Inasmuch, however, as we think there was no evidence of disturbance of the fairs, it is not necessary to go further into the question of the right to the fairs. As regards the holding of the market, the evidence showed that no market had been held in modern times on a Friday. On every Wednesday and Saturday it appeared that there was a small market held for the sale of some articles, but the important question in this cause arises as to the markets for sheep, horses, and cattle; and as to that it appears that the practice for many years has been to hold, for that purpose, what is called a great market once a fortnight. For many years the cattle market has been held on every alternate Saturday; the object of this appears to be the convenience of persons frequenting the market; and there was some evidence to show that the market ground had actually been open every Saturday to persons who chose to bring cattle there for sale. It by no means appears, therefore, that the corporation have lost their right to hold a cattle market every Saturday, or indeed every Wednesday, if they choose to do so. But, however that may be, the plaintiffs can only recover in this action for disturbance of markets which they actually held, and they only appear to have held cattle markets on alternate Saturdays. As, however, this is one of the days on which the markets granted were originally held, and so far as appears upon the evidence the cattle markets have constantly been held, and always on one of these days, we are of opinion that they are rightfully held, so far as the day is concerned. A further question was raised as to the place in which the market was held. It was conceded on both sides that the market might be held on any part of the ancient borough. The market field however, in which the market has been held since shortly after the passing of the Municipal Corporation Act is without the ancient borough, but within the limits of the Parliamentary borough to which, for some purposes, at all events, the ancient borough was enlarged. The question is, whether upon the passing of that Act the corporation became entitled to hold their ancient market anywhere within the limits of the borough as enlarged; and that, of course depends upon the words of the Act. The sections principally in question are the 7th and 8th. The 7th section says that the metes and boundaries of certain boroughs (amongst them Dorchester) "*for the purposes of this Act*, shall be those of the Parliamentary boroughs." The 8th section says that "every place and precinct which shall be included within the lands of any borough as therein before provided, and none other, shall be part of such borough, and in those boroughs which are counties in themselves shall be part of such county, and of none other. In this 8th section the words "*for the purposes of this Act*" are not used. It appears, indeed, from a note in Rawlinson's Municipal Corporation Acts, p. 14, and also in Chitty's Statutes, p. 962, that some of the copies of the Act printed by the king's printer had those words in the 8th section also, but that they are not in the Parliament roll. As the words are not found in any of the copies printed since attention was drawn to the point, there can be no doubt that this latter statement is correct. Probably the words were in the Bill, but were struck out before it passed; that, of course, cannot affect the construction of the Act as it stands, but it increases the probability in fact that the omission of the words was intentional, and therefore justifies us in giving effect to the difference in language in the two sections which otherwise might have been thought so slight as to be immaterial. Now what is the effect of the two sections taken together. Sect. 7 says that "for the purposes of the Act" (within which sect. 8 would apparently be included), the boundary should be so and so. . . . Then sect. 8 says that all places within the boundaries defined by sect. 7 shall be parts of the borough, without any restriction as to their being so for the purposes of the Act only. There can be no doubt that the main object of sect. 8 was rather to cause the locality attached by the Act to boroughs or counties to cease to form parts of those to which they had before belonged; but if the language by which this is effected is efficient to attach them to the borough for general purposes, more extensive than those as to which sect. 7 applied, there is no reason why we should not give effect to that arrangement. It is true that in *Beardsworth* v. *Toorkington*, 1 Q. B. 782; 10 L. J., N. S., 254, Q. B., it is said by the court, at p. 791 of 1 Q. B., that they find no provision in the Act sufficient to add these places to the boroughs, for all intents and purposes. But it must be remembered that that case was a very different one from the present. If it had been held that the additional parish had been attached to the borough of Stamford for the purpose of entitling the inhabitants of such additional parish to the rights which the inhabitants in the old borough had by prescription, the result would have clearly been to disregard the policy of the 2nd section of the Act, by which ancient rights are reserved only to those persons who would be entitled to them but for the passing of the Act. That case is rather like what the present case would be if the market had been moved before the boundaries were enlarged. It appears to us that the corporation, being at the passing of the Municipal Corporation Act, entitled to hold a market at any place within the jurisdiction of their governing body, became, upon the passing of that Act, entitled to hold it within any part of the district to which that jurisdiction was enlarged, and that there is nothing in the wording of the 7th section which obliges us to hold that the corporation, by holding the market within the part added to the borough, had forfeited their ancient right. It must be remembered that no rights would

be affected by the jurisdiction being enlarged for this purpose. It would not cause any acts to be disturbances of the market which would not have been such before; for a market in a borough may be disturbed by holding another market near; whether the new market be held within or without the borough. The moving of the market could only be prompted as, undoubtedly it was in the present case, by considerations of convenience. It was contended that if there had been a disturbance at all, it was not a disturbance by both defendants jointly. Now the evidence showed that the defendant Ensor was an auctioneer who at one time had sold cattle by auction under the authority of the corporation at their market; but that latterly he had held, at another place close by, a fortnightly sale of cattle by auction, which appeared to have been regularly advertised. There can be no question that this is substantially another market, and that it differs very much from the case of a man selling his own goods out of the market, which may or may not be a wrongful disturbance according to circumstances. The cases, therefore, as to the right of persons in some boroughs, where there is an ancient market, to sell marketable goods on their own premises and the like, do not, we think, apply; because what is complained of here is not that the defendants sell their own goods, but that they provide a means for others to sell their goods without bringing them to the market. Then, as to the part taken by the other defendant. It appears that Ensor, who actually conducts the sale, does so in a place which was called "Mr. Manfield's field." There was no legal proof that the field belonged to the defendant Manfield. It appears, however, that he was present on some occasions when the sales were going on, and that he said the field was his private field, and asserted his right to turn off a police constable who was counting the sheep which were being sold. He also served a notice on the collector of tolls for the borough, not to trespass on any land belonging to him, "the same being in the joint occupation of himself and Ensor." It was contended that, although the particular place was not specified yet, as there was no other land which there was any pretence for saying was in the joint occupation of the defendants, this notice amounted to an admission that Manfield was responsible for what was done on his field. Now it is not necessary, in order to fix a defendant with disturbing a market that he should have actually sold. It would also appear from what was said in *Mosley* v. *Chadwick*, 7 B. & C. 47, note, that merely receiving rent of the land used for the new market from the persons using it would be sufficient; and at any rate receiving rent in the nature of stallage, or any increased rent in consequence of the use to which the land is put above that which otherwise would be obtainable, would be sufficient. We think that the interference proved on the part of Manfield amounted to evidence to go the jury that both these defendants were taking part in carrying on the fortnightly sales. It remains only to consider the further fact that the sales were not held on the same Saturday as that on which the plaintiffs held their cattle market. The defendants, on the argument of the rule, contended that on this ground there was no disturbance. At the trial it appeared to me that the points which Mr. Cole desired to raise on behalf of the defendants, were sufficiently open to him upon the plaintiff's case, and it was rather at my suggestion that the case proceeded no further. I find, however, from my note that the form in which I reserved the question was "Leave to move to enter a verdict for the defendants on the counts claiming a right to hold the markets, if no evidence to go to the jury in support of these counts, and the like leave as to counts claiming a right to hold the fairs. Also to enter a verdict for the defendants if no evidence to go to a jury of a disturbance of the fair or market for the defendant against whom there was no evidence of a disturbance." I, however, ruled as a point of law that the defendants, if otherwise guilty, were so, though the disturbance was not on the day on which the plaintiffs were entitled to hold and held their market, but on a day shortly after. According to the view taken upon a more careful consideration of the case than I could give at Nisi Prius, my direction, though not incorrect as far as it goes, is not sufficient for the decision of the case. We think the law to be laid down in the notes to *Yard* v. *Ford*, 2 Wms. Saund. 174, that is that where a new market is held on the same day as the old, it *shall be intended to be* a nuisance; that where it is on a different day it shall be put in issue whether it be a nuisance or not. It was not, however, suggested to me that the true view in such a case was that it was a question of fact to be left to the jury, whether the old market was injuriously affected or not. The contention was that the defendants were not liable unless the disturbance was on the same day. If my attention had been drawn to it, I think that which was the object of all parties, namely, to bring the matter fully before the court, would have been carried out by expressly reserving to the court a power to draw inferences. If that had been done, we should have been prepared to draw the inference that some of the very large number of sheep and cattle sold at the defendants' sales would, if these sales had not been held, have been sold at the plaintiffs' market. This would, upon the authorities, clearly support the verdict for the plaintiffs. But the power to draw inferences was not expressly given to the court. Leave was given to enter a verdict if there was no evidence to go to the jury. We are of opinion not only that there was evidence to go to the jury, but that there was sufficient to support a verdict for the plaintiffs, and upon which that verdict ought to have been found. The rule to enter the verdict, therefore, cannot be made absolute, but, as my direction appears not to have been accurate, the defendants are entitled to a new trial. It is to be hoped, however, that after the opinion which we have expressed, the parties may come to an arrangement which may avoid the necessity of further litigation. Of course the opinion which we have formed, as far as questions of fact are concerned, might be altered by evidence at a second trial; yet, in order to prevent misapprehension, we think we ought to say that, unless the facts are substantially altered, a verdict for the defendants would be wrong. We cannot, however, see that we are authorised to draw such inferences as a jury might draw, and on that ground we are obliged to direct a new trial.

Rule to enter verdict for the defendants, discharged.

Rule for a new trial, absolute. (a)

Attorneys for the plaintiffs, *Dangerfield* and *Frazer*, 36, Craven-street, Strand, W.C., agents for *Symonds*, town clerk, Dorchester.

Attorneys for the defendants, *Rhodes, Son*, and *Duffett*, 63, Chancery-lane, W.C., agents for *Andrews* and *Cockeram*, Dorchester.

(a) The case went down, and was tried again at the last Summer (1869) Assizes for Dorsetshire, *Kingdon*, Q. C., *Lopes*, Q. C., and *Bowen*, appearing for the plaintiffs, and *M. Bere*, Q. C., for the defendants, when the latter consented to a verdict for the plaintiffs for 400l. and an agreed sum for costs.

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Saturday, June 7.

HALL v. THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamps—Bequest of residue of personalty to executors in trust for residuary legatee—Residue consisting of shares in a gas company and moneys on mortgage—Transfer by executors of the shares and mortgages to residuary legatee—Proper stamps on—Ad valorem—Stamp Acts (55 Geo. 3, c. 184, schedule, title "Transfer;" and 28 & 29 Vict. c. 96, s. 17)—Consequence of bequeathing residue to executors in trust for residuary legatee.

A testator by will bequeathed the residue of his "moneys, securities for moneys, goods, chattels, personal estate, and effects (subject to the payment of debts, &c., and legacies), unto A. and B., their executors, administrators, and assigns, and the survivors of them, upon trust, to call in, sell, and convert into money such part thereof as should not consist of money or securities for money, and stand possessed of the moneys arising by such sale and conversion, and all other his residuary personal estate in trust, to pay 3000l. to C., and the residue unto his (the testator's) nephew, R. H.; and he appointed A. and B. executors. All the debts and all the legacies which had become payable (including the said 3000l. to C.) were duly paid and discharged by the executors out of the personal estate and rents of the real estate, and several outstanding mortgage securities, made and granted to the testator in his lifetime, of sufficient amount for the purpose, were appropriated and set apart by them to meet certain other legacies bequeathed by the will, in which life interests were thereby directed to be paid to certain persons named.

The residuary personal estate consisted (inter alia) of certain shares in the L. Gaslight Company, and of several principal sums of money secured on several mortgages, transfers of mortgages, further charges, bonds, notes, and other securities, and it had not been necessary for any of the purposes of the will to call in, sell, or convert into money any portion of such residuary estate.

At the request of R. H., the residuary legatee, A. and B. agreed, as such trustees and executors as aforesaid, to transfer to him the above mentioned shares and principal sums of money, and a deed dated 1st June 1866, and made between the said A. and B. of the one part, and R. H. of the other part, was accordingly prepared and executed, which recited all the facts and matters above stated. By the first testatum clause of the deed, all the said gas shares and also all the several principal sums of money secured by the said several mortgages, &c. specified in three several schedules therein underwritten, and all interest, &c., together with the said several mortgage deeds, were assigned and transferred by the said A. and B., unto the said R. H., his executors, administrators, and assigns absolutely:

By a second testatum clause, "to the intent that the several hereditaments comprised in the said several mortgages, &c. might be duly vested in the said R. H., his heirs and assigns," all the messuages, &c. comprised in the said several mortgages, &c. were granted and conveyed by the said A. and B. unto and to the use of the said R. H., his heirs and assigns for ever, subject to the equity of redemption then subsisting therein respectively:

The aggregate amount of the several principal sums secured by the several mortgage deeds, was 32,499l.:

Held, by the Court of Exchequer (Kelly, C. B., and Bramwell, Channell, and Cleasby, BB.), that the deed on the face of it was a technical, substantial, and real transfer both of the gas shares and the mortgages specifically to R. H. and as such came within the description of the Act of Parliament, and was therefore liable to the stamp duty of 10l. 12s. 6d., assessed as follows:—As a transfer of shares in the stock of the L. Gas Company, "not otherwise charged under the heads of mortgage or of conveyance" (55 Geo. 3, c. 184, schedule, tit. "Transfer"), to a duty of 1l. 10s.; as a transfer of mortgages for 32,499l., to an ad valorem duty (under 28 & 29 Vict. c. 96, s. 17) of 6d. per 100l., 8l. 2s. 6d., and to a progressive duty of 1l.

Semble, had the bequest of the residue been directly to R. H., instead of to the executors in trust for him, no deed of transfer from the executors would have been necessary in order to vest the shares and mortgages in him.

This was a case, on adjudicaton for stamp duty, stated by the Commissioners of Inland Revenue for the opinion of the Court of Exchequer, pursuant to the 13 & 14 Vict. c. 97, on the requisition and behalf of Richard Hall, with respect to the proper stamp duty chargeable on the indenture next hereinafter mentioned.

By the indenture in question, which bore date 1st June 1866, and was made between Benjamin Hyde, of Louth, in the county of Lincoln, Esq., and Samuel Hyde, of 8, Billiter-square, London, Esq., of the one part, and the said Richard Hall, of the other part, after reciting that Richard Thew, Esq., deceased, by his will, dated 15th April 1851, legally executed, after devising his real estate and bequeathing several legacies, as therein mentioned, gave and bequeathed all the rest, residue, and remainder of his moneys, securities for moneys, goods, chattels, personal estate, and effects not before disposed of, and the moneys arising from the sale of his estate (subject to the payment of debts, funeral and testamentary expenses, legacies, &c., and the legacy duties for the same), unto the said B. Hyde and S. Hyde, their executors, administrators, and assigns, and the survivor of them, upon trust, to call in, sell, and dispose of and convert into money such part of his said residuary personal estate as should not consist of moneys or securities for money, and stand possessed of the moneys to arise by such sale and conversion, and all other his said residuary personal estate, and of the moneys to arise from sale of his said real estate (or part thereof) in trust to pay 3000l. to his nephew, Thos. Hall, and the residue thereof unto his nephew the said Richard Hall. And the testator appointed the said B. Hyde and S. Hyde executors of his said will, and reciting the testator's death on the 8th Dec. 1863, and that the said executors proved his said will on the 15th June 1864; and that all the testator's debts (except an annuity of 15l. secured by his bond as therein-mentioned), and his funeral and testamentary expenses had been duly paid and discharged by the said executors out of the testator's personal estate, and the rents of his real estate. And that all the several legacies bequeathed by his said will which had become due and payable, and all legacy duties payable in respect of the same had been duly paid and discharged with and out of the personal estate of the said testator, and the rents of his real estate; and in order to meet the due payment of the remaining legacies bequeathed by the said will, of and in which legacies, life interests, are therein directed to be paid to certain persons therein-named, several outstanding mortgages and securities, made and granted to the said testator in his lifetime, of sufficient amount had been appropriated and set apart. And reciting that the several shares of the said testator of and in the capital, stock, property, and effects of the Louth Gas Light Company, had not been sold and disposed of, and converted into money by the said executors, in pursuance of the trusts of the said will, and the several principal sums of money secured by and due on the

several mortgages, transfers of mortgages, further charges, bonds, notes, and other securities specified in the several schedules thereto, had not been called in; and that it was not necessary for any of the purposes of the said will that the said shares should be sold, disposed of, and converted into money, nor that the said principal sums of money should be called in. *And reciting* that the said R. Hall, as residuary legatee as aforesaid, had requested the said B. Hyde and S. Hyde, as such trustees and executors as aforesaid, to assign and transfer the said several shares, and the said several principal sums of money, and the dividends and interest then and thereafter to become due thereon respectively, unto him, the said R. Hall, his executors, administrators, and assigns, which they had agreed to do as thereinafter mentioned. *It was witnessed* that in pursuance of agreement and for a nominal consideration, the said B. Hyde and S. Hyde did assign, transfer, and sell over unto the said R. Hall, his executors, administrators, and assigns, *all those* thirty-two shares of 25*l.* each in the capital, stock, property, and effects of the Louth Gas Light Company, numbered respectively (as therein set forth); and also all the several principal sums of money secured by and then due on the several mortgages, &c., and other securities mentioned and specified in the three several schedules thereunder written; and all interest due and to become due for or in respect of the said several shares and the several principal sums respectively, together with the said several mortgages, transfer of mortgages, &c., and all other the deeds, evidences, &c., in the custody or power of the said B. Hyde and S. Hyde, &c. *To hold* and take the said shares principal sums of money, dividends and interest, and all other the premises thereby assigned unto and by the said R. Hall, his executors, administrators, and assigns, to his and their own absolute use and benefit. And it was further witnessed that to the intent that the several hereditaments mentioned and comprised in the said mortgages, &c., specified in the first schedule, might be duly vested in the said R. Hall, his heirs and assigns. They the said B. Hyde and S. Hyde granted and conveyed unto the said R. Hall and his heirs, all and singular the messuages, &c., and other the hereditaments comprised in the said several mortgages, &c., mentioned and specified in the said first schedule (being freehold), with the appurtenances, to hold unto and to the use of the said R. Hall, and his heirs and assigns for ever, subject nevertheless to such right or equity of redemption as was then subsisting therein respectively. And it was further witnessed that for the reasons and considerations aforesaid, the said B. Hyde and S. Hyde assigned, transferred, and set over unto the said R. Hall, his executors, administrators, and assigns, all and singular the messuages, &c., comprised in the several mortgages, &c., mentioned and specified in the second schedule (being leasehold messuages) with the appurtenances, to hold to the said R. Hall, his executors, administrators, and assigns, for the residue of and in the several terms of years for which the same hereditaments and premises were granted and demised, subject, nevertheless, to such right and equity of redemption as was then subsisting therein.

Then followed the three schedules to the said deed, comprising the various mortgages and securities of freehold, leasehold, and copyhold lands, bonds, and notes of hand, &c., the aggregate amount of the principal moneys thereby secured being 32,499*l.* 0*s.* 7*d.*

The said deed was executed by all the parties thereto, and attested.

On the 6th July last, Mr. Hall, by his solicitor, presented the deed, which was then stamped with the duty of 2*l.* 15*s.* to the Commissioners of Inland Revenue at Somerset House under the 14th section of the 13 & 14 Vict. c. 97, and desired to have their opinion as to the stamp duty with which in their judgment, it was chargeable, and tendered and paid to the said commissioners 10*s.* as required by the said Act. The commissioners assessed and charged a duty of 10*l.* 12*s.* 6*d.* thereon as follows:—

Ad valorem transfer of mortgage on 32,499*l.*, being the total amount of the sums of money mentioned in the three schedules of the said indenture at the rate of 6*d.* per 100*l.* (28 & 29 Vict. c. 96, s. 17.)	8 2 6
Transfer of shares in the stock of the Louth Gas Light Company, not otherwise charged under the head of mortgage or of conveyance (55 Geo. 3, c. 184, sched. title "Transfer")	1 10 0
Progressive Duty (13 & 14 Vict. c. 97).	1 0 0
	£10 12 6

The solicitor of the said R. Hall was, however, at the same time informed that if it could be shown that the said shares had been transferred by a separate duly stamped instrument, the duty of 1*l.* 10*s.* would not be claimed.

Thereupon the said R. Hall, without producing or alleging that there had been any other transfer of the said shares, paid to the Receiver-General of the Inland Revenue 7*l.* 17*s.* 6*d.*, making up together with the 2*l.* 15*s.* duty impressed upon the said indenture the sum of 10*l.* 12*s.* 6*d.*, together with 10*l.* by way of penalty. And thereupon the said indenture was stamped with the proper stamps, denoting the said additional duty and the payment of the said penalty, and also with the particular stamp provided by the said commissioners under the said Act, denoting that the full amount of duty chargeable by law had been paid.

Mr. Hall was dissatisfied with that determination, and called on the commissioners to state and sign the present case, which they have accordingly done. The question for the opinion of the Court of Exchequer being with what stamp duty the said indenture of the 1st June 1866 is chargeable?

Sir *J. B. Karslake*, Q. C. (with him was *F. P. Onslow*, of the Chancery Bar) for the plaintiff Mr. Hall.—The question is, had this deed any operation at all at law beyond the mere conveyance of the dry legal estate, except possibly expressing the assent of the executors to the bequest to the plaintiff? It is contended that it had not as between themselves and the plaintiff the legatee. The executors had no further duty to perform, as soon as they assented the property became the plaintiff's property, without any transfer at all, and no transfer being required, the deed in question, though on its face and in terms a transfer, had no operation as such. By virtue of the probate the personal property vested in the executors, by whose assent it vests in the legatee. [BRAMWELL, B.—Had the bequest of the shares been to Hall directly, I could understand the argument, but here they are bequeathed to the executors in trust for Hall. Is not a transfer then necessary to get them out of the executors?] I apprehend if personalty is left to executors to pay debts and legacies, &c., they have a right to sell, even if not expressly directed to do so; and it is not because the testator directs a sale by them in trust for the benefit of A. B., that the executors take the property in any other way than as executors, and as between the executors and the legatee no deed was necessary. Moreover, the gas company, in all probability, have a particular form of transfer of their own, by which the property in shares is vested in the transferee, and on which, if at all, the duty may be payable. [BRAMWELL, B.—What is there to show that this deed is not equally efficacious, and why may not the gas company demand

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possession of the deed for the purpose of registering the plaintiff as a transferee. All that is necessary is that a person selling the shares should execute a transfer of them, and it is the company's duty to register them where so transferred. It may be that this is not a sufficient instrument to transfer these shares; but we must take it as it is, having no evidence on the subject. If a further instrument be necessary, it would be the subject of application to the Stamp-office, as a matter of mercy, to be relieved from paying the duty again; but meanwhile the plaintiff is not to be let off paying this stamp duty.] The deed must be taken with its legal effect. If it be that, as far as the gas company is concerned, it has no operation, then the duty cannot be charged; but it may be perfectly effectual as an assent by the executors to the legatees having the beneficial interest in the shares. Then, with regard to the money, the deed merely assigns to Hall what was his already. It may be taken to indicate the executor's assent, and that the time had arrived for him to have it, but he takes the whole of the mortgages and all the money without the assignment. The only operation of this deed is the conveyance to the plaintiff of a dry legal estate in the mortgaged premises. It is admitted that no *ad valorem* duty is payable on the value of a money bond assigned, and mortgage-debts are in the same position. The plaintiff's position with regard to the debts is not made a whit the better by this deed. But in addition to being executors they were also devisees in trust, and as such, conveyed the legal estate to the plaintiff. Suppose the executors and devisees in trust had been different persons, the executors would have been entitled to the debts, and the devisees would have had the legal estate, and as devisees, the executors here had no more than that dry estate on the conveyance of which a deed stamp of 1*l.* 15*s.* only is required. There was here no transfer of the mortgages in substance. The right to the money passed by assent of the executors. The plaintiff being entitled, by that assent, to all the personalty. The fact that the executors did by this deed, not in their character of executors, but as devisees in trust, simply vest the mortgaged estates in the plaintiff, who was equitably entitled to the mortgage debts, does not make an *ad valorem* duty on the amount of the mortgage money payable. The only part of the deed effecting any transfer at all is that transferring the legal estate, and its operation does not bring it within the meaning of the Act requiring, upon the transfer of a mortgage, an *ad valorem* duty of 6 per cent., and therefore the plaintiff (or appellant) is entitled to the judgment of the court.

C. Hutton (with whom were the *Attorney-General* (Sir R. P. Collier, Q. C.) and the *Solicitor-General* (Sir J. D. Coleridge, Q. C.), was not called on to argue on the part of the Crown.

KELLY, C. B.—I think the Crown is entitled to the judgment of the court in this case. Two questions have been left to the court in this case by the Commissioners of Inland Revenue. The first is whether they should require that a stamp of 1*l.* 10*s.* should be affixed to the deed, in respect of certain gas shares, which, on the face of the deed are purported to be assigned thereby? Now the deed is upon the face of it an assignment of the shares in question, and therefore *primâ facie* it is within the express words of the Act of Parliament. Then it is said, and truly, that it may well be that this instrument in effect passes nothing, for such may be the constitution of the gas company, that the deceased may have had only an equitable interest in the shares; and that equitable interest would have passed by his will to his executors, and by this conveyance would pass from his executors to the now appellants. Still, another transfer might be necessary, and if we were acquainted with the whole of the circumstances of the case, it might turn out to be a case in which this transfer, or rather this deed, so far as regards the gas shares, would be of no effect whatever, and that in order to vest the gas shares in the appellant, another transfer on which this duty would be payable would be necessary. But we have not this fact before us, and we must deal with the case as it appears before us, and that is, that certain gas shares, which we assumed to have been the property of the executors, have been legally vested in them, and by this instrument they have transferred them to the appellant, and that thereunder there is a complete transfer, which is liable to the duty imposed by the Act of Parliament. The other question, relating to the mortgage debts, appears to be equally clear. First of all, this deed is, upon the face of it, a technical, substantial, and real act of transfer of the mortgages in question, and, as such (as I observed with regard to the question upon the gas shares), it is clearly within the language of the Act of Parliament, and requires an *ad valorem* stamp of 6*d.* per cent. upon the amount of the mortgage money. Well, then it is said that, partly under this deed, and possibly independently of the deed, and under the will, whatever appears on the deed to have taken place with reference to the satisfaction of the debts and legacies, and the transfer of the remainder, over to the residuary legatee that the equitable interest in the mortgage-deeds had been transferred, and had, in some way or another, become the property of the appellant. That may be so, and I do not entertain any doubt that, upon this instrument, and upon its recitals, supposing them to be true, the appellant had on this deed an equitable interest in the mortgage money which entitled him, if he though fit to question the propriety of conduct, or fitness for the office of executors or trustees of the persons in question, and to have applied to the court of equity to compel them to assign the mortgages to the appellant. But that is not the question. If he be content with the equitable title which he possesses, and is willing to leave the mortgages and the legal estate in the trustees, in whom they have been vested by the will, he can do so, and, indeed, no conveyance is necessary. But if he should think fit (and it is very natural to suppose that he should so think fit) to become possessed of the mortgage-deeds themselves, and to have the actual holding of the instruments, in case he should be desirous of putting them in force in a court of law or otherwise; and, moreover, he is desirous of securing to himself the legal estate in the mortgaged premises to enable him to do that which he otherwise would not be able to do, that is to say, in the case of moneys being about to fall into arrear, and his desiring to enforce the mortgage that he may be able to bring ejectment and recover possession of the premises, then he calls upon the trustees to assign, and if the trustees are willing to comply with his wishes and do assign these mortgages, it is strictly within the meaning of the Act of Parliament so as to make him liable to the duties in question. I think the case is altogether, upon both points, free from doubt, it being within the express terms of the Act of Parliament; and that, in both respects, the Crown is entitled to our judgment.

BRAMWELL, B.—I am of the same opinion. I think the deed is within the description in the Act of Parliament. Then Sir John Karslake says that, nevertheless, it ought not to pay a transfer duty,

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either upon the transfer of the mortgages or of the shares, because it does not transfer them. Well, whether that would be a good argument in that case I am sure I do not know; but it is ill-founded in point of fact, because it *does* transfer them. Sir John Karslake has endeavoured to show that there had been, under this will, a transference of these shares and mortgages specifically to Hall; and no doubt, if there had been, nothing further would have been necessary than for the executors to have vested them in the legatee. But they are not legacies to Hall at all. They are legacies in trust for Hall, with certain other trusts, but ultimately in trust for Hall. Therefore, I think, Sir John Karslake fails. It seems to me absurd that a transfer of this sort should be necessary; but the testator has thought it right to leave his property in such a way that a transfer from his trustees and executors is necessary. This ought to be a warning to testators to take care, for the future, not to leave their property in trust, but to leave it specifically to the person entitled to it. This testator having thought fit to leave it in this way, it is necessary for the trustees to execute a transfer, and the Legislature has put this stamp upon it.

CHANNELL, B.—I am of opinion that the Crown is entitled to our judgment. Where property is specifically bequeathed to A., the property will not pass as a matter of course, there being executors under the will, until those executors have assented to its passing, because they are entitled to the property, they having first of all to pay all debts, funeral, and testamentary expenses and so on; and I do not propose to interfere for a moment with the rule that, in such a case, the assent of the executor, as soon as it is given, will vest the property in the legatee named in the will, and taking as legatee. In this case, executors are appointed under the will, and the same persons who are made executors are made devisees in trust, ultimately for Mr. Hall the appellant. It appears to me that that being so, the rule of law that applies in favour of a legatee who ultimately takes from the executor, is *primâ facie* a good rule of law. I think, in point of fact, that the assent of the executors, as presented to us by Sir John Karslake's argument, does not make the deed unnecessary, the assent of the executors not being applicable in the present case.

CLEASBY, B.—I merely add this, by way of illustration, to show what the effect would be of holding that, if people thought it fit and right, in such a case as this, to take a deed of transfer, it ought not to have a stamp, Supposing the deed to be produced on a trial on some future occasion, the officer of the court looks at it and says, "It is not stamped," and counsel objects to it. Then counsel on the other side says, "You must not object to this, I am prepared to give evidence to show how it was that this deed was given;" and then he is ready to go into the particular circumstances under which the deed was given, in order to show that it was not necessary that there should have been a transfer. How the judge is to try it, and how the parties are to investigate it, I really cannot say. The only safe course would be to hold that the deed, being a transfer of a mortgage, a stamp ought to be put upon it. If the parties choose to put it in that shape so as to make it a transfer, they cannot take it as a transfer without paying the stamp.

Judgment for the Crown.

Attorney for the plaintiff, *R. Dickson*, 20, Bedford-row, W.C.

Attorney for the defendants, the *Solicitor of Inland Revenue*, Somerset-house.

BANKRUPTCY.

NEWCASTLE DISTRICT COURT OF BANKRUPTCY.

(Before Mr. Commissioner ABRAHALL.)

Re JAMES DOWNIE.

Application to dismiss a petition for adjudication of bankruptcy after registration of a trust deed.

The court, in sect. 3 of the Bankruptcy Amendment Act 1868, held to mean the court described in sect. 8 as having jurisdiction under trust-deeds, and to be the proper court to which application for further time to register a deed should be made, after a stay of proceedings under a petition for adjudication of bankruptcy filed pending the time allowed for registration, and which application should be made before the expiration of such time.

The proceeding referred to in sect. 8 as not impeachable held to mean one subsequent to registration.

Application to a district court to dismiss a petition for adjudication, on the ground that a trust-deed had been duly registered by order of a London Commissioner made on an application for extension of time, subsequently to the expiration of the time allowed for registering the deed, refused. Costs to abide event of an appeal. Choice of assignees meanwhile postponed.

In this case, pending the time for registration of a trust deed, a creditor filed a petition for adjudication of bankruptcy, in which the proceedings were stayed for twenty-eight days ending the 30th June. The deed not having been registered within the time allowed, the proceedings in the bankruptcy were resumed on the 1st July. On that day an application was made to the court in London for an extension of the time for registration, which was granted by Mr. Commissioner Bacon, and in pursuance of his order, on the 2nd July, the Chief Registrar gave his certificate of registration. Some days after, an application was made to the district court to dismiss the petition for adjudication, on the ground that the deed had been registered. This the commissioner of the district court declined to do, for reasons which will appear in the following judgment:—

HIS HONOUR.—I am asked to dismiss the petition for adjudication of bankruptcy in this case, on the ground that a deed of arrangement by the debtor has been duly registered under the provisions of the Bankruptcy Act 1861, and of the Bankruptcy Amendment Act 1868, which are to be construed as one Act. The court upon which sect. 3 of the Amendment Act confers the power to allow further time for the registration of a deed, means, I apprehend, the court that by the terms of sect. 8 of the same Act, is to have and exercise all jurisdiction given by either Act, under the deed; the court, within the district of which the arranging debtor resides, and in which a petition for adjudication of bankruptcy against himself would at the time of the execution of the deed be required to be filed—in this case the Newcastle District Court—and, as it seems to me, for a very obvious reason, that it must be supposed to have better opportunities of judging of the propriety of granting any extension of the time for registration, than the court in London can be expected to have, upon a mere *ex parte* application. This clause, after describing the court that is to have jurisdiction under the deed, contains a proviso that, with a view to placing trust-deeds (as far as may be, having regard to the different modes of administration) on a par with petitions for adjudication of bankruptcy, empowers the London court to direct applications under any

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deed to be prosecuted in any court without regard to the district in which the debtor resided, or carried on business, &c., in analogy to the 88th section of the Act of 1861, which gives the London Court power to direct the prosecution of petitions in bankruptcy in any district other than the one in which the bankrupt shall have resided, or, &c., and to transfer the proceedings under them from any one court to another. The concluding proviso in this 8th section of the Amendment Act, as to the unimpeachable nature of proceedings *bonâ fide* taken in any court, the jurisdiction appearing to be in some other court, I understand as meaning proceedings subsequent to registration, or in relation to a change of districts, on discovery of such a mistake as is supposed, in which case the papers are made transmissible to the proper court; but I do not understand it as having any reference whatever to such an application as one for extending the time for registration. The time for registering the deed in this case expired on the 30th June, and the proceedings in bankruptcy which I had stayed up to that time revived, and were resumed on the 1st July. On that day, the court in London was moved to extend the time for registration, which being granted by Mr. Commissioner Bacon, the chief registrar issued a certificate of registration, dated the 2nd July, and a short time after I am asked to dismiss the petition. Now, even supposing the court in London, which is only however co-ordinate with the District Court, to have had jurisdiction, it must have been exercised after the expiration of the time allowed for registration, and whereas the application and order upon it should have been made prior to that event. A case was quoted to me in which the judges of the Court of Queen's Bench had decided that such an application might be granted after the expiration of the twenty-eight days. That, however, was in the case of a deed under the 194th section of the Act of 1861, enacting that deeds must be registered in order to be receivable in evidence. I think such deeds are distinguishable from deeds under the 192nd section, which provides the conditions upon which their validity is to depend. In case of a petition in Bankruptcy being presented against a debtor under such circumstances, the proceedings may be stayed, in the discretion of the court (either in London or the country, as the case may be), the words being, "if the court shall think fit;" and if in any case belonging to a country district, the London Court is, on an *ex parte* application, to extend the time for registration, without reference to the district, and that after the expiration of the time to which the proceedings in bankruptcy have been stayed, where is the limit to be fixed? *Pari ratione*, the time for disputing the validity of an adjudication, under the Consolidation Act is seven days, or such extended time not exceeding fourteen days in the whole as the court shall think fit, the application being required to be made within twenty-one days. A certain limit is fixed, and if the London court has the unlimited power which I am questioning, its exercise must frequently occasion great additional expense, and tend to the encouragement of further abuses. Whatever, therefore, may be the law in cases of deeds under the 194th section of the Act of 1861, I do not think I am wrong in saying it is inapplicable to those under the 192nd section, especially in a case like this, where a creditor's petition for bankruptcy has been filed pending the time allowed for registration. I am therefore of opinion, with the utmost respect, however, for that of Mr. Commissioner Bacon, that the London court has acted in this case *ultra vires*, and that it could only have jurisdiction to extend the time for registration in the matter of a deed executed by an arranging debtor resident within the London district. I must then decline to dismiss the petition for adjudication in bankruptcy, the trust deed not having, as I think, been duly registered within the meaning of the 199th clause of the Bankruptcy Act 1861, the time for registration not having been extended by the proper court within the 3rd and 8th sections of the Bankruptcy Amendment Act 1868. The trustee having intimated an intention to appeal, for which I am desirous of affording every facility, I will postpone the choice of assignees to abide the event, and meanwhile reserve the question of costs.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

July 6 and 20.

(Before Lord PENZANCE, J. O.)

MUMBY v. MUMBY.

Dissolution suit—Alimony pendente lite—No answer to petition—Respondent's capacity proved by affidavit—Practice.

In a case where the husband had filed no answer to his wife's petition for alimony, the court to save expense allowed the wife to prove the husband's faculties by affidavits; but it required that the husband should have notice of the filing of the affidavits served on him, and also of the motion to ask for alimony upon them.

The wife in this suit petitioned for a judicial separation, and the husband, who is a quack doctor, at Hull, did not answer. A petition for alimony was filed, in which the wife stated that her husband was earning an income of 250*l.* a year from his business, and to this petition the husband filed no answer.

Swabey, for the petitioner, moved the court for leave to prove the husband's income by affidavits, on the ground that the cost of bringing witnesses from Hull would be considerable, and that she had no means of her own to defray the expense.

Lord PENZANCE, J. O.—I think, in order to save the expense of bringing up witnesses from the other end of the country, the motion should be granted. But you must give notice to the respondent that you have filed affidavits in the registry where he can see them, and also that you intend to ask the court to allot alimony upon them.

Subsequently, affidavits were filed, and on July 20th alimony *pendente lite* was granted at the rate of 50*l.* a year.

Attorney for petitioner, *J. Yarde.*

Tuesday, July 20.

(Before Lord PENZANCE, J. O.)

MILFORD v. MILFORD.

Judicial separation—Wife's suit—Permanent alimony—Custody and maintenance of children—20 & 21 Vict. c. 85, s. 35.

*Where the wife had obtained a decree of judicial separation by reason of the gross and profligate adultery of the husband, though his father and sister offered to take charge of the children—two daughters aged ten and twelve—and to educate them suitably, the court declined to deprive the mother of their custody. And in addition to permanent alimony at the rate of one-third of the joint income, of which the wife contributed nearly half, it ordered the husband to pay 30*l.* a year towards the maintenance and education of the children.*

This was originally the wife's suit for dissolution of marriage on the ground of her husband's cruelty

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and adultery. It was heard in Dec. 1866, and the wife proved a case of gross and profligate adultery against her husband, but failed to establish the charge of cruelty. The court pronounced a decree of judicial separation, which was confirmed by the House of Lords on appeal.

The wife now applied for permanent alimony, and an allowance for the maintenance of two daughters aged ten and twelve years. The income of the respondent was reported by the registrar to be 550*l.* a year, and the separate income of the wife 248*l.* a year. The registrar's report was not disputed. The father and sister of the respondent filed affidavits stating their willingness to take charge of the children, and to bring them up in a manner suitable to their station.

Dr. *Spinks* (Dr. *Tristram* with him) on behalf of the petitioner, urged that she was entitled to one-third of the joint income; and that as no misconduct had been proved against her, she was also entitled to the custody of the children.

Dr. *Deane* (*Searle* with him) submitted that the children would be benefited by being placed under the charge of their grandfather, and that if the wife insisted on retaining them in her own custody, she was not entitled to any allowance for their maintenance. They cited

Marsh v. *Marsh*, 1 Sw. & Tr. 312;
Boynton v. *Boynton*, 1 Sw. & Tr. 324; 4 L. T. Rep. N. S. 258;
Whieldon v. *Whieldon*, 2 Sw. & Tr. 388; 5 L. T. Rep. N. S. 138.

Lord Penzance, J.O.—I am clear in this case that the children ought not to be taken away from the wife and handed over to the husband's father, and for this simple reason—that the wife was clearly without blame in the suit. No charge is made against her, and she has done nothing whatever to forfeit her natural rights as a mother in the indulgence of her affections in the possession and care of her children. All that has happened in the case has been the husband's doing. He was proved to have lived a very profligate life, and the wife has obtained a decree of judicial separation on the ground of that profligacy. In considering what ought to be done in regard to the custody and maintenance of the children, the court always looks to see whose fault it was that led to the breaking-up of the common home. In this case it was undoubtedly the husband's fault. Not only did he so act as to bring about the separation, but his misconduct was such that the court could not possibly place these two children, both of them girls, under the control and supervision of such a man. All these cases must depend on their circumstances. It is impossible to lay down a principle one way or the other; but I am clear, from the reasons I have stated, that the children ought to live with their mother. The next question is, whether any allowance ought to be paid by the husband towards their maintenance? Looking at the circumstances I have mentioned, the disqualification of the husband and the fact that his home could not be a proper resort for his children, and looking also at the incomes, I think that I ought to make some allowance. I allot to the petitioner permanent alimony at the rate of 266*l.* a year (one-third of the joint income), and in addition the respondent must pay 30*l.* a year towards the maintenance of the children, both orders to go from the date of the decree.

Attorneys for petitioner, *Shepheard* and *Son*.

Attorneys for respondent, *Harrison*, *Beal*, and *Harrison*.

COURT OF PROBATE.

Reported by W. Leycester, Esq., Barrister-at-Law.

Tuesday, June 15.

(Before Lord Penzance.)

Wright v. Rogers and Goodman (Winterbotham intervening).

Will—Due execution—Signature in presence of attesting witnesses—Surviving attesting witness adverse—No other evidence forthcoming—Probate.

A testator made a will, drawn by a competent solicitor from his instructions. It was attested by the solicitor and his clerk. For the purpose of obtaining probate in common form, the solicitor made an affidavit as to execution which was prepared by the other attesting witness. The solicitor died a short time afterwards, and the other attesting witness then for the first time stated that the will had not been attested in the presence of the deceased. There was no evidence the other way, and the court, under all the circumstances, not being satisfied with the evidence of the surviving attesting witness, granted probate.

T. Pearce, of Albion-grove, Barnsbury, in the county of Middlesex, died April 4, 1868, leaving a will bearing date April 2, 1868, of which the defendants were appointed executors.

It was prepared by Mr. C. Bell, a solicitor, from the testator's instructions, and the attestation clause was in the following form:

Signed, published, and declared by Thomas Pearce, the testator, in the presence of us, and in the presence of each other (all being present at the same time), who at his request, and in his presence, have subscribed our names as witnesses hereto.—C. Bell, solicitor, 36, Bedford-row, London; J. E. Haynes, clerk to the above-named C. Bell.

On April 23, 1868, the defendants, as executors, took out probate in common form, and Mr. Bell, the attesting witness, who had prepared the will, made an affidavit as to the execution and certain interlineations. This affidavit was made in a printed form, the body of which was filled up by Haynes, the other attesting witness, and signed by Mr. Bell. He died March 17, 1867, and his business was taken by the firm of Belfrage and Middleton. At the request of Mr. Middleton, Haynes drew up the following statement of the circumstances attending the execution:

I accompanied Mr. Bell in a cab to Mr. Pearce's, and on the street door being opened we were admitted into the house by Miss Whipp, and shown into the parlour. Mr. Pearce was lying on a bed in the front parlour, and Mr. Bell went to the bedside. I waited in the back parlour, and at that distance I observed what took place, the parlours having folding doors, which were thrown open, and enabled me to do so. Mr. Bell first read to the deceased or said something to him about a deed of revocation, and laid it down on the table, and then he read the will. When Mr. Bell had finished reading the will he beckoned to me to come into the front room, and the bell was rung for pen and ink. Miss Whipp answered the bell (she had been previously requested by Mr. Bell to retire), and produced the pen and ink, and raised the testator up, and so held or supported him while he executed the will. Having executed the will the testator sank down in the bed in a very exhausted state, and as I thought in a dying state, and Mr. Bell seemed to have the same impression, for he said to me on retiring to the back room, "that was a very near thing." Miss Whipp remained in the front parlour, and was shortly afterwards joined by Mr. Bell. After waiting in the back parlour about an hour, I saw Miss Whipp beat an egg and mix it with a liquid which she put to testator's mouth, and he swallowed it. He appeared to revive a little, but not sufficient to be enabled to sit up, and Miss Whipp tried to raise him in bed, but was not strong enough, whereupon she summoned Mr. Windred into the room, who lifted Mr. Pearce into a sitting position, in which position Miss Whipp supported him, and Mr. Windred left the room. The testator then received the pen from Mr. Bell and executed the revocation; but being too weak to write, Mr. Bell directed me to guide the testator's hand, and the matter was completed. The anxiety consequent upon Mr. Pearce's condition, and my and Mr. Bell's watchfulness for the opportunity to get the deed of revocation executed, which *pro forma* should have

been done before the execution of the will, caused us to neglect the attestation of the will in the presence of the testator. In fact, neither the will nor the deed of revocation was attested until we returned to the office; for as soon as the deed of revocation which had been so anxiously watched for had been executed, Mr. Bell hastily snatched up both documents unattested. Mr. Bell being anxious to get back to his business, we hastily left the testator's house, jumped into a cab, and returned to the office; and upon arriving at the office I immediately pointed out to Mr. Bell that the will had not been attested, whereupon Mr. Bell said, off handedly, that it did not matter, and at Mr. Bell's request both the deed of revocation and the will were attested by us at Mr. Bell's office in Bedford-row.

In his first draft of this statement Mr. Haynes said nothing about the attestation, either of the will or of the deed of revocation, but when his attention was called to the matter by a note in the margin by Middleton, "Query, whether the will was attested in the front or back room," he then added the further particulars as to the attestation taking place in Mr. Bell's office.

The probate granted in common form was called in at the instance of the plaintiff, and the defendants—the executors then propounded the will. In opposition the plaintiff pleaded that the will was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

The case was heard before Lord Penzance on June 15.

Keane, Q.C. (Dr. *Swabey* with him) for the plaintiff.

Dr. *Spinks*, Q.C. (Dr. *Tristram* with him) for the executors.

Ballantine, Serjt. and *Inderwick*, for the intervener, beneficially interested under the will.

Haynes, the surviving attesting witness, was called, and gave the same account of the execution as that contained in his affidavit. In cross-examination he stated that he had witnessed other wills, and that Mr. Bell was a gentleman of great experience in such business.

Lord PENZANCE.—The will in question was made by the testator on the 2nd April 1868, in the presence of an attorney and his clerk. It was drawn by the attorney, a gentleman of large practice and forty years' experience, it was copied by his clerk, and it has a perfect attestation clause. So far as presumption is concerned, *prima facie* there could not be a stronger case upon which the court would properly presume that the will was duly executed. But the matter does not end there, because, after the death of the testator, an affidavit was drawn out by Mr. Bell to swear to; the written facts of it were filled in by the clerk, and the facts so filled in by him, coupled with the printed matter, represented that the will was duly executed—that it was signed by the testator in the presence of the witnesses, and that the witnesses signed in his presence. The will was then proved; Mr. Bell died, and two or three days after his death Mr. Middleton, whose position in the matter I do not know, but who was then the employer of Haynes, asked him to make a statement in writing of the circumstances under which the will was executed; and thereupon Haynes made the statement which now lies before me. [His Lordship read the statement and continued.] This statement having been made, and Mr. Middleton observing that nothing was said about the attestation, put this query in pencil, "Was the will attested in the front or back room?" I asked Haynes whether he had told anyone as to the defect in the attestation, because, if he had, it might have come to Mr Middleton's ears, and might have led him to make this inquiry; but it appears that Haynes had never mentioned it to anybody, and therefore the query by Mr. Middleton was rather a curious one. It may, however, have been a perfectly proper inquiry, and the court is not disposed to place much reliance on it. The query was put down and answered, and when in the witness-box, Mr. Haynes repeated the story. Now, I think too much has been said about his coming here with a fraudulent desire to conceal the truth. There is another, and, as I think, a more proper question to ask, namely, whether the court can rely altogether upon his memory in this matter. There was a deed to be signed as well as the will, and he may have mixed up the two things, and so satisfied himself that the will was not attested in the presence of the deceased, when the circumstance may have occurred only in the case of the deed. The presumption, as I have said, is in favour of the will. The presumption is of course capable of being rebutted; but when two persons, one of them a professional man of large experience, who well understood what the law required, have signed an attestation clause duly worded, the court ought to have the strongest evidence to induce it to believe that the statement in the clause is not true. Nothing would tend more to greater uncertainty in the proving of wills than the contrary practice, and the consequence is, that where there is a duly worded attestation clause, the court is always in the habit of presuming as largely as possible in favour of the due execution of the instrument. The proof of the due execution lies upon those who set up the will, and when the two attesting witnesses come and swear that the will was not duly executed, and there is no evidence the other way, the court has nothing upon which to take its stand in maintenance of the presumption. That was the case in *Croft* v. *Croft*, 34 L. J., N. S., 44, P. & M.; 4 Sw. & Tr. 10. In this case the court has the evidence of only one witness to the fact that they did not sign in the presence of the deceased; and when I find that he stood by and assented to an affidavit made by his fellow witness to the effect that the will was duly executed, and also remained so long without disclosing the alleged defect in the attestation, I cannot rely upon his recollection of what took place. Under all the circumstances, I am not satisfied with the evidence, and I shall therefore hold that the will was well executed.

Attorneys for plaintiff, *Hensman* and *Nicholson*.

Attorneys for defendants, *Belfrage* and *Middleton*.

Attorney for the intervenant, *J. Taylor*.

In Parliament.

Reported by FREDERICK CLIFFORD, and PEMBROKE S. STEPHENS, Esqrs., Barristers-at-Law.

COURT OF REFEREES ON PRIVATE BILLS.

Monday, April 19.

(Before Sir E. COLEBROOKE, M.P., Chairman; Mr. ST. AUBYN, M.P., and Mr. RICKARDS.)

LONDON AND NORTH-WESTERN RAILWAY BILL.

Objections to *locus standi* of LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railways—Extension of branch already authorised—Competition—S. O. 127.

Two railway companies competed for traffic between the towns of M. and B. the distance by the L. and N. W. route being seventeen, and by the L. and Y. route under eleven miles. In 1865 *the L. and N. W. Co. promoted a Bill for a branch which stopped about midway between the two towns, and they now proposed by an omnibus Bill to extend the branch to B., thus com-*

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pleting a new route, and reducing the distance from seventeen to twelve miles. The L. and Y. were allowed a locus standi against the Bill of 1865, *and it was now contended that their appearance at that time shut them out from opposition to a mere prolongation of the branch line then authorised.*

Held, however, that they were entitled to a locus standi against the present Bill.

In 1865 the Lancashire and Yorkshire Railway Company were allowed to be heard, on the ground of competition, against a Bill promoted by the London and North-Western Railway Company for a line called the Little Hulton line, stretching northward from a point in their system towards Bolton. Parliament having then authorised the construction of that line, the London and North-Western Company now promoted an omnibus Bill, which, amongst other things, sought to extend the Little Hulton line to Bolton. The lines of both companies already communicated with Bolton and Manchester, but the distance between Manchester and Bolton by the Lancashire and Yorkshire Railway was ten miles and three quarters, and by the London and North-Western Railway, *viâ* Tyldesley, seventeen miles. The proposed extension would reduce the distance on the promoters' system from seventeen to twelve and a half miles. The Lancashire and Yorkshire Railway Company petitioned against the Bill on the ground (*inter alia*) of competition.

It was objected to their claims for a *locus standi* that "the Bill does not contain any provision for taking, using, or interfering with any lands, railway stations, works, or accommodation of the petitioners, or for running engines or carriages upon or across the same, or for granting other facilities over or in respect of the railway of the petitioners;" that it did not allege any ground of competition which entitled the petitioners to be heard; that the powers sought by the Bill did not alter, prejudice, or affect any property, right, or interest of the petitioners, and if otherwise were not such as entitled the petitioners to be heard against the Bill.

Pope, Q. C. for petitioners.—The principal traffic between Bolton and Manchester is now carried on the Lancashire and Yorkshire line. The London and North-Western Railway now competes with us for the Bolton traffic, and on that ground we were allowed a *locus standi* against their Little Hulton line. In committee, however, the London and North-Western met our case by saying it would be time enough to object to their running direct to Bolton when they proposed to do so. If the petitioners had a *locus standi* against the Little Hulton branch when it stopped short of Bolton, *à fortiori* they have a *locus standi* when the line is to be extended to Bolton.

Merewether, Q. C. for promoters.—There is no *scintilla* of a case for a *locus standi* on the ground that we take or use any lands or works of the petitioners, who claim upon the ground of competition alone. Standing Order 127 no doubt gives the court the largest discretion to admit parties on that ground. But here, if the petitioners have any complaint to make as a competing line, they had an opportunity of making it when the Bill for the Little Hulton branch was passed. That authorised line carried the London and North-Western Company something like half-way on the more direct road to Bolton, and we are merely proposing to prolong a line upon which, as the petitioners admit, the question of competition was fought; the fact being that, when in committee in 1865 we were charged with an intention to go to Bolton, we answered through the mouth of our witness, Mr. Cawkwell, that we had a right to go there. Competition between the two companies for the Bolton traffic exists already upon lines now constructed; and that being so, have we not a right to shorten our distance from Bolton without new opposition from the petitioners?

Locus standi allowed.

Agents for petitioners, *Dyson* and *Co.*

Agents for Bill, *Sherwood* and *Co.*

DUNDEE HARBOUR BILL.

Objections to *locus standi* of CALEDONIAN RAILWAY COMPANY.

Harbour works—Interference with railway—Landowner—Temporary occupation of land—Railways Clauses Consolidation Act 1845.

A temporary occupation of land by the promoters of a Bill for the purposes of their undertaking, gives to petitioners against the Bill no right to a locus standi.

Thus, where the Harbour Board of D. proposed a temporary occupation of land within certain specified limits, which included the petitioners' line of railway:

Held, that the petitioners, who alleged that ground of opposition, could not be heard against the Bill.

The petitioners alleged (*inter alia*) that it was proposed to incorporate in the Bill the clauses of the Railway Clauses Consolidation (Scotland) Act 1845, with respect to the temporary occupation of lands, and that it was provided that the limits within which the harbour trustees might exercise the powers conferred by these clauses should extend to 200 yards from any part of the works authorised by the Bill, which limits would embrace the petitioners' line of railway along the greater part of the northern side of these works.

They further alleged "that the powers given by the said clauses are compulsory and of a very extensive character, and would give the trustees power, for any purpose connected with the construction or repair of the works, to interfere most inconveniently and most injuriously with your petitioners' railway and lands; and this power or interference is aggravated by the fact that there is no time limited in the Bill within which the said works are to be completed, so that the trustees will not only be enabled to enforce these compulsory powers against your petitioners, but to exercise the same at any future time when they think proper; and your petitioners will never be safe from the operations of the trustees, however injurious they may be to their railway."

The *locus standi* of the petitioners was objected to on the following grounds:—

1. The works intended to be authorised by the Bill will not affect or interfere with any railways, works, or property belonging to the petitioners.
2. The Bill does not affect or interfere with any railway property, rights, or privileges belonging to the petitioners.
3. The Bill does not alter or repeal any statutory provision now in force for the protection or benefit of the petitioners.
4. The petitioners have not alleged in their petition any valid or sufficient grounds for being heard against the Bill.

Mundell, Q.C., for petitioners.—We are entitled to be heard against the proposed powers for the temporary occupation of our land under Standing Order 129, which says that "where a railway Bill contains provisions for taking or using any part of the lands, railways, stations, or accommodations of another company, or for running engines or carriages upon or across the same, or for granting other facilities, such company shall be entitled to be heard upon their petition against the preamble and

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clauses of such Bill." By sect. 27 of 8 & 9 Vict. c. 33 (Railways Clauses Act (Scotland), incorporated with the Bill, the harbour trustees could actually use for temporary purposes the station of the Caledonian Company, make roads across our railway, and regulate traffic.

Mr. RICKARDS.—Standing Order 129 applies only to railway Bills.

Mundell.—Incidentally the harbour trustees are the owners of a railway.

Mr. RICKARDS.—But you can hardly call this a railway Bill?

Mundell.—I cannot contend for that; but then the promoters have no right to incorporate part of the Railways Clauses Consolidation Act.

Mr. RICKARDS.—That is not an unusual course.

Mundell.—No; but if the promoters adopt it they must take that advantage *cum oneribus.*

Mr. RICKARDS.—Have we had any case before where it has been held that a temporary occupation of lands gives a *locus standi?*

Mundell.—It is a new point. But suppose the case were that of a landowner. Surely, though the decided cases refer only to a permanent taking of lands, an occupation of his land for temporary purposes would also give him a *locus standi.*

Clerk, Q. C., for promoters.—In cases where there is merely a temporary occupation for the purposes of the proposed works, no notice is given to the landowner. The petitioners say that, inasmuch as we ask for power to make a temporary use of their land within a certain distance of our works, they have a *locus standi*, because we might make a spoil-bank of their railway, or cross their line by a level crossing. But in no clause of our Bill do we propose to interfere with their railway, and what you are really asked to do is to introduce a new class of petitioners and allow every landowner to appear against a bill—though no part of his property may be scheduled, though he may have received no notice, and none of his land is required—on the plea that his land is temporarily affected in the construction of a railway or any other public work. In like manner any railway company so temporarily affected would be allowed to oppose any other railway Bill, though the company had no *locus standi* on the ground of competition of land taken, or any sort of interference.

Mr. RICKARDS.—Under the Railway Clauses Consolidation Act, if the promoters, in the course of their temporary occupation of land, do anything to obstruct the working of a railway, you can apply to the justices and obtain a summary remedy.

Locus standi disallowed.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

June 18 *and July* 15.

(Present: The Right Hon. Lord ROMILLY, M.R., Sir WILLIAM ERLE, Sir JAMES W. COLVILE, and Sir JOSEPH NAPIER.)

DROEGE and COMPANY, the consignees of the cargo laden in the ship *Karnak* (apps.) *v.* STUART and SIMPSON, the legal holders of a bottomry bond upon the ship *Karnak*, her freight and cargo (resps.)

THE KARNAK.

Bottomry—Necessity for hypothecation of cargo—Possibility of communication with owners—Advances of freight—Commission for obtaining charter.

A ship, on a voyage from Galveston, United States, to Liverpool, put into Bermuda disabled. The master wrote to the owners of the ship and cargo, and meanwhile, to avoid delay and loss, commenced repairing the ship. The repairs were completed, and the master then, fearing detention of the ship, and having received no replies from the owners of the ship and cargo, raised money to pay for the repairs on bottomry of the ship, freight and cargo. The lenders were not the repairers of the ship. In a suit by the bondholders against the owners of the cargo:

Held (affirming the judgment of the court below), that the bond was valid and bound the cargo.

The necessity, which will validate the hypothecation of a cargo by bottomry, is a high degree of need, arising when choice is to be made of one of several alternatives, under the peril of severe loss, if a wrong choice should be made. And any combination of events which should prevent the completion of the voyage with profit, unless money should be obtained by bottomry, would raise the question whether there was need for bottomry in such high degree as to create a necessity. If, though the repairs are complete, yet the ship cannot leave the port until they are paid for, the completion of repairs is an immaterial fact in estimating the degree of need for bottomry.

The possibility of communication with the owners of the ship or cargo must be construed by estimating the cost and risk incidental to the delay from the attempt to make such communication, and the probability of failure, after every exertion made.

Advances, not stipulated for in the charter-party, were obtained by the captain from the charterer. The receipt, given by the former, promised to pay the said advances "out of the proceeds of the present freight, with the addition of 10l. per cent. per annum and charges for insurance:"

Held (reversing the judgment of the court below), that the sums obtained were advances of freight to be repaid by deductions from freight, if earned; and if not earned, then to be lost by the charterer, unless he should have used the stipulated premium in insuring.

A usage to establish a right to deduct commission for obtaining the charter from the freight as against the holder of a bottomry bond, must be distinctly proved.

This was an appeal from a decree of the judge of the High Court of Admiralty, in a cause of bottomry.

The circumstances out of which the appeal arose were shortly as follows:

The suit was instituted in the court below by the respondents, as the legal holders of a bond of bottomry on the *Karnak*, her cargo and freight.

The bond in question was executed on the 17th April 1867, by the master of the *Karnak*, in favour of Mr. John Bluck. The *Karnak*, which was a British vessel, of 267 tons register, was then lying at the port of St. George, in the island of Bermuda, into which port she had been compelled to put in a state of distress, having sustained damage whilst prosecuting a voyage from Galveston, in the United States of America, to Liverpool, with the cargo in question, which consisted of cotton, and was very valuable.

The bond was given to secure the payment to the said Mr. John Bluck of the sum of 2690*l.* 6*s.* 1*d.* advanced by him to the said master, for the purpose of enabling the *Karnak* to pursue the voyage, and a premium thereon at the rate of 20*l.* per centum, making in the aggregate the sum of 3228*l.* 7*s* 3*d.*, and was made payable after the safe arrival of the *Karnak* at Liverpool, in case certain bills of exchange given to the said Mr. John Bluck as a collateral security should not be paid.

The *Karnak* proceeded on and completed her

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voyage, and arrived safely at Liverpool. The said bills were not paid, and according to its tenor the bond became payable.

The appellants, as consignees or owners of the cargo, entered an appearance and opposed the bond, so far as regarded the cargo, which was released upon bail being given by them.

No opposition to the bond was offered by the owner of the *Karnak*; and the *Karnak* was sold by order of the court at the instance of the respondents. Claims having priority to the claim of the respondents were, by order of the court, paid out of the proceeds of such sale, and the net proceeds of such sale, available for the payment of the bond, were reduced to the sum of 512*l.* 11*s.* 9*d.* By a decree made by the court below, on the 12th Nov. 1867, the court pronounced for the validity of the said bond, so far as regarded the *Karnak* and her freight in the amount due thereunder and in costs.

Under an order of the court below, the appellants were ordered to bring into court the freight due for the carriage of the said cargo. The total freight which became due at Liverpool for the carriage of the said cargo amounted, according to the contention of the respondents, to the sum of 1356*l.* 14*s.* 6*d.*

Pursuant to such order, the appellants brought into court the sum of 628*l.* 15*s.* 3*d.* in respect of such freight, and they claimed to retain the sum of 727*l.* 19*s.* 3*d.* made up as follows, namely: the sum of 633*l.* 14*s.* 2*d.* in respect of an alleged advance of freight made to the master of the *Karnak* at Galveston, and the sum of 61*l.* 6*s.* 9*d.* for interest and insurance on the said alleged advance, and the sum of 33*l.* 8*s.* 4*d.* in respect of a commission on the charter-party of the *Karnak*. The respondents denied it to be the fact that any such advance of freight had been made, and further contended that the master of the *Karnak* had not any authority to receive payment of his freight in advance.

The respondents by their petition prayed the court below to pronounce for the force of the said bond, so far as regarded the said cargo, to direct the appellants to pay into court the said sum of 727*l.* 19*s.* 3*d.*, and to order such sum to be paid to the respondents in part satisfaction of the same bond, and to condemn the appellants (as consignees or owners of the said cargo) and their bail, in the balance which should then remain due on the said bond, together with interest and costs.

The appellants, by their answer, contested the validity of the bond, so far as regarded the cargo, upon two grounds, viz.:—1. That the said sum of 2690*l.* 6*s.* 1*d.* was advanced by the said John Bluck, not before, but after all the expenses and charges, in respect of which the bond was given, had been incurred; 2. That the master had made default in communicating to the owners or consignees of the cargo the fact of his being in want of money, or of the necessity which would compel him to hypothecate the cargo if not supplied with money; and that there was no reasonable ground for his not making such communication before resorting to a bottomry bond on the cargo, and they further said that he ought even to have transshipped the cargo rather than to have hypothecated it.

The defence of the appellants to the claim of the respondents, to have the said sum of 729*l.* 19*s.* 3*d.* paid into court for their benefit, was in the 9th and following articles of this answer, which were as follows—

9. After the making of the charter-party in the 7th article of the petition mentioned, and whilst the *Karnak* was lying at Galveston, and before she departed on her chartered voyage, the defendants from time to time advanced to the said master, on account of necessary disbursements, certain moneys amounting in the whole to 632*l.* 14*s.* 2*d.*, and at the respective times of the making of the said advances as aforesaid, it was agreed between the said charterers and the said master, as follows (that is to say)—That the said advances should be made and taken *pro tanto* in part payment of freight, and that the owner of the said vessel should in no case whatsoever be liable to refund to the said charterers the said advances, and further that the costs of the insurances to be effected by the said charterer, as well as interest at the rate of 10*l.* per cent. per annum on the said advances, should be also deducted from and taken *pro tanto* in part payment of freight.

10. After the greater part of the said advances—(to wit) advances amounting to the sum of 596*l.* 12*s.* 6*d.*—had been made to him, the said master endorsed on the said charter-party a receipt of which the following is a copy:

Received of Messrs. Droege and Co., of here, the sum of 596*l.* 12*s.* 6*d.* pounds sterling, which I promise to pay, at Liverpool, to Messrs. Droege and Co., of Manchester, or their order, out of the proceeds of the present freight, with the addition of 10*l.* per cent. per annum and charges for insurance for the above-named sum.

(Signed) GEO. S. LOCKE.

11. The costs of insurance, and the interest on the said advances, as mentioned in the last preceding article, amount to the sum of 61*l.* 6*s.* 9*d.*

12. By a well-known usage, applicable to the afore-mentioned charter-party, the defendants are entitled to deduct from the freight and have a lien on the same for a commission on the said charter-party amounting to the sum of 33*l.* 18*s.* 4*d.*

13. At the time when the said John Bluck made the advance of the said sum of money mentioned in the first article of the said petition, he had notice that part of the freight had been paid in advance, and had notice, or could reasonably have had notice, of how much money had been advanced as aforesaid, in part payment of the freight; and also had, or could reasonably have had, notice of the charter-party by which the said vessel had been chartered as aforesaid.

The respondents, by their reply, alleged as follows:

1. The *Karnak* arrived at Bermuda, on the 17th Jan. 1867, in a disabled state, and upon her so arriving, her master applied for advice to Messrs. Hyland and Company, the agents there for the American underwriters, and he afterwards acted by their advice in and about the affairs of the *Karnak* and her cargo, and, by their advice, surveys were as soon as possible held on the *Karnak*. Very shortly after her arrival at Bermuda, the master of the *Karnak* despatched a letter to the agents of the ship, and also to her managing owner, at New York, informing them of the disabled state of the *Karnak*, and that he should require funds to pay for repairs, and he, from time to time afterwards, as opportunity offered, made further communications to her owners. He also, soon after the said surveys had been held, wrote and sent to Mr. Meek, of Liverpool, with whom he had been directed by Messrs. Droege and Company, of Galveston, the shippers of the cargo of the *Karnak*, to communicate, a letter informing the said Mr. Meek of the state of the *Karnak*, the repairs which would be necessary to fit her for sea, and the probable time it would take to effect such repairs. The said Mr. Meek and the defendants were, during the time that the *Karnak* was being repaired at Bermuda, in communication with the owner of the *Karnak* upon the subject of the said vessel.

2. The said master had no reason to doubt, and fully expected that the owners of the *Karnak* would duly furnish him with the funds necessary to enable him to pay for and discharge all necessary repairs and expenses. The *Karnak* was making water, and it was necessary to discharge a great portion of her

cargo, and to place her on the patent slip at Bermuda, and inasmuch as there was but one patent slip at Bermuda, for the use of which vessels have to wait their turn, and there were at the time many vessels at Bermuda requiring the use of the said slip, the master of the *Karnak* determined to proceed with the repairs of the *Karnak* before receiving any answer from his owners, and the repairs of the *Karnak* were accordingly commenced in the second week of the month of February 1867, and a large portion of her cargo was discharged and warehoused, and she was put upon the said slip.

3. The repairs of the *Karnak* were completed, or nearly completed, at the beginning of the month of April 1867, and it was not till then that the master of the *Karnak* had any reason to expect, or that he did expect that it would be necessary to resort to a bottomry bond; but in consequence of his not having received any reply to his said communications, he then found it necessary to raise money on bottomry, and he accordingly, on the 14th April 1867, caused to be sent to a great number of the principal mercantile houses in Bermuda, and among them to Mr. John Bluck, in the petition named, a circular in the words and figures following (that is to say):

CIRCULAR.

St. George's, 4th April, 1867.

Sir,—I am desirous of obtaining 2000*l.* to defray the outfit and disbursements of the brig *Karnak*, of Nassau, N. P., at this port hence to Liverpool. The *Karnak* is seven years old, rates A 2 good, is in every respect a staunch, sound vessel, and has had a thorough refit at this port. Her cargo consists of 720 bales of cotton, with a freight list of about 1400*l.*, will be ready for sea on or about the 11th inst. I will, therefore, be glad if you will inform me not later than Monday noon, 8th inst., whether you will advance the said amount to be secured on vessel, cargo, and freight by a bottomry and respondentia bond, and at what rate of premium of maritime interest.—I am, Sir, your obedient servant,

GEO. S. LOCKE.

4. In answer to such circular, various tenders were made by various mercantile firms, and amongst them was one by the said Mr. Bluck, which lastly-mentioned tender being the lowest, was accepted by the master of the *Karnak*, and thereupon the bond in question in this cause was given.

5. The cargo of the *Karnak*, which consisted of cotton, was a very valuable one, and belonged to various parties. It had been shipped at Galveston by Messrs. Droege and Co., of that place, under bills of lading, whereby it was to be delivered at Liverpool to their order or to assigns. If the master of the *Karnak*, when he so found it necessary to resort to a bottomry bond, had, before doing so, awaited the result of a communication with either Galveston or England, great delay would have been occasioned and a great loss on the said cargo might have, and in fact would have happened, inasmuch as he could not have received an answer from either Galveston or England within a shorter period than between two or three months. By the law in force at Bermuda, the *Karnak* was subject to a lien in respect of the repairs and advances which had been made and done to her, and had her master delayed payment for the same, the *Karnak* would probably have been proceeded against, and sold by and at the instance of the parties entitled to the benefit of such lien before the master could have received any answer from the owners or consignees of the cargo. The master of the *Karnak*, moreover, did not know who was the owner of the said cargo. Heavy expenses relating to the cargo had already been incurred, and the said cargo was subject to a lien for the warehouse, and other expenses thereon, which lien would have been increased in amount. The cotton market in England was falling. There was reasonable expectation that the *Karnak* and her freight would be of a value sufficient, or nearly sufficient, to defray the whole amount secured by the said bond. The *Karnak* left Bermuda for Liverpool on or about the 18th April 1867.

6. The plaintiffs deny it to have been the duty of the said master to transfer the said cargo, and further allege that he had not any opportunity of doing so.

8. The plaintiffs deny the truth of the statement contained in the 9th 10th, 11th and 15th articles of the said answer.

9. The plaintiffs deny the truth of the statement contained in the 13th article of the said answer, and allege that the said John Bluck made his advances upon faith of the statement contained in the said circular, as to the amount of the freight of the *Karnak*.

The substance of the material evidence is sufficiently stated in the report of the case and the judgment in the court below.

Pursuant to an order of the court the following document was produced by the appellants, being a receipt for the balance of the loan by Droege and Co. to the master of the *Karnak*, at Galveston, not included in the receipt indorsed on the charter:

Received, Galveston, Dec. 13, 1866, of Messrs. Droege and Co., the amount of 36 pounds one $\frac{1}{12}$ shillings British sterling, besides the amount of five hundred ninety-six pounds twelve $\frac{1}{12}$ shillings sterling, entered on the charter-party, thus making the total loan of Droege and Co. to me the amount of six hundred thirty-two pounds fourteen $\frac{1}{12}$ shillings British sterling, which with 10 % per annum interest from date, and the premiums of insurance, I promise to pay to the order of Messrs. Droege and Co., on my arrival at Liverpool, out of the proceeds of my present freight.

596*l.* 12*s.* 6*d.* entered on charter-party.
36*l.* 1*s.* 8*d.* paid to me to-day. GEO. S. LOCKE.

The cause was heard on the 13th and 14th May 1868. The learned judge of the court below took time to deliberate, and on the 9th June 1868 made a decree, by which he pronounced for the validity of the said bond, so far as regarded the said cargo, and directed the appellants to pay into court the sum of 727*l.* 19*s.* 3*d.*, and condemned the appellants and their bail in the sum which remained due in respect of the said bond, with 4 per cent. per annum interest from the time when it ought to have been paid, and in the costs of the suit: (18 L. T. Rep. N. S. 661,)

This decree was the subject of the present appeal.

Sir *George Honyman*, Q. C. and *Cohen* for the appellants, contended that the bottomry bond was not valid as against the cargo, because the money was not borrowed on bottomry until all the charges to defray which the hypothecation was made had been incurred, because a sufficiently urgent need for hypothecation had not arisen, and because a proper communication to the owners and consignees of the cargo had not been previously made. And that the appellants were entitled to make the said deductions from the freight, because the evidence showed that there was an agreement between the master and the charterers that the money advanced should be taken in part payment of freight.

Mellish, Q. C. and *Clarkson*, for the respondents, contended that the hypothecation of the cargo was necessary and proper, because, had the sums for repairs not been paid the *Karnak* would by the law of Bermuda, have been liable to arrest, and because, under the circumstances no previous communication with the consignees or owners of the cargo was necessary. And that, as to the deductions claimed, the advances by Droege and Co. to the master were advances by way of loan on the security of the freight, and not a part payment of freight.

The following cases and authorities were cited:

The Hebe, 2 W. Rob. 146; 4 No. Cas. 368; 10 Jur. 227;

The Prince George, 4 Moo. P. C. 21;

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Wallace v. *Fielden*, 7 Moo. P. C. 398;
The Bonaparte, 8 Moo. P. C. 459;
The Hamburg, Br. & Lush. 253; 8 L. T. Rep. N. S. 175; 10 Ib. 206; 2 Moo. P. C., N. S. 289;
The Lizzie, L. Rep. 2 Adm. 254; 19 L. T. Rep. N. S. 71;
Hicks v. *Shield*, 7 Ell. & Bl. 633;
Beldon v. *Campbell*, 6 Ex. 886; 17 L. T. Rep. N. S. 257;
The Osmanli, 3 W. Rob. 212; 14 Jur. 96;
Rosetto v. *Gurney*, 11 C. B. 176;
The Laurel, Br. & Lush. 191, 317; 9 L. T. Rep. N. S. 457;
The North Star, 1 Lush. 45; 2 L. T. Rep. N. S. 264;
The Edmond, 1 Lush. 57; 2 L. T. Rep. N. S. 196, 521;
The Augusta, 1 Dod. 282;
The Aurora, 1 Wheaton, 104;
1 Parsons on Shipping, Bk. 1, c. 6;
3 Boulay-Paty, "Contrat à la Grosse," edit. 1822;
Peek v. *North Staffordshire Railway Company*, 32 L. J. 241, Q. B.; 8 L. T. Rep. N. S. 768.

Cur. adv. vult.

July 15.—Judgment was delivered by Sir WILLIAM ERLE:—Upon this appeal two questions have been raised; the first relating to the cargo, the second to a part of the freight. As to the cargo, the question is, whether the circumstances in which the ship is shown to have been placed, created a necessity for hypothecation? In the court below the answer was in the affirmative; and, in his judgment there (18 L. T. Rep. N. S. 661), the learned judge carefully examined all the evidence and all the authorities in the Admiralty Courts relevant to the case, and their Lordships now agree in the conclusion which was there arrived at in respect of the cargo, and consider that any detailed examination of the arguments adduced here on behalf of the appellants is rendered unnecessary thereby; but they add a reference to some common law cases containing principles confirmatory of the decision in the court below. In *Lloyd* v. *Guibert*, 6 B. & S. 100 and 120, the extent of the authority conferred on the captain by his appointment to bind the interest of the owner either of the ship or of the cargo, and the principles on which the limits of that authority are to be ascertained are laid down by Blackburn, J. in the Queen's Bench, and by Willes, J. in the Exchequer Chamber. There the captain of a French ship had hypothecated ship, freight, and cargo, and the owner of the cargo sued the shipowner to indemnify him for the loss occasioned thereby, and it was decided that he could not recover, because by the law of France the captain cannot make the shipowner liable for more than the value of the ship and freight, and as the owner had abandoned both, he was exempt from further liability. It was there laid down that the captain's authority is derived from and bounded by the municipal law of a country to which the ship belongs—that is, by the law of the flag; and Willes, J., delivering the judgment of the Exchequer Chamber, answers an argument, founded on the supposition of a general maritime law, contradistinguished from the municipal law of this country, by refusing to recognise the existence of a maritime law in that sense. In accordance with the principle thereby laid down, their Lordships consider that the existence of the necessity which validates the hypothecation of cargo by bottomry is to be ascertained by evidence in the usual manner; and that the meaning of the term necessity, in respect of hypothecation by the master, is analogous to its meaning in other parts of the law. This meaning has been the subject of much discussion in Westminster Hall (see *R.* v. *Winsor*, L. Rep. 1 Q. B. 384; 14 L. T. Rep. N. S. 195); it has been described as a high degree of need; a need which arises when choice is to be made of one of several alternatives under the peril of severe loss if a wrong choice should be made. In the case of a voyage it is probably correct to say that any alternative for the captain is better than total loss of ship and cargo, and that he is under a necessity of choosing another alternative, if any should be possible; and in respect of bottomry, any combination of events which would prevent the completion of the voyage with profit, unless money should be obtained by bottomry, would raise the question whether there was need for bottomry in such high degree as to create a necessity. These remarks are made in answer to some arguments offered to us founded upon cases supposed to decide that a bottomry bond would in all cases be void on account of the absence of necessity if the repairs were completed before the bond to raise money to pay for them was given or contracted for, or if there was no communication with the owner of ship or cargo before the bottomry bond was given. The effect of any such fact cannot be appreciated without taking it in combination with the concomitant facts. If the repairs were complete, but the ship could not leave the port until they were paid for, the completion of repairs would be an immaterial fact in estimating the degree of need for bottomry. If the creditor could sell the ship in case of nonpayment, the sale would be a total loss of the voyage for the ship, and the learned counsel for the appellant failed to show either any duty on the captain in case of such sale, to land, warehouse, and transship the cargo, or any possibility thereby to realise any profit for the freighter. So in respect of communication with the owner either of ship or cargo, the possibility of so doing must be construed by estimating the cost and risk incidental to the delay from the attempt to make such communication, and the probability of failure after every exertion should have been made. The effect of any single fact upon the prospect of prosecuting the voyage with profit varies in endless permutation, according as some other fact forms a part of the combination of events which the captain has to consider in deciding whether there is a necessity for bottomry; and, as we before observed, we concur with the learned judge in the court below in thinking that such necessity was shown to exist in this case, although the repairs were completed before any proposal for the bond was made by the captain, and although the attempts to communicate with the owner of ship or cargo were not carried further than appeared by the evidence. Then as to the second ground of appeal, relating to the sums borrowed by the captain from the charterer at the port of loading, viz., 632*l.* 14*s.* 2*d.* cash advanced, and 61*l.* 6*s.* 9*d.* interest and insurance thereon, the question between these parties is, whether the sums were to be repaid in any event or only by deduction from the freight if freight was earned. The charterer, on signing the charter-party, incurs a liability for the chartered freight which becomes a debt in case of safe delivery of cargo, and the captain, for the shipowners, frequently obtains advances as well on account of this liability (whether stipulated for in the charter-party or not), as on the personal security of his owners: in either case they are loans; in the one case they are advances of freight, in the other case they are debts from the borrower. The distinction is at times material, because if they are advances of freight, the lender has an insurable interest in an advance which is to be lost if freight is not earned, but he has no such interest in an absolute debt. In the present case advances are not stipulated for in the charter-party, but were obtained by the application of the captain to the charterer, and both he and the charterer state that they were advances of freight, and the receipts for the advances are so expressed as that, if effect is

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given to those parts of them relating to insurance, they are decisive to show that the sums obtained were advances of freight, to be repaid by deductions from freight, if earned; and if not earned, then to be lost by the charterer, unless he should have used the stipulated premium in insuring. We consider *Hicks* v. *Shield*, 7 Ell. and Bl. 638, to be an authority for this construction. On these grounds, as between the charterer and the shipowner, their Lordships come to the conclusion that the sums obtained, viz., 632*l.* 14*s.* 2*d.* cash advanced, and 61*l.* 6*s.* 9*d.* for interest and insurance thereon; together, 694*l.* 0*s.* 11*d.*, were advances of freight. Then as between the holder of the bottomry bond and the charterer, is the nature of the transaction changed? Does the captain, by hypothecating the chartered freight to the obligee in bottomry, give a right to more freight than he, as obligor, had a right to demand from the charterer? The learned counsel for the respondent adduced no authority in support of the proposition that the assignee took by assignment what the assignor had no title to. The case of the last bottomry bond taking precedence of prior bottomry bonds, stands on the known incidents to a loan on bottomry; and no such incident has been shown to be attached by known course of law to advances on account of chartered freight. But, on the contrary, in Parson's Maritime Law, America, 429, it is stated that a general hypothecation of freight includes freight whether earned or not, "provided it has not been paid to the master or owner." He refers to the *John*, 3 W. Rob. 170, where the advance was stipulated for by the charter-party, but we consider that the same principle applies to any *bonâ fide* arrangement without fraud for forehand-payment or discharge before the bottomry is required. The learned counsel also used as an argument the policy of the law in making bottomry a good security, but it must not be made a good security by violating the rights of others. It is a good security in this case, as the cargo must pay if the prepaid freight is exempt. The lender on bottomry had the opportunity for knowing what advances had been made on account of freight, as they were indorsed on the charter-party, which he might have seen, and there was no ground for imputing fraud. For these reasons, their Lordships will recommend that the judgment in the court below should be reversed, in so for as it relates to the sums claimed as advances of freight, and for interest and insurance thereon. There remains the sum of 33*l.* 18*s.* 4*d.*, claimed as commission due by usage for obtaining the charter; and, according to such usage, to be paid by deduction from freight, if earned. But as to this sum, the statements in the evidence do not convince their Lordships that the appellant had the right to deduct it from the freight as against the holder of the bottomry bond; and they do not further examine into the right to this sum because as between these parties no interest depends upon the right thereto. Their Lordships will therefore recommend to Her Majesty to affirm so much of the judgment of the court below, as affirms the liability of the appellants, as owners of the cargo to the holder of a bottomry bond, and denies the right of the appellants to deduct the sum of 33*l.* 18*s.* 4*d.* from the freight for commission; and to reverse so much of the judgment as relates to the refusal to allow, as deductions from the freight to be paid to the respondent, the abovementioned sums which their Lordships consider to have been advances of freight. There will be no costs of appeal on either side.

Judgment varied.

Proctors for the appellants, *Field, Roscoe, Field,* and *Francis*, agents for *T. E. Paget*, Liverpool.

Proctors for the respondents, *Waltons* and *Bubb*.

Equity Courts

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Saturday, Feb. 13.

Re IBBITSON'S TRUST.

Real estate—Conversion—Assignment of personal estate in expectancy.

A testator devised his real estate to trustees upon trust to pay the rents and profits thereof to his wife during her life, if she should so long continue his widow, and after her death or marrying again to hold the same in trust for all his children who should then be living as tenants in common, subject to a proviso that it should be lawful for the trustees for the time being, if they should in their discretion think it expedient so to do, upon the death or second marriage of his said wife, to sell his real estate; and he directed the trustees to divide the moneys to arise by any such sale amongst all his children, who should be then living, in equal shares. During the lifetime of the tenant for life, H., one of the children, assigned all his personal estate in possession, remainder or expectancy to trustees for the benefit of his creditors; and afterwards he took the benefit of the Insolvent Debtors' Act. Upon the death of the tenant for life, the trustees sold the real estate under the power contained in the will:

Held, that there was no conversion, and that the assignee in insolvency, and not the trustees of the composition-deed, was entitled to H.'s share of the proceeds of the sale of the real estate.

This was a petition by the trustees of a composition-deed for payment to them of a certain fund, which had been paid into court under the following circumstances.

Thomas Ibbitson, by his will, dated the 15th Jan. 1840, after directing that his debts and funeral and testamentary expenses should be paid by his executors out of his personal estate, devised all his real estate to trustees upon trust to pay unto his wife Jane Ibbitson the rents and profits thereof during her life, if she should so long continue his widow, and from and after her decease or marrying again the said testator declared that the said trustees and their heirs should stand possessed of the said real estate in trust for all his children who should be then living, and their respective heirs, as tenants in common, subject to the proviso for the sale and disposition thereof thereinafter contained. And the testator bequeathed all his personal estate, stock-in-trade excepted, to his trustees upon the same trusts as his real estate. And as to his stock-in-trade he gave the same to his trustees upon trust to sell the same as soon after his death as convenient, and to place out the money to arise by the sale thereof, together with any other moneys which he might die entitled to, and which should not be required for the payment of his debts or funeral or testamentary expenses upon good and sufficient security, and to pay the interest thereof to his said wife during her life in case she should so long continue his widow, and from and after her decease or marrying again, upon trust to pay and divide the said principal money so to be placed out at interest unto and amongst all his children who should be then living, in equal shares. And he thereby declared that in case of the death of any one or more of his children before the death or marrying again, as the case might be, of his said wife, leaving lawful issue of his, her, or their body or respective bodies, then

and in such case the trustees for the time being of his will should stand possessed of that part or share of his said real and personal estates and premises wherein each such deceased child would, if living, have been entitled as aforesaid, upon trust for the issue of such deceased child in manner therein mentioned. And it was thereby provided that it should be lawful for the trustees for the time being of his said will, if they should in their discretion think it expedient or proper so to do, and of their own proper authority, upon the decease or second marriage of his said wife, absolutely to sell and dispose of all or any part or parts of his said real and personal estates and premises respectively; and the trustees were thereby directed to pay, apply, divide, and apportion the moneys to arise by the sale and disposition of his said real and personal estates, or any part thereof, after deducting all necessary expenses unto and amongst all his children who should be then living, in equal shares, and the lawful issue of such of them as should be then dead and have left issue, such issue to take in manner therein mentioned.

The testator died on the 6th May 1840.

In 1858, Henry Ibbitson, one of the children of the testator executed a composition deed, dated the 4th March 1858, whereby he assigned his stock in trade, furniture, fixtures, and effects, and all other the personal estate and effects whatsoever and wheresoever of him the said Henry Ibbitson in possession, remainder, or expectancy to trustees for the benefit of his creditors.

In April 1860 Henry Ibbitson took the benefit of the Insolvent Debtor's Act.

The testator's widow died on the 23rd Oct. 1867; and shortly afterwards the trustees, in pursuance of the directions contained in the will, sold the testator's real estate, and got in his outstanding personal estate, and they paid into court under the Trustee Relief Act, the sum of 264*l.* 10*s.* 4*d.*, being the amount of Henry Ibbitson's share on the testator's real and personal estate.

This fund was claimed by the trustees of the composition deed, who presented the present petition for payment of the fund out of court; a contrary claim was made by Henry Ibbitson's assignee in insolvency.

Southgate, Q. C. and *Bagshawe*, for the petitioners, contended that the testator's real estate had been converted, and that Henry Ibbitson's share in it came to him as personalty, and passed by the composition-deed under the words "personal estate in expectancy." They cited

Hobson v. *Neale*, 17 Beav. 178.

R. Forster, for the assignee in insolvency; and

W. C. Harvey, for the trustees of the will, were not called upon.

Lord ROMILLY.—It is clear that there is no conversion. The will cannot be considered as creating a trust for sale. I think that the assignee in insolvency, and not the trustees of the deed, is entitled to the proceeds of sale of the real estate.

Solicitors for the petitioners, *Few* and *Co.*

Solicitors for the other parties, *C. G. Rushworth*; *Wells* and *Sykes*.

Saturday, May 29.

Re COMMERCIAL BANK CORPORATION OF INDIA AND THE EAST; WILSON'S CASE.

Company—Contributory—Infant transferee—Acquiescence.

Shares in a company were transferred to an infant. After he attained twenty-one a solicitor attended at chambers on behalf of him, and a number of other persons to oppose the making of a call:

Held, that this was not such a distinct act of acquiescence as to preclude him from afterwards applying to have his name struck off the list of contributories on the ground of infancy.

This was an application by one Henry Wilson to have his name struck off the list of contributories to the above company in respect of certain shares on the ground that he was an infant at the time when the shares were transferred to him. The shares were transferred into his name in Sept. 1865, and he was then an infant, as he was born in Jan. 1846, and consequently did not attain twenty-one till Jan. 1867. He was residing in India at the date of the transfer; he never paid any call in respect of the shares, and took no step to repudiate them.

On the 28th May 1866 an order was made for the winding-up of the company.

The official liquidator resisted Wilson's application on the ground that after he attained twenty-one he had acquiesced in the transfer. The following were the circumstances under which he was alleged to have acquiesced: At the date of the winding-up order it was supposed that it would not be necessary to make any further call, and the official liquidator made a report to that effect in Nov. 1866. Notwithstanding this, a summons for a call was issued in the following August, returnable in Nov. 1867. Wilson had come to England in the latter part of 1867, and in October of that year, Messrs. Tucker and Few, solicitors, attended at chambers on behalf of Wilson and a number of other shareholders of the company, to oppose the making of the call, in which they were unsuccessful. A balance order was eventually made against Wilson, who then took out the present summons to have his name removed from the list of contributories.

Roxburgh, Q. C. and *Ince*, for the applicant, submitted that it was well settled that an infant transferee was not liable, if he took steps to repudiate his liability in time; the applicant in this case had taken steps for that purpose as soon as he knew that he was fixed on the list, and the appearance of solicitors on behalf of him and a number of other persons could not be held to be an act of acquiescence. They cited

Re Blakely Ordnance Company, Lumsden's case, 19 L. T. Rep. N. S. 437; L. Rep. 4 Ch. App. 31.

Sir *R. Baggallay*, Q. C. and *Kekewich*, for the official liquidator, contended that Wilson's appearance at chambers by his solicitors was a distinct act of acquiescence, and that he had thereby precluded himself from applying to have his name removed on the ground of infancy.

Lord ROMILLY.—It is clear that there must be a distinct act of acquiescence to render the applicant liable, and the mere fact of solicitors appearing for him and a number of other persons at chambers to oppose a call is not sufficient; probably the solicitors did not know that he was an infant at the date of the transfer. I am of opinion that there has not been complete acquiescence on his part, and the

his name must, therefore, not be placed on the list of contributories.

Solicitor for the applicant, *F. Bradley.*

Solicitors for the official liquidator, *Freshfields.*

July 14 *and* 15.

Re BLAKELY ORDNANCE COMPANY;

CREYKE'S CASE.

Company—Contributory—Forfeiture of shares—Past member—List B.—Companies Act 1862, *s.* 38.

C.'s shares in a company were forfeited, in consequence of nonpayment of a call, within the period of one year prior to the commencement of the winding-up.

By the articles of association of the company it was provided that such forfeiture should involve the extinction of all interest in, and all claims and demands against, the company in respect of the shares forfeited, and all other rights incident to the shares; but that any member whose shares had been forfeited should, notwithstanding, be liable to pay to the company all calls owing on such shares at the time of such forfeiture:

Held that C. was liable to be placed on the list of contributories as a past member of the company.

Bridger and Neill's cases, *L. Rep.* 4 *Ch. App.* 266, *followed.*

This was an application by the official liquidator of the above company to have the name of a Mr. Creyke placed on the list B as a past member of the company in respect of certain shares which he formerly held.

The circumstances of the case were as follows:

In June 1865 Creyke applied for forty shares, which were duly allotted to him and registered in his name. A call was soon after made, and on his failing to pay it, the shares were forfeited in Nov. 1865.

By the articles of association of the company it was provided that, after one month's nonpayment of any call in respect of any share, the board might declare the share forfeited for the benefit of the company; and also that the forfeiture of any share should involve the extinction, at the time of the forfeiture, of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the share; but that any member whose shares had been forfeited should, notwithstanding, be liable to pay to the company all calls owing on such shares at the time of such forfeiture.

Subsequently to the forfeiture of his shares, Creyke paid the call, for the nonpayment of which his shares had been forfeited.

On the 28th July 1866 the company was ordered to be wound-up.

As it appeared that the existing members of the company were unable to satisfy the contributions required to be made by them in pursuance of the Companies Act 1862, the official liquidator proceeded to settle the list B of past members in accordance with the 38th section of the Act, hence the present application.

The liability of past members of a company is determined by the 38th section of the Act, which, so far as is material, is in the following words:

In the event of a company formed under this Act being wound-up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following, that is to say, (1) "No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up: (2) No past member shall be liable to contribute in respect of any debt or liabilities of the company contracted after the time at which he ceased to a member," &c., &c.

In his affidavit the official liquidator deposed that there existed debts and liabilities of the company contracted prior to the time when Mr. Creyke ceased to be a member.

Sir *R. Baggallay*, Q.C. and *J. Napier Higgins*, for the official liquidator, submitted that as Creyke had ceased to be a member within the period of one year prior to the commencement of the winding up, and as there now existed debts and liabilities of the company, contracted prior to the time when he ceased to be a member, he was clearly under the 38th section of the Act liable to be placed on the list in respect of such debts. They cited

Re Accidental and Marine Insurance Corporation—Bridger's case and *Neill's case*, L. Rep. 4, Ch. App. 266.

Jessel, Q.C. and *Speed*, for Mr. Creyke, contended that as he had afterwards paid the call, the rights of the company against him were altogether extinguished under the articles of association by the forfeiture of the shares. The creditors of the company had notice of the power conferred on the directors by the articles to declare shares forfeited and in that manner to release shareholders from subsequent claims. They cited

Re Reese River Silver Mining Company, Smith's case, 16 L. T. Rep. N. S. 549; L. Rep. 2 Ch. App. 604;

Re Blakely Ordnance Company, Stocken's case, L. Rep. 3 Ch. App. 412;

Re Blakely Ordnance Company, Needham's case, 16 L. T. Rep. N. S. 472; L. Rep. 4 Eq. 135;

Re Barned's Banking Company, Andrew's case, 16 L. T. Rep. N. S. 656; L. Rep. 4 Eq. 458;

Devaynes v. *Noble*, 1 Mer. 530.

Lord ROMILLY.—The question in this case is whether, under the 38th section of the Companies Act, Mr. Creyke is liable to contribute as a past member to the assets of the company. I am of opinion that he is liable. The present case comes clearly within the decision in *Bridger and Neill's cases*, (*sup.*), where it was held that forfeiture of shares does not relieve a shareholder from liability to pay past calls, and debts and liabilities of the company which existed at the time of the forfeiture; and this is clearly the effect of the 38th section of the Act. Mr. Creyke's name must, therefore, be settled on the list B. as a past member.

Solicitors for the official liquidator, *Lewis, Munns, Nunn*, and *Longden.*

Solicitors for Mr. Creyke, *Taylor, Hoare*, and *Taylor.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Friday, June 11.

WESTWOOD *v.* MCKIE.

Will—Charity—Gift for the benefit of the Scotch kirk—Free Church—Presbyterian form of worship—Cy près.

A testator, who died in 1841, *by his will, dated in* 1838, *after reciting that it was in contemplation to build a Scotch kirk for the performance of the Presbyterian form of worship in the island of Antigua, where he resided, gave* 1000*l.* *to trustees to invest in the name of the minister and members of the kirk session for the time being, and in all time coming for ever, the interest of which was to be in aid of an*

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endowment for the use and maintenance of such minister as should be inducted and performing the sacred offices and duties of the Scotch kirk in the said island, and not otherwise; and if no such kirk should be built within eight years from the date of his will, then upon trust for certain persons beneficially. In 1838, *shortly after the date of the testator's will, a Presbyterian kirk was erected, and was opened for public worship in* 1842, *and an ordained minister of the Established Church of Scotland was inducted to the kirk, but he resigned his office in* 1843, *and in* 1846 *an ordained minister of the Free Church of Scotland was appointed by the colonial committee of the Free Kirk, and a Free Church minister had ever since continued to perform the duties of minister of the kirk, according to the Presbyterian form of worship; and a kirk session according to the constitution of the Free Church had been constituted, and was then in existence. There had not been in Antigua any other Scotch kirk during the last thirty-six years. The testator, who was a member of the Established Church of Scotland, had taken great interest in, and was a subscriber to, the scheme for building the kirk:*

Held, that inasmuch as the Established and Free Churches of Scotland differed only in matters of Church discipline, the charitable gift did not fail.

This was a petition in the cause for the payment out of court of a fund, the suit being for the administration of the estate of Robert Briggs, late of the Island of Antigua. The details of the proceedings which had been had were extremely complicated, but the only point to be argued related to a gift of 1000*l.* in his will. This instrument was dated the 13th Aug. 1838, whereby after reciting that it was in contemplation to build a Scotch kirk for the performance of the Presbyterian form of public worship in the said island if that good work should be proceeded with, and brought to a completion, and a minister of the Kirk of Scotland should be inducted to such church, and performing the sacred duties of such kirk in the said island, the testator directed his executors and trustees to invest in good and safe securities on interest in the names of the minister and members of the kirk session for the time being, and in all time coming for ever, the sum of 1000*l.* sterling, the interest of such sum to be in aid of an endowment for the use and maintenance of such minister as should be inducted and performing the sacred offices and duties of such Scotch kirk in the said Island, and not otherwise. And the testator further directed that if no such kirk should be built within eight years from the date of that his will, then and in such case the said principal sum of 1000*l.* should remain to and be part of his trust moneys to be invested as thereinbefore directed.

The testator died on the 3rd May 1841, his estate being administered in Chancery. By a certificate of the chief clerk dated the 20th Jan. 1865, in pursuance of an order of the 24th Nov. 1856, it was certified that as to an inquiry who were then entitled to a sum of 697*l.* 17*s.* 8*d.*, being the amount apportioned in respect of the legacy of 1000*l.* bequeathed in trust for the benefit of the Scotch kirk in Antigua, it appeared that in 1838, shortly after the date of the testator's will, and while he resided in Antigua, the erection of a Scotch kirk for the performance of the Presbyterian form of public worship, was commenced at the city of St. John in that island, and that the testator took great interest in it, and was a subscriber to the scheme for building the kirk; that the kirk was completed in 1842, and in the same year the Rev. Alex. Brown, a duly ordained minister of the Established Church of Scotland, was duly inducted to the kirk which was opened for public worship on the 9th Oct. 1842, under the pastorship of Mr. Brown, who continued to perform the duties of minister of the kirk until June 1843, when he resigned the office. That in Feb. 1846 the Rev. George Anderson, who was an ordained minister of the Free Church of Scotland, but was not an ordained minister of the Established Church of Scotland, was appointed to the charge of the kirk by the colonial committee of the Free Church, and was inducted to the kirk and continued to perform the duties of its minister according to the Presbyterian form of public worship until June 1850, when he resigned. That upon such resignation the Rev. Peter Mason, who was an ordained minister of the Free Church of Scotland, but was not an ordained minister of the Established Church of Scotland, was appointed to the charge of the kirk by the said colonial committee, and he continued to perform the duties of minister of the kirk according to the Presbyterian form of public worship until the year 1858, when he resigned. And that it also appeared that with the exception of an occasional temporary supply the office of minister of the kirk continued vacant from the time of Mr. Mason's resignation until the 21st July 1863, when the Rev. John Smith, who was a duly ordained minister of the Free Church of Scotland, but not of the Established Church of Scotland, was appointed to the charge of the kirk by the colonial committee, and on the 6th Oct. 1863, Mr. Smith was inducted to the kirk, and had ever since continued to perform the duties of minister according to the Presbyterian form of public worship, and that a kirk session of the kirk according to the constitution of the Free Church of Scotland had been constituted, and was then in existence, the minister and members whereof were all members of the Free Church. That there was not, and had not been for the last thirty-six years and upwards, in Antigua any Scotch kirk for the performance of the Presbyterian form of public worship other than the abovementioned kirk. The chief clerk then certified that subject to the question whether the ministers and elders of the Free Kirk in Antigua came within the terms of the gift of the legacy of 1000*l.*, the then present minister and members of the kirk session of the said kirk at the city of St. John in Antigua were the persons (if any) who were then entitled to the apportioned legacy.

Vaughan Hawkins, as representing the charity, contended that the exact description of minister and members of the congregation, only existing for a short period after the testator's death, and the Free Church having been in possession ever since, the court must apply the fund *cy près*; it was difficult to understand how the trust could fail. [THE VICE-CHANCELLOR.—In *The Attorney-General* v. *Munro*, 2 De G. & S. 122, it was held that the Free Church were not entitled.] It must be admitted that the Free Church is the only Scotch church now in Antigua.

Attorney-General v. *Murdock*, 7 Hare 445; 1 De G. M. & G. 86;
Attorney-General v. *Bunce*, L. Rep. 6 Eq, 574; 18 L. T. Rep. N. S. 742;

If there was no other authority on the subject than that the charity would take *cy près*. *Da Costa* v. *Parr*, Ambl. 228, was a gift by a Jew for an assembly for reading the law and instructing the people in the Jewish religion, which, being illegal, the bequest was applied towards supporting a preacher for instructing children in the Christian religion.

Muggridge v. *Tapwell*, 7 Ves. 36;
Attorney-General v. *Francis*, W. N, 1866, 280.

In the latter case there was a bequest to a school in Virginia, which disappeared, but there was a fund in court. There was the college of William and Mary, however, in connection with a similar school, and the Master of the Rolls held it to be a proper object for the gift, but, being

a foreign charity, no scheme was directed. The doctrine of *cy près* was of the widest possible application. The differences in the different sections of the church in Scotland were very minute: (Taylor Innes' Law of the Creeds of Scotland). The will here was made during the struggle when the General Assembly of the Church of Scotland passed an Act that no pastor should be introduced contrary to the will of the people, and the establishment rescinded that resolution.

Glasse, Q. C., for persons interested in the residuary estate, insisted that the doctrine of *cy près* had been carried much too far. The words here were distinct as to the form "Presbyterian form of worship," and how could it be said that the Free Church form the least resembled it? There was such a distinction that hundreds of ministers went out upon it. *Attorney-General* v. *Bunce* (*sup.*) did not apply there. There there had been one congregation for seventy years, and a set of strangers came on purpose to claim the legacy.

Attorney-General v. *Whitely*, 11 Ves. 241;
Clark v. *Taylor*, 1 Drew. 642;
Cherry v. *Mott*, 1 M. & Cr. 123.

The testator here was a Presbyterian and took great interest in the erection of a kirk, and his intention could not have been to have given it to a Free Church congregation.

Bevir, for other parties, supported the same view, submitting that the court would carry out the testator's intention. Here the words excluded any other form of public worship than Presbyterian. Moreover, the words "not otherwise" were very strongly in favour of that view.

G. O. Edwards for parties in the same interest.

The VICE-CHANCELLOR.—I think if it is necessary the doctrine of *cy près* must be applied to this case; I am not satisfied that it must be. The general object of the gift is distinctly stated by the testator, who, after reciting that it was contemplated to build a Scotch kirk if they could get land provided, for members of the Kirk of Scotland, he being one himself, directed his executors and trustees and the survivor to invest on good and sufficient security, in the names of the minister and members of the kirk session for time being and in all time to come, 1000*l.* in aid of an endowment for such Scotch kirk, and not otherwise. That, I think, means except in the event contemplated. The minister was inducted, and a Scotch kirk built; but from the year 1843 there have been a succession of Free Church ministers. It is very possible if the testator could have foreseen what would take place he would have provided for the money in that event not being given at all; but as he died in 1841, it is impossible to conjecture what he intended, or to come to the conclusion that strict Presbyterians only were to be the objects of his bounty. There is, I believe, little or no difference of doctrine between Presbyterians and Free Churchmen, except in points of church discipline, and therefore I think, having regard to the object the testator had in view, the existence of something which will carry it into effect on general principles is sufficient. As I said before, if it should be necessary to apply the doctrine of *cy près*, I am clearly of opinion it must be applied, and the benefit of the legacy given to the Free Church rather than that the gift should fail altogether. It is not necessary to go into the cases cited by Mr. Glasse. They are all quite distinguishable from the present. I had occasion to consider them in the case of *Attorney-General* v. *Bunce* (*sup.*), and I think I should be bound to hold that the rules I there recognised shall be applied here. The Presbyterian views were there fully considered and argued upon, and there was a minute examination of all the authorities, and I came to the conclusion that a Baptist congregation were entitled rather than that the gift to the charity should fail. I did so because between the Presbyterians and Baptists there is a general consonance, except in matters of church discipline; and so here, as I have observed, there is between the Free Churchmen and the members of the Kirk of Scotland. On the general paramount objects of the testator, therefore, I am of opinion that the charity does not fail.

Solicitors: *Chauntler* and *Crouch*; *Fearon* and *Clabon*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

Tuesday, May 4.

PHELPS v. AMCOTT AND OTHERS.

Settlement—Covenant to settle moiety of the property settlor should be intitled to at the time of his death—Release.

A release which had been executed by a person ignorant of his rights, and where it was proved that he had no intention of releasing such rights, set aside.

By a marriage settlement dated in May 1839, the husband, the settlor, covenanted to settle one moiety of all the real and personal estate which he should be seised or possessed of, or entitled to at law or in equity, at the time of his decease (subject to the payment of a moiety of his debts and any jointure) upon the usual trusts of a marriage settlement. One of these was whereby the survivor of the settlor and his intended wife would be entitled on the death of a Mrs. Cherry (the lady's mother) to a life interest in certain property.

The bill was filed by a Col. W. T. Powell, the husband, and the trustees of this marriage settlement, against the executors of the will of his wife's father, W. C. Cherry, and the trustees of a deed of conveyance and assignment by the late W. C. Cherry, dated in Sept. 1858, against the trustees and beneficiaries under the marriage settlement of another daughter of W. C. Cherry, and the solicitor who prepared that conveyance and assignment, to enforce the covenant contained in the first-mentioned marriage settlement.

After the marriage of Col. Powell and his wife differences had arisen between them which terminated in a separation. Her father, W. C. Cherry, by a deed of Sept. 1858, in consideration as it was expressed of the natural love and affection which he bore for his wife and daughters (of whom Mrs. Col. Powell was one) granted to two of the defendants and their heirs, certain real estates to the use of the said W. Cherry and his assigns, for life without impeachment of waste, and after his decease to the use of said grantees and their heirs upon trust, to permit said Mrs. Cherry to enjoy the same for her life, and after her decease or during her lifetime with her consent upon trust to sell and pay one moiety of the net proceeds to such persons, and for such interests as the said Mrs. Col. Powell should, notwithstanding her coverture appoint, and in default of such appointment into her proper hands for her separate use.

By the answers put in by the defendants it was, in fact, admitted that the object of this latter deed was to protect the property therein comprised from the trusts of the marriage settlement of Col. and Mrs. Powell of May 1839, and any claims which he or the plaintiffs, the trustees, might have thereunder.

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Mrs. Cherry who, as before stated, had a life interest in the property, died in May 1859.

Much evidence was entered into to show that the deed of release and assignment was executed by Col. Powell in ignorance of his rights. No case was made against the solicitor who had the preparation of this deed.

Karslake, Q. C. and *Fawcett* for the plaintiffs.

Amphlett, Q. C., and *Cookson*, and *Willcock*, Q. C. and *B. L. Chapman*, for the principal defendants, contended that the plaintiff Col. Powell, had acquiesced in what had taken place, and the release was a good and valid release of all the rights under his marriage settlement.

E. E. Kay, Q. C. and *W. H. G. Bagshawe*, for the solicitor, contended that no case had been made against him.

The VICE-CHANCELLOR said that the general law of the case and the authorities showed that the plaintiffs were entitled to the remedies sought. Indeed the right of the plaintiffs to the relief prayed was not disputed, except on the ground of the release and acquiescence. But it did not appear from the terms of the release, nor did the evidence adduced in the cause show, that Col. Powell was aware of the rights which it was said he had released, nor that he had any intention of releasing any such rights. He was not, therefore, bound by the release which had been executed, nor could the defence of acquiescence prevail. There must, therefore, be the usual decree in the terms of the prayer of the bill setting aside the release with costs. The plaintiffs, however, would have to pay personally the costs of the defendant, the solicitor against whom the unfounded charges had been made.

Decree accordingly.

Solicitors, *G. F. Cook; Hayes, Twisden* and *Co.*

Wednesday, June 9.

GEPP *v.* MAJENDIE.

Power—Due exercise of—Mortgage—Compound interest.

By a deed of disentail and re-settlement of certain real estates power was given to the father and son, and for the son if he should survive, to mortgage the estate to raise such sums as might be requisite to redeem several prior mortgages:

The father and son exercised their joint power of appointment, creating various charges:

The son was the survivor, and he mortgaged the estates to the plaintiffs to secure a sum of 600l. advanced at various times to the grandfather, father, and son, during the lifetimes of the two former, on the faith of an agrement that those sums should be secured to them by a mortgage:

Held, that this mortgage was a valid execution of the power, and compound interest allowed as provided for by the prior charges.

This was a bill filed by the plaintiffs, who had been solicitors in partnership at Chelmsford, in concurrence with other parties interested in the question, to take the opinion of the court as to whether a mortgage dated the 18th March 1868 was a valid exercise of a power under the following circumstances:

By a deed of disentail and resettlement, dated the 1st Oct. 1868 certain real estates in Essex were conveyed to trustees and their heirs, subject to certain mortgages, and to an estate for life of Ashurst Majendie (the grandfather), and to other powers, estates, and charges, including a mortgage of the 6th Sept. 1858, to the use that Ashurst Lewis Majendie (the son) should from and after the death and failure of issue of the granfather, and during the joint lives of Henry Lewis Majendie (the father) and himself receive an annuity, and subject thereto to the use of the father for life, remainder to the uses created by the powers of mortgaging therein contained; and subject thereto to the use of the son for life, without impeachment of waste, remainder to the use of the first and other sons in tail male with remainders over. The first power of mortgaging was a power for the son and the father, or the son if he should be the survivor, and after the decease of the survivor for the trustees to raise by mortgage such sums as might be requisite to redeem the mortgage of the 6th Sept. 1858 and pay costs, and that it should be lawful for the son and the father, or the survivor of them, and at the decease of the survivors for the trustees, by the means aforesaid, to raise and levy "so much money as should be requisite to pay the interest and compound interest which might from time to time accrue or become due," during the lifetime of the son and the father or the survivor, upon or in respect of the moneys which should be raised and levied for the purpose of redeeming the said mortgage and paying costs and the costs of such last-mentioned transaction, "all which moneys so to be raised as last aforesaid should be paid and applied in discharge of such interest, compound interest, and costs."

The second power of mortgaging was a power for the father during his lifetime to mortgage to the extent of 5000*l.* for his own benefit, which was followed by a similar clause as to raising and levying such moneys as should be requisite to pay compound interest on the 5000*l.* and costs.

On the 5th Feb. 1859 the son and father, in exercise of the joint power of appointment, charged the estates by way of mortgage. On the 4th March 1859, and on the 18th Feb. 1860, they again exercised their joint power by mortgaging to the extent of 4000*l.*, at 4½ per cent. On the 23rd July 1861 the grandfather, father, and son joined in assigning a debt of 6550*l.* and interest at 4½ per cent., then due on the indenture of the 5th Feb. 1859.

The father died on the 6th Jan. 1863.

The son being unable to pay the interest due on the indentures of 1859, 1860, and 1861, the requisite sums were advanced by the plaintiffs on the faith of an agreement that these sums should be secured to them by a mortgage.

The grandfather died in June 1867.

A mortgage to the plaintiffs for 600*l.* was executed by the son on the 18th March 1868.

An agreement having been entered into that these several mortgages should be transferred to a purchaser, he took an objection that the mortgage of the 18th March 1868 was not a valid execution of the power.

The cause now came on to be heard.

Amphlett, Q. C. and *Wickens*, for the plaintiffs, contended that the mortgage was strictly within the provisions of the powers conferred by the deed of disentail and resettlement before referred to.

Waley, for the defendants, contended that it was not; and urged that the parol agreement with the plaintiffs to secure their advances by a mortgage could not amount to an equitable exercise of a power, and that if this mortgage deed were so there was nothing to prevent a man in this position from himself advancing moneys, and charging the estate with compound interest in his own favour.

The VICE-CHANCELLOR remarked that that was not the case before the court; when it should arise

it would be the time to deal with it. It did not appear to him that there was anything illegal in providing for compound interest, and he must hold that this mortgage of the 18th March was within the power conferred by the first deed. There would be a declaration that such deed was a valid exercise of the power.

Decree accordingly.

Solicitors: *Paterson, Snow,* and *Co.; Domville, Lawrence,* and *Co.*

Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

TAUNTON ELECTION PETITION.

March 2, 3, 4, and 5.

(Before BLACKBURN, J.)

Political association—Agency—Payment of barristers' court money — Bribery — Scrutiny — Corruption by strangers.

There existed in the town a Conservative and a Liberal association, each of which generally promoted the return of its own candidate, and assisted the registration of its own supporters.

The managers of the Conservative Association having circulated addresses and papers issued by the candidate, will be presumed to have done so with his knowledge, or with that of his agents, so as to constitute the association an agent of such candidate, and to make him responsible for any illegal acts of its managers.

Amongst other things, the managers of the association paid 5s to every person who claimed it in respect of time lost in attending the barrister's court at the registration. Several voters claimed and received this amount who had not attended the court.

Held to be bribery by the association.

Where a person has actually attended the revising barrister's court, either because he was obliged to do so, or because he thought he was obliged to do so, and has actually lost a day's time in attending there, he may be inferred to have taken the compensation honestly and not for his vote. But where nothing has been done to entitle the person to the money, the inference must be that he took it for his vote, and his name would be struck off on a scrutiny.

Where an association or a person is tacitly allowed by a candidate, or with the candidate's knowledge, to promote his election, that is some evidence to show that he is an agent.

And where a body acts in support of a candidate, the assistance being a substantial benefit, and he does not hold them off or repudiate them, he must accept the consequences, and be responsible for their malpractices.

On a scrutiny, every voter who is shewn to have been corrupted, although corrupted by the opposite side to that on which he voted, and even though the bribe be received from a stranger, will be struck off. The object of a scrutiny is to ascertain, without regard to who corrupted this man or that, what is the majority of uncorrupted voters, and whether there is a majority for anyone who has not rendered himself by personal misconduct incapable of standing.

This was a petition against the return of Mr. Serjeant Cox, the seat being claimed for Mr. James. The evidence and points in the case are sufficiently noticed in the judgment.

Ballantine, Serjt., and *J. O. Griffits* appeared for the petition.

Rodwell, Q.C., and *Collins* for the respondent.

BLACKBURN, J.—There are two questions raised by this petition, touching this election. The first is, the assertion in the petition that the election of Mr. Serjeant Cox, who was returned as the member for the borough, is void, the consequence of which would be that there should be a new election. The other is, the claim of the seat on behalf of Mr. James, claiming that he ought to have been returned at the last election, and should now be the sitting member for the borough. The two matters come on together, but they involve different considerations. Upon the first the law has been well established, that where a person has been returned a Member of Parliament for a constituency, and it is made to appear that he has obtained his seat by any corrupt practice (I pass by other matters which are not relevant to the present question), committed by himself or his agents, the seat which he has obtained by means of that corrupt practice is not capable of being retained, and the election must be void, that being to a very considerable extent a matter affecting personally the candidate who has been returned (though, of course, involving the interests of the constituency also), depending very much upon what he, or his agents, for whom he is responsible, have done. The second matter involves a different consideration. The member who is returned for any constituency ought to be the member who is elected by a majority of pure and unimpeached voters who vote at that particular election; if anyone failed to obtain such a majority, or (what comes to the same thing) if it cannot be proved that he has obtained such a majority, there must be a new election; that constituency must have a fresh choice to return such member as they choose for the purpose. The distinction, therefore, is obvious there; it is not any longer a matter merely between the two candidates, but it involves the interests of the constituency. The constituency are, as one may say, parties to the question, and their interests must be considered as well as those of the sitting member and the candidate who claims the seat; it is necessary in that case to see whether or no there is a majority of pure voters, and accordingly, every voter who is shown to have been corrupted, must be struck off, for whomever he voted. It matters not whether he was corrupted by the sitting member, or whether he was corrupted by the sitting member's agents, or by a stranger; even if corrupted by the other side, I take for granted the man's vote is bad; if a man accepts a bribe for the purpose of voting, say for Mr. Serjeant Cox, and then, having been so corrupted, votes for Mr. James, his vote cannot be counted for Mr. James, any more than if Mr. James himself had bribed him. Or *vice versa* if it were to be shown that he had received a bribe, or was corrupted by somebody, to vote for Mr. James, and then voted for Mr. Serjeant Cox, his vote could not stand for Mr. Serjeant Cox, and must be struck off. The result is, that we have to see, without regard to who it was corrupted this man or that, what was the majority of uncorrupted voters, and whether there is a majority for any one who has not rendered himself by personal misconduct incapable of standing. If there is such a majority, that person should be declared returned and substituted for the sitting member; if that majority is not made out, there must be a new election in case it is shown that the first election is void. That being so, the first question to consider is, whether there is shown here to have been corruption and bribery on the part of Mr. Serjeant Cox or his agents; I may say at once, there has been no evidence, and no ground given whatever, for saying that there was any personal bribery or personal corruption on the part of either candidate; I pass that by, taking it for granted that they are both personally untainted with anything of the nature of bribery. The first question then is, has

there been any corruption on the part of those for whom Mr. Serjeant Cox is responsible, such as to make his election, as far as he was concerned, void. Now, the great matter which has been relied on has been what has been called barrister's court money, and the proceedings of the Conservative Association in paying that barrister's court money; and that matter I divide in this way. The first question is, to see if what has been shown to have been done by the Conservative Association in paying that barrister's court money was a corrupt practice; and secondly, if that be established, whether the relation between Mr. Serjeant Cox and that Conservative Association, or those who acted for them, is such as to make him responsible for them as his agents. Now, as to the first of these questions, it depends entirely, I think, upon the true construction of the Corrupt Practices Act (17 & 18 Vict. c. 102), s. 2, the first part of the section, and its proper application to the facts of the case. That section enacts, "that every person who shall, directly or indirectly by himself, or by any other person on his behalf, offer, promise, or promise to procure, or to endeavour to procure, to or for any person, on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting," is declared to be guilty of bribery. That is the section we have first to consider; it is, "every person who directly or indirectly by himself" gives money—I pass by everything else—"to any voter in order to induce any voter to vote at the election;" that is made bribery on the part of the person who gives it; it is a subsequent section that declares what shall be bribery on the part of the receiver. We have to see, taking that section, whether the facts here proved, do bring the Conservative Association, treated as if it were a person within that category, as having given money to induce voters to vote. Now, as far as that goes, the facts do not seem to be very much in dispute as to the broad outline of the case. It appears that the registration in this particular year happened in September, at which time it was well known that there was going to be a contest very speedily in this borough, and throughout all England; I mention that date because it makes a substantial and important difference as a matter of evidence in considering the bearing of the matter. If there was a registration held, as probably a registration in this autumn will be held, at the beginning of a Parliament when there was not likely to be a contested election for four or five years, one would hardly consider that any proceedings taken at the registration were intended to induce voters to vote afterwards, when we find that the canvass had already commenced at the time of the registration in September, and when the election was expected to come off and did come off about the middle of November, then it becomes far more probable that what was done in connection with the registration was to induce voters to vote; I only point that out as being one of the matters of evidence. At this time, when no doubt the revising barrister held his court, many persons who were claimants, some of whom were objected to, would attend at the barrister's court to support their case, or to see if any objection were made to their claims. Now what was done or professed to be done on the part of the Conservative Association, was to repay those persons for their loss of time, to give them a day's pay for their loss of time in attending the registration court. The matter differs in that way from what it would have been if there had been a payment given to them for their loss of time in attending at the election itself, which was the case in one of the cases cited by my brother Ballantine, the *Devonport case*, 14 L. T. Rep. N. S. 574, where the persons who were paid money were paid for their loss of time in attending to give their votes. Such payments, when given to a person for loss of time in coming to deliver his vote, inevitably it seems to me (I cannot see how there can be a doubt about it) are payments for voting, and are distinctly struck at by the express words of the section, which I shall refer to afterwards, when I come to speak of those who received the money. That would be a distinct and clear case within the very terms of the Act; and there is nothing further than to say, was there a payment given to them for voting? But when the payment is given for an attendance at the revising barrister's court, it is not within the express terms of the Act. It may very well be that there should be a payment for an attendance at the barrister's court, which should be *bonâ fide* for that purpose, and no other, and which is not meant by the Act of Parliament. From the fact of paying a person money for attending to be put upon the register, it is a matter of inference, that, doubtless, the persons who put the voter on the register expected him to vote for their party; no doubt that would be in their minds at the time. Doubtless, if you were to pay a man direct for being put upon the register, and to offer a reward for every person who would himself come and be registered by the Conservative Association or the Liberal Association, as the case might be, it would not be as a matter of law that that would be a bribe for a vote; but it would be a matter of very strong observation, and there would be reasonable ground for inferring that those who paid people belonging to any particular political party, for coming and being put upon the register did expect, as part of what they were paying for, that they were to vote for that party when the election came. It would be a matter of fact, not of law, but the inference would be strong from it. When it is merely repaying them what may be called almost money out of pocket, the loss of a day's work, the inference is by no means so strong. It might be so or it might not; in each case it would be a matter of inference, looking at the facts, and a very important fact would be, whether or no an election was pending, or close approaching. It would require looking at that to see whether it was really or not paid to induce the votes, or whether it was really and *bonâ fide* a repayment for money out of pocket. I certainly think that it would be a wise thing on the part of all people to avoid making such payments at any time, because, certainly, it is always open to the observation and inference that it may be for the corrupt purpose of inducing the vote, and may therefore be considered bribery. In the present case, however, we have to go a great deal further than that. I think where it was *bonâ fide* it would not be a bribe; where it was intended to induce a vote, which would be a matter to be collected from the whole of the facts, it would be a bribe. In the present case I have to consider whether what was proved was such as to lead me to the conclusion that I ought to say that these payments were made to induce the vote. First, we have to look at the dates. The registration was held in September; the election was coming off in the middle of November. About the first week in November these payments were made. Five shillings is a very liberal day's pay, but not in itself necessarily a corrupt one, though it is estimating the day's wages pretty high, still it is not necessarily corrupt, though open to observation. It would almost appear that it was practically paid to everyone who would come forward and ask for it. It may be that it was want of business habit; it may be that it was not intended, but no precaution seems to have been taken at all, except an endeavour to see that the man who came forward and claimed the 5s. was really a voter. No attempt seems to have been

made to procure from the persons who came forward and had the 5s. any proof that if they had, in fact, attended the registration court; many of them I have no doubt had attended; many of them I have no doubt had not. I do not doubt, from the nature of the evidence, and the way in which it came out, that a great many (what number I cannot tell, but a considerable number) got the 5s. who had no claim at all to be the person, or to be claiming on behalf of the person in whose name they got it. I have very little doubt that there was a considerable quantity of embezzlement of the funds of the Conservative Association by persons who were not voters at all. But that is not what I am concerned with at all at present, but to try to see what from the evidence is the conclusion which I ought to form of the motives of those who advanced the money. Now, when I find that a very considerable sum (we do not know with precision how much it was, certainly beyond 25*l.*; and there seems to be some reason to believe that it was something like 50*l.*) was paid to a large number of persons without any check at all to see that they really had done anything for it, with no precaution whatever, except to see that they were voters on the register, which they did endeavour to see; and that this payment was made a considerable time after the registration, and a very short time before the election came off, and made in this way to everybody who came forward to claim it; is there any reasonable ground for coming to any other conclusion than that the motive of those who advanced the money and paid it in that way was to induce persons to vote at the election? I have thought it over, and I cannot myself come to any other conclusion than that it was so. If that be so, it is brought at once within the terms of the section I read, and the payments to those voters were payments made to induce the voter to vote; and, consequently, being made with that intention on the part of the person who paid it, they are bribery on the part of the payer of the money; whether or no they are corruption on the part of the person who receives it depends on another section. I may probably as well point out the difference between them at once. The 3rd section, the first part of it says, "every voter who shall before or during any election receive" (I pass over the words that do not bear upon this) "any money for voting or agreeing to vote, shall be deemed to be guilty of bribery." Now, it may very well be, as a matter of fact, that a person gives money (I have already said that I have come to the conclusion that persons did give money here) to all voters who would come forward and ask for it, saying and holding forth "this is paid for your loss of time at the revising barrister's court, and I will pay money for loss of time at the revising barrister's court to every voter who will come forward for it," having the full intention thereby to induce the voter to vote on his own side and in support of his own particular views; and yet it may so happen that the voter who comes forward and receives that 5s. does come forward honestly and *bona fide*, because he believes that he is entitled to the money for his loss of time; and if he honestly and *bona fide* comes forward in that way, I do not, as at present advised, think that it would be bribery on his part within the meaning of the clause. I need hardly point out that it is a question of fact, and as a general principle where a person comes forward to receive money which is given as a bribe, the general rule of evidence applies in all such cases one would naturally conclude very strongly that the persons took it as a bribe, though it by no means follows as a matter of law that it would be so, and in regard to this particular case there are many instances in which it would require a good deal of consideration to see whether it was so or not. Where a person has actually attended the revising barrister's court, either because he was obliged to do so, or because he thought he was obliged to do so, and has actually lost a day's time in attending there (and the matter to be considered is a matter of fact to see whether that was so), it is not a very strained or unreasonable inference in his favour to say that he may have taken the 5s., unquestionably believing that he was entitled to it, and not believing it to be for his vote. Where, on the other hand, a man has not attended the revising barrister's court, but has literally done nothing for it, and has not a pretence or colour for it, he may (I will not say as a matter of law he may not) believe he is entitled to receive 5s. for going there; but I think that there would be a very strong inference in such a case, and the natural inference would be that when he took the 5s., having nothing else to give for it but his vote, he took it for his vote; and his name would be struck off on a scrutiny. I need not say that in such a case the constituency would be concerned. We must necessarily look at every individual case by itself and see in the interests of the constituency, is this really a bad vote, and one which ought to be struck off so as to see what the majority of pure votes were? It is not an inquiry that I am particularly desirous to invite, but I feel bound to enter into it, case by case and name by name; and you, brother Ballantine and Mr. Rodwell, must consider for yourselves both of you, whether that can be done, and how far it can be done. What I have just said may rather be considered as a parenthesis, and now I have to proceed with the second question as to whether or no there is sufficient evidence of the agency in this case. Now, upon that the rule of law has long been established, and has been ratified by acts as I think, that in Parliamentary matters we are not to consider the strict rule of common law agency generally established to this extent, that a person is responsible for his agent in all that he does within the scope of his authority, but is not responsible for anything that he does beyond the scope of his authority. There is one exception in the case of the sheriff, but I may pass that by. So that the common rule of law would be, if you employed a man to do an honest thing, and he chose to commit a crime, you would never be responsible criminally, but beyond that you would not be even responsible civilly for the crime committed when the instructions you gave him were to act as an honest man. But in Parliamentary election law it has long been established that, where a person has employed an agent for the purpose of procuring his election, he, the candidate, is responsible for the act of that agent in committing corruption, though he himself not only did not intend it or authorise it, but though *bonâ fide* he did his best to hinder it. The rule must, at times, fall with great hardship upon particular persons. But I may just mention the considerations which no doubt led the common law, as I may call it, of Parliament to establish it. Corruption, as we all know, in practice and in fact, is seldom or never done by the hand of the candidate. The two modes in which it was found in practice that corruption was carried on were, I take it, principally these: persons were put forward to do all the work of canvassing and conducting an election, who did it corruptly, the candidate purposely keeping himself out of knowledge of anything about the matter, or being kept by his friends purposely out of knowledge of the matter, so that he should have the full benefit of their services; and were it not for this rule which has been established he would not suffer for their misdeeds; he would put forward a person to be his agent, and conduct his election and win for him, telling him to do it by fair means; if the man won it by foul means he would have the benefit of it.

That is one of the great reasons. Another great reason would be, that no doubt people were put forward, as to whom the candidate was carefully kept from knowing that they were spending any money, or doing anything, with the notion, according to the loose morality that prevailed in election matters, that when the time for petitioning was past, those persons might come to him and say, "I did spend that 1000*l.* for you upon the election; of course I did not tell you about it, or say a word about it, and now you are bound in honour to pay me that 1000*l.*, of which you had the benefit;" and which, in point of fact, the candidates did, I have no doubt, with some grumbling, feel themselves bound in honour to pay; accordingly that was another reason, that wherever a person was in such a relation to the candidate, that there would be reason to apprehend that consequence following, there the Parliamentary law was a motive for declaring that the candidate should be responsible for the act of his agent. Those were the guiding principal motives that induced, I was going to say the enacting, of the law, but I should rather say the establishing of the law in practice. Now comes the important and difficult question, to say what is the definition of agency, for which the candidate would be responsible; what relation between the candidate and the person who is shown to be guilty of a corrupt practice, would be sufficient to make the candidate responsible for that person's corrupt practice; and upon that I have, of course, done my best to find what others may have spoken about it, and have done my best to reflect upon it myself; and I am not able at present (and I rather doubt if in the nature of things it is possible) to give a precise definition of it. I think that all one can do is this, to say, that wherever a person is in any way allowed by a candidate, or has the candidate's sanction for it, to try to carry on his election and to act for him, that is some evidence to show that he is an agent. I think that we cannot come further (at least I have not been able to come further) than to say this: if in the ordinary course of things I had a jury to find the facts, I being a judge of the law, the direction I should give to the jury would be, to say, "All this is some evidence of agency; what I must say to you is to point out what I consider to be the reasons that have led to the law being established in this way;" in the present case the particular consideration would be, whether or no the agent had been doing so much for the candidate, whether there was so much *commodum* done that it would be just (using the Latin phrase quoted by Mr. Rodwell) to impose the onus upon him; I think I could not define it better than that I should say to a jury, "It is a question of more or less; it is the extent to which it goes. If there is evidence to show that the party is acting for the member who is returned, then, I think, one should consider him to be an agent; if, taking the spirit and object of the rule, you think, bringing your common sense to bear upon it, that he was substantially an agent," I think that is all I could say to a jury; and then, as the Legislature have thought fit to make me both judge and jury, I must apply that guide as best I can myself. I at once see the great inconvenience of such a rule being laid down in this. If that be the proper guide to be taken, the law must be very uncertain. It is an old observation of Selden in his Table Talk upon Equity, as then administered, when there were no fixed rules, but according to the conscience of the Chancellor, that equity necessarily is as uncertain as a measure of length in which the writ was made the Chancellor's foot, because a Chancellor's conscience was as variable as the length of a Chancellor's foot; a remark with strong sense in it, and no doubt as applicable to the substantial common sense of an election judge as it was to the conscience of the Chancellor in those days. But I have been unable, after the best consideration I have been able to give to it, to devise any better rule. I shall be excessively glad, for my part, if the Legislature can find out a better rule and make an enactment to apply hereafter. I shall be excessively glad if other judges can discover a better rule. I have not yet been able to do so; but I must act as best I can, according to my light. Then we have to see upon this particular case what the evidence comes to, and that is not excessively great. The evidence, I think, establishes this, that there was a Conservative Association, of which Mr. Turle and Mr. Sheppard were two members who were called by the petitioners. And I may observe at once that I think, as regards Mr. Turle and Mr. Sheppard, who were undoubtedly partisans, and might be expected to be partisans, on Mr. Serjeant Cox's side, though they were inclined to get a little irritated and angry under cross-examination, I did not see the slightest ground for doubting that they both honestly spoke the whole truth to the best of their knowledge and belief. I daresay there were little inaccuracies in what they said, and perhaps there were some matters not clearly explained; but I saw no reason to induce me to suppose they were not speaking the truth as honest witnesses. From their evidence I gather this: that this association was formed as a body for the purpose principally of conducting the registration, and also for the purpose of conducting the election. Whence they got the funds, or how they got the funds, those gentlemen were not able to tell us with any precision. The parties who could have told us have not been called, and we cannot tell where they got the funds, but they did get funds, and those funds were deposited in a bank; and the arrangement with the bank, no doubt, was to honour cheques that were presented signed, I am not quite sure whether by three members, of whom Mr. Turle was one, or whether by any one of those three, or any two of those three; but I have no doubt that the fact was that cheques upon the balance at the bank were to be signed by two or more of those members. Mr. Turle did sign the two cheques which were applied to the purpose of making the payments on this occasion; and he, after being examined both by Mr. Serjeant Ballantine and myself, was unable to say when it was agreed that the money should be paid, or who it was gave the directions that it was to be paid. The result was, that I drew the conclusion that the fact was that, though he signed the cheques, he was not the active member managing the matter; that, though he signed the cheques, he was directed, I suppose, by the secretary, Mr. Clarke; and when Mr. Clarke, the secretary, told him that it was right to sign the cheque, he took it upon his word, and signed it. I mention that as pointing to the conclusion I should draw from what Mr. Turle said, who knew but little more about it than that money in November was advanced, though whether it was 25*l.*, or, as would appear to be indicated by the ticks on the book, about 50*l.*, one cannot precisely tell. I may observe that one thing that leads me to believe that Turle and Sheppard were properly and honestly fulfilling their duty as witnesses, is the way in which that book was produced. It was unknown to the petitioners. It was suggested that there was a book. Mr. Turle answered, with every appearance of sincerity, that there was such a book. He said, "It may or may not be at my house." Then he was asked to go and look for it; and he did go and look for it, and found it, and brought it. That at once produced the impression upon my mind that he was honestly telling the truth. Had he said, as a partisan witness might have said, that the book was lost or destroyed, I might

have entertained a different view of the matter. I pass that by. Then we find that this association was formed; that they took a room at No. 2, Hammett-street. When they took it does not precisely appear. The landlord said they entered into possession in October. It appears that that must be inaccurate, or else they were twice occupying the room, because it appears from the evidence both of the man Trent, who was the messenger, and Mr. Cross, the printer, that there were some of these things done in this room just before the registration in September; and I think it seems probable, from what one of the other witnesses said, that the room was really taken in August, and not in October, and that Mr. Norman made a mistake in the time. It is not impossible that the higher rent of 1*l.* was to begin in October instead of August. At all events they took this room, and at this room at the time of the registration, and at the time of the election; and this much appears, that during the election, in that room the association did all those things which would commonly be done by a committee for promoting an election. They issued circulars; people met there, and sent out circulars; they circulated papers from there, and had messengers there. Now, all this was done by them in this way; and it appears distinctly enough that it was done openly, and must have been over a considerable time. They were known to be actively acting on the canvass in favour of Mr. Serjeant Cox, and there was every probability that Mr. Serjeant Cox and his agents would know it, from its being a matter that there was no secret about. Then, further, there is distinct evidence that at the time of the registration Mr. Cox's agents were aware of this association working there, and that they acted in concert with them, and helped them by sending circulars, and causing circulars to be printed, which were paid for by Mr. Sheppard. That does not come to very much, but it brings the thing to this point, which is the point upon which I think the important case turns. We have it that this body are acting as canvassers for Mr. Cox, actively acting in promoting the election at this time, and that fact, I think, we must fairly take it, was known to him and his people. Now does that, without taking any more, raise a *primâ facie* case which would call for an answer? I think it does. I think when it appears that things are done openly in that way, which in the ordinary course of things would not be done, except with the cognisance of a candidate who sanctioned them, the fair and natural inference, in the absence of proof to the contrary, would be that they were done by a person acting as agent for the candidate. If that be so, then there is some evidence arising upon that, and the principle of the chimney sweep's case, *Armory* v. *Delamirie*, 1 Smith's Leading Cases, at once applies very strongly. I am very far, indeed, from thinking that that evidence which I have mentioned would be conclusive at all. I think it was quite open to Mr. Cox himself and his agent to have been called to show that they had no communication with that body; that they repudiated it, and if that repudiation was *bonâ fide*, they would not certainly be responsible for their acts. I should be sorry to lay down, for example, that every liberal candidate in London should be responsible for the acts of the Reform League. Many similar cases might be supposed. The candidate may show that the body acting in that way was acting officiously for him, as I may call it, that it was not with his consent, and was against his will; but the presumption does arise, I think, that it was done in his favour, done for him, unless there be something to show the contrary. Then, taking it, as I said before, as a matter of common sense, looking to the substantial degree to which they went, I think the degree goes very far. I think, in this case, such a degree of benefit would be derived from their assistance, that their assistance was so important to the candidate, that it fairly establishes this, that if he took their assistance, did not hold them off or repudiate them, he must abide the consequences, and be responsible for their malpractices. And, coming to that conclusion, it does establish this, I think, that the election of Mr. Serjeant Cox cannot stand, for this reason, that I think it is shown that those who were his agents were guilty of bribery in giving money with the intent to induce voters to vote.

The scrutiny being unopposed, a sufficient number of votes of the classes already declared bad were struck off, and

BLACKBURN, J. said:—My certificate will be that Mr. Serjeant Cox is unseated, and that Mr. James ought to have been seated, and ought to have been returned, and should be returned now.

Common Law Courts.

COURT OF COMMON PLEAS.

Reported by W. GRAHAM and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Saturday, June 26.

ROBERTS v. THE BURY IMPROVEMENT COMMISSIONERS.

Right to begin—Contract, construction of—Right of employers to determine contract in default of contractor making due progress, and using due diligence in the opinion of employers' architects.

In the case of cross-demurrers it is the practice of the Court of Common Pleas to let the plaintiff begin.

The plaintiff contracted to erect certain works by a stipulated day, and it was agreed that the defendants' architect should have power, if he saw fit, to suspend the progress of the works, or to add to the works originally contemplated. Power was also given to the architect to enlarge the time for completion if he thought it necessary. Power was reserved to the defendants to determine the contract, and enter on the works, if the plaintiff did not, in the opinion of the architect, use due diligence, and make due progress so as to complete the works by the day stipulated. The architect made some delay in furnishing the original plans, and subsequently made considerable additions to them. He did not, however, enlarge the time for completion. Before the completion of the works, and before the day fixed by the contract for completion, the architect reported to the defendants that the plaintiff was not using due diligence, or making sufficient progress, so as to complete by the time originally agreed upon. The defendants accordingly gave the plaintiff notice that they determined the contract, and they then entered and took possession of the works:

Held, on an action for refusing to permit the plaintiff to complete the performance of his contract, and wrongfully preventing and discharging him from completing the same, and wholly, wrongfully, and finally renouncing the said contract, that the decision of the architect, that the plaintiff was not in his opinion using due diligence, and making due progress with the works, was final between the parties, and that it afforded a justification to the defendants for the course they took.

The declaration stated that the defendants were, under the provisions of the Act in that behalf, duly constituted as a burial board, and that on the 2nd Oct. 1866 an agreement was made between them and the plaintiff, by which, after reciting that the defendants were desirous of forming a burial

ground with certain buildings thereon, and that the plaintiff had tendered for the erection of the said buildings for a certain sum, which tender the defendants had accepted, the plaintiff bound himself within the time, according to the plans and drawings, in the manner and pursuant and subject to all and singular the terms, stipulations, provisions, obligations, and conditions contained in a certain specification and schedule of quantities annexed to the said agreement, for the said sum or such varied sums as in the said specification mentioned and provided, to make, construct, complete, and deliver up the said works comprised in this agreement and the schedules thereto annexed; and, in consideration of the plaintiff's binding himself as aforesaid, the defendants promised and agreed with the plaintiff that, he (the plaintiff) from time to time well and truly executing, observing and performing, fulfilling, submitting to, and keeping all things on his part to be executed, &c., they would pay the plaintiff the sum to become due to him, and that they would well and truly execute, observe, and perform all things in this agreement and in the said specification and schedule to be executed, observed, and performed by them. Averment that, in the said specification contained in the said schedule, there were thirty-six conditions, seventeen of which are for convenience hereinafter set forth: that all things have happened, &c. Breach, that before the time for the performance and completion of the said contract by the plaintiff, the defendants wholly, finally, and wrongfully refused to suffer or permit the plaintiff to complete the performance of the said contract on his part, and wholly, finally, and wrongfully prevented and discharged the plaintiff from completing the same, and wholly, finally, and wrongfully renounced the said contract on the defendant's part, whereby, &c.

The following are the material parts of the seventeen conditions above referred to as appended to the declaration:

Condition 22:

That the said contractor (the plaintiff) shall without recompense, claim or demand, delay or suspend the progress of the works or any part thereof, if and when and so often as he shall be so required by the said architect (meaning thereby the architect engaged by the defendants to superintend the works) or his clerk, assistant or inspector, and for such time or times as may in the judgment of the said architect or his clerk, assistant, or inspector be necessary for the purpose or advantage of the undertaking, and shall whenever directed by the said architect or his said clerk, assistant or inspector, and upon all other needful occasions at his own expense, properly cover down and secure so much of the said works as may be liable to sustain injury from weather or otherwise, and shall at all times during the continuance of his contract, and forthwith when required, properly make good any damage or injury, which such works or any part thereof may sustain, to the full satisfaction of the said architect.

Condition 24:

Provided always, that if by reason of any additions to or enlargements of the works (which additions or enlargements, the said architect is hereby authorised to make) as for any other just cause arising with the said burial board, or with the architect or his clerk, assistant, or inspector, or in consequence of any unusual inclemency of weather or for want, or for alleged want or deficiency of any orders, drawings, or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences whatsoever and howsoever occasioned, the contractor shall, in the opinion of the architect, have been unduly delayed or impeded in the completion of his contract, it shall be lawful for the said architect to grant, from time to time, by writing under his hand, such extension of time, and to assign such other day or days for completion as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the sufficiency in the tender; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for or in respect of any and every actual and probable loss or injury sustained or sustainable by the said contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the said burial board, for or in respect of the delay occasioned by the cause or causes, in respect of which any and every such extension of time shall have been made, but not further or otherwise, or for or in respect of any delay continued beyond the time mentioned in such writing or writings respectively.

Condition 27:

That it shall be lawful for the said burial board, in case the said contractor shall fail in the due performance of any part of the undertaking, or shall become bankrupt or insolvent, or shall compound with his creditors, or propose any composition to his creditors for the settlement of their debts, or shall carry on, or propose to carry on his business under inspectors on behalf of his creditors, or shall commit any act of bankruptcy, or shall not, in the opinion and according to the determination of the said architect, exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid, to determine the contract by a notice in writing under the hand of the clerk of the burial board, and to enter upon and take possession of the said works, and of the plant, tools, and materials of the said contractor, and use or sell, or use and sell the same as the absolute property of the burial board.

Condition 29:

That in case the said contractor shall fail in the due performance of his contract by and at the time or times hereinbefore mentioned or referred to, or at other the day or days to which the period of completion may have been extended, he shall be liable to pay to the said burial board a certain sum of money as and for liquidated damages.

Condition 34:

That in case any doubts, disputes, or differences arising or happening touching or concerning the said erections, or buildings, or any of them, or relating to the quantities, quality, descriptions, or manner of work done and executed, or to be done and executed by the said contractor, or to the quantity or quality of the materials to be employed therein, or in respect of any additions, deductions, alterations, or deviations made in, to or from the said works, or any of them, or touching or concerning the meaning or intention of this specification, or any part thereof, or of the contract entered into by and between the said burial board and the said contractor, or any plans, drawings, instructions, or directions referred to in this specification, or the contract, or which may be furnished or given during the progress of the works, or touching or concerning any certificate, order, or award which may have been made by the said architect, or in anywise whatsoever relating to the interest of the said burial board, or of the said contractor in the premises, such doubts, disputes, or differences shall from time to time be referred to the settlement, and be settled and decided by the said architect. And the said architect shall not be required or be compellable by any proceeding whatsoever by the contractor at law or in equity, or otherwise to answer or explain any matter touching or relating to any certificate or award made by him, or to state or show how, or why, or in what manner, or on what grounds he settled, ascertained, or determined, or omitted to settle, ascertain, or determine any matter whatsoever; nor shall he be required or be compellable in any way to state or give his reasons for any proceeding whatsoever which he may take or direct to be taken in or about the premises; nor shall he be required or be compellable to produce or show to any person or persons, or for any purpose whatever, any plans, drawings, or documents whatsoever, or any calculations or measurements in his possession or power.

Condition 36:

The whole of the works are to be completed on or before the 2nd Oct. 1868.

To this the defendants pleaded:

3. That the plaintiff failed in the due performance of certain parts of his undertaking, and did not, in the opinion and according to the determination of the said architect, and within the meaning of the said agreement, exercise due diligence and make such due progress as provided in and by the said twenty-seventh clause above mentioned, and as would have enabled the said works to be effectually and efficiently completed at the time and in the manner by the said alleged agreement provided. And all things happened, &c., necessary to entitle the defendants, under and according to the provisions of the said alleged agreement, to give the notice and to proceed in the manner hereinafter mentioned; and thereupon the defendants did duly serve upon the plaintiff a notice in writing under the hand of the clerk of the defendants as such burial board.

The plea then set out the notice whereby the defendants determined the contract.

And the defendants say that they thereupon accordingly determined the said contract, and took possession of the said works, and of the plant, tools, and materials of the plaintiff as by the said twenty-seventh clause provided. And the defendants further say that the said determination of the said contract, and the said taking possession of the said works and of the said plant, tools, and materials are the matters by the plaintiff in the said first count complained of, and not otherwise.

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Second replication to the said third plea:

That the said architect did not at any time grant an extension of time for the performance and completion of the said contract, and that the alleged failure of the plaintiff and the non-exercise by the plaintiff of such due diligence, and the not making by the plaintiff of such due progress, were caused and occasioned by the acts and orders, and the neglects, defaults, and hindrances of the defendants and their said architect, and by breaches of the said contract by the defendants, and not otherwise.

Third replication to the said third plea:

That the alleged failure by the plaintiff in the third plea mentioned and the non-exercise by the plaintiff of due diligence as therein alleged, and the not making by the plaintiff of such due progress as therein alleged, were wholly caused and occasioned by reason of causes, matters, and things provided for in and by the said 24th clause, by reason whereof the plaintiff was, in fact (and in the opinion of the said architect), unduly delayed and impeded in the completion of the said contract. And all conditions were performed, &c., necessary to entitle him, the plaintiff, to have granted to him by the said architect an extension of time, and to have another day assigned for completion of the said contract. Nevertheless the said architect wholly failed and neglected to grant any extension of time whatever to the plaintiff, or to assign any other day or days whatever for the completion of the said contract by the plaintiff.

Fourth replication to the said third plea:

That the plaintiff repeats the several statements in the said third replication mentioned with the exception of the words "and in the opinion of the said architect."

To the second replication to the third plea, the defendants rejoined:—

That the non-exercise by the plaintiff of such due diligence as therein mentioned, and the not making by the plaintiff of such due progress as therein mentioned were not in the opinion or according to the determination of the said architect caused and occasioned by the acts and orders, and by the neglects, defaults, and hindrances of the defendants and their said architect, and by breaches of the said contract by the defendants.

And for a third rejoinder to the said second replication:—

The defendants repeat the statements in the next preceding rejoinder mentioned, and further say the said opinion and determination of the architect was formed and arrived at upon and after due, reasonable, proper, and *bona fide* consideration of the facts and circumstances relating to such failure, and non-exercise of due diligence.

Demurrer to the said second replication on the ground, that it is no legal answer to the defendant's third plea, for that such a replication admits that, in the opinion and according to the determination of the architect, the plaintiff had not exercised due diligence, or made due progress, and such opinion and determination entitled the defendants to put an end to the contract.

Demurrer to the third replication, on the ground that it only alleges facts which would have justified the architect in giving extended time for the execution of the contract works, but fails to allege that the architect did give such extended time according to the contract.

Demurrer to the fourth replication on the same grounds.

Joinder in demurrers.

Demurrer to the second rejoinder to the second replication to the third plea to the first count, on the ground that the opinion of the architect affords no answer to the statements contained in the second replication.

Demurrer to the third rejoinder, on the ground that the opinion of the architect affords no answer to the statements contained in the second replication, though he acted *bonâ fide* and after consideration of the circumstances.

Joinder in demurrer to plaintiff's demurrer to the rejoinders.

The plaintiff's points were: First, that the second replication is good, and the rejoinders to it bad, on the ground that, if the defendants, by their own acts, defaults, or the acts and defaults of their servants, prevented the plaintiff from being in a position to complete the works by the day fixed, they cannot afterwards turn round upon the plaintiff, and take advantage of their own acts and defaults to put an end to the contract; that it is immaterial what the opinion or determination of the architect may have been, if the plaintiff was in fact so prevented. Secondly, that the third and fourth replications are good, on the grounds that the granting of an extension of time by the architect is not the only condition or circumstance which would relieve the plaintiff from completing the works within the time originally fixed; and that the neglect of the architect to grant an extension of time, when in fact and in his opinion or when in fact the plaintiff had been unduly delayed, cannot entitle the defendants to take advantage of their own delay, and put an end to the contract. The non-extension of the time leaves the parties in the same position as if there had been no provision such as that contained in the twenty-fourth condition.

The defendants' points were: First. That the third plea is a good answer to the first count, on the ground that it alleges facts bringing the case within the 27th clause of the conditions of the contract, and entitling the defendants to determine such contract, and it shows that the defendants did determine the contract accordingly. Secondly. That the said second replication is not a good answer to such third plea, on the ground that it admits that, according to the architect's opinion and determination the plaintiff had not exercised due diligence, &c., or if such replication is good then the second and third rejoinders are, or either of them is a good answer thereto, because such rejoinders show affirmatively, that in the opinion, &c., of the architect, the non-exercise of due diligence, &c., on the part of the plaintiff was not caused by any such matter as alleged by way of excuse in the second replication. Thirdly. That the said second replication is further bad because it shows that there was no extension of time given by the architect within the 24th clause, and by such clause the architect was the person to determine whether the plaintiff was entitled on any ground to such extension of time. Fourthly, that the said third replication is no answer to the said third plea, because at best such replication only alleges facts which might have justified the architect in giving an extension of time, but fails to show that he did in fact give such extension. Fifthly, that the fourth replication is no answer to the third plea, for, in addition to the grounds of objection last mentioned, it fails to show that the architect thought that the plaintiff was entitled to an extension of time. Sixthly, the defendants will contend generally that, under the contract in question, it was for the architect to decide whether the plaintiff had failed in due diligence, &c., so as to entitle the defendants to determine the contract; and, it appearing that the architect was of opinion, &c., that the plaintiff had failed and no collusion or *mala fides* being suggested, the architect's determination is conclusive. Seventhly, that the defendants are entitled to the judgment of the court on the demurrers to the said second, third, and fourth replications, and to the said second and third rejoinders.

Holker, Q.C. (*Chas. Russell* with him), for the defendants, claimed the right to begin, the defendants having demurred first.

WILLES, J.—Where there are cross-demurrers, it is the practice in this court for the plaintiff to begin.

Manisty (*R. G. Williams* with him), for the plaintiff.—Two questions are raised upon the pleadings. 1st. Whether the defendants had a right to take the work out of the hands of the plaintiff, the plaintiff not being able to complete by the stipulated day, and not making sufficient progress in order to com-

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plete by the stipulated day, owing to the extra work put upon him by the defendants. 2nd. Assuming that the architect was of opinion that the extra work put upon the plaintiff did not entitle him to further time, whereas, in fact, it did prevent him from completing by that time, though the architect thought it ought not, whether under these circumstances the defendants had the right to take the works out of the plaintiff's hands. As a matter of fact there was considerable delay on the part of the architect in furnishing plans, drawings, &c., and he subsequently imposed a considerable quantity of work beyond that specified in the contract, on the plaintiff. If these acts on the part of the architect did, as a matter of fact, render it impossible for the contractor to complete by the appointed day, then the obligation to complete by that day was gone, and the defendants had no right to take the works out of his hands. The meaning of the twenty-fourth condition is this: if in the opinion of the architect the imposition of extra work did prevent the plaintiff from finishing by the appointed day, then the architect is to have power to name another day instead, and all the conditions of the contract, in so far as they related to the day first named, would apply to the substituted day. *Holme* v. *Guppy*, 3 M. & W. 387, is in favour of the plaintiff's contention; so is *Russell* v. *Da Bandeira*, 13 C. B., N. S., 149. Erle, C. J., in giving judgment in the latter case (p. 202), says, "On the part of the defendant an attempt has been made to set-off against any demand which Mr. Russell might be able to substantiate against him a claim for penalties incurred under the claim in the contract, which provides that if the vessel should not be launched and delivered at the stipulated time, fitted and completed, as agreed, the plaintiff should forfeit 5*l.* per day by way of liquidated damages. Now the vessel was not delivered until a very considerable time after the day mentioned in the contract. But it is found by the arbitrator that the extra time required for the execution of the work comprised in the accounts A and B caused a delay in the whole of about six weeks in the progress of the shipbuilding. The days consumed by this delay so occasioned by the requirements of the defendant, and those employed by him, do not come within the penalty clause . . . . The case of *Holme* v. *Guppy* decides, that where a contractor undertakes, under pain of a certain penalty or forfeiture, to perform a work within a given time, and the performance within the time is prevented by the act of the party with whom he contracts, the contractor is exonerated from the penalties." In *Westwood* v. *Secretary of State for India* (7 L. T. Rep. N. S. 736; and 1 New R. 262), Wightman, J., says, "As to the set-off of the penalties, I am of opinion that the plaintiffs are not liable to them; even although the engineer did not think it necessary to extend the time for the completion of the works, as the plaintiffs aver that the act of the defendant rendered the completion within the appointed time impossible, and that too, to his knowledge. It would be so entirely unreasonable, that they should be liable under such circumstances, that we are bound so to construe the contract as to avoid such a conclusion." And Crompton, J., says, "It can never be said that these penalties accrued. If it had depended on the extension of time alone, I should have thought it was entirely in the discretion of the engineer; but when I find an allegation in the replication that the defendant ordered alterations, which rendered it impossible to complete the original work in the specified time, that is an answer to the claim for penalties. I think *Holme* v. *Guppy*, and the other authorities, are sufficient to entitle us to say, that, where the act, on the non-performance of which the penalty is to accrue, is prevented by the party complaining, the penalty does not attach." When the architect gave extra work to be done, the contract was *ipso facto* gone, so far as the stipulated day was concerned, and the architect was bound to use the power given to him by the contract to name a new day. The fact that the architect has power given to him to suspend the works for twelve months if he saw fit, shows that it was intended that in any such case the time should be extended.

Holker (*C. Russell* with him) for defendants.—A case of this kind depends on the true construction of the contract. It was undoubtedly competent to the parties to leave the determination of any question that might arise between them to the architect, and if they did so they must abide by his decision. The plaintiff agreed to abide by the decision of the architect, but now that that decision is against him, he seeks to appeal against it. The plaintiff's replications simply amount to this: that the architect might have granted more time, and though he did not do so, he ought to have done so. There is nothing to show in *Westwood* v. *The Secretary of State for India*, that the parties had agreed, as here, to make the engineer the sole arbitrator between them, as to whether the plaintiff had incurred penalties or not. *Stadhard* v. *Lee*, 7 L. T. Rep. N. S. 850; 32 L. J. 75, Q. B., is directly in favour of the defendants. There Cockburn, C. J. said: "We quite agree that stipulations and conditions of this kind should, where the language of the contract admits of it, receive a reasonable construction; as it is to be assumed that the party, in whose favour such a clause is inserted, meant to secure only what was reasonable and just. And we therefore entirely accede to the propriety of the decision in *Dallman* v. *King*, 4 Bing. N. C. 105; 7 L. J., N. S., 6, C. P. But we are equally clear that where from the whole tenor of the agreement it appears that, however unreasonable and oppressive a stipulation or condition may be, the one party intended to insist upon, and the other to submit to it, a court of justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties. . . . If these terms had been ever so unreasonable, we should have felt bound to give effect to them, and to hold that so long as the defendants were acting *bonâ fide*, under an honest sense of dissatisfaction, although that dissatisfaction might be ill-founded and unreasonable, they were entitled to insist on the condition, and consequently that the replication, which only alleges that their dissatisfaction was unreasonable and capricious, but which stops short of alleging *mala fides* in the defendants in acting as is stated in the plea, is insufficient." That is precisely this case. If *mala fides* were charged against the architect, or collusion between him and the defendants, it would be another question. After having left everything to the architect's decision, it is not open to either party to dispute it on any other ground. [WILLES, J.—The architect might have come to a wrong conclusion in favour of the plaintiff. Could the defendants have pleaded to an action brought against them, that he wrongfully did so? You may take it for granted that, if the architect did what he did within the scope of his powers, the defendants are justified.] Can there be any doubt on the construction of the contract, that the parties intended to make the architect the sole judge between them? He cited also

Clark v *Watson*, 34 L. J. 148, C. P.; 11 L. T. Rep. N. S. 679;

Scott v. *The Corporation of Liverpool*, 27 L. J. 64, Ch.

Manisty in reply.—Supposing that the 24th condition were not found in the agreement, then the case would stand thus: Extra work is given so as

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to prevent the contractor finishing by the appointed day; therefore the obligation to complete by that day is gone. What then is the effect of the 24th condition? That in such an event the architect should have power to enlarge the time, retaining all the other conditions of the contract. The plaintiff's case is that he never agreed to submit to the arbitration of the architect, as the defendants contend he did. The notice sent by the defendants to the plaintiff amounts simply to this: "You are not making sufficient progress and using sufficient diligence to finish the works by the 2nd Oct. 1868" (the day originally fixed). The plaintiff's contention is that at the time this notice was sent to him, he was under no obligation to complete by the 2nd Oct. 1868. That obligation expired as soon as extra work was imposed upon him.

WILLES, J.—The question raised by these pleadings is, whether it is competent for the plaintiff, notwithstanding the decision of the architect, to contend that the time had not arrived at which the defendants would have been justified in entering upon and taking the works in accordance with the powers reserved to them by the 22nd condition, and so depriving the plaintiff of the benefit which he had a right to expect from the fulfilment of his contract. The answer to this question depends on the construction which we put upon the specification annexed to the contract, and mainly to the 27th condition. This condition must be construed with reference to the conditions before and after it, but as to what are the rights of the parties, these are determined by the condition having reference to the special matter rather than by general inferences drawn from other conditions. Now, it is evident that the plaintiff was content to place great reliance on the good faith of the architect. In this 27th clause we find a number of acts enumerated, on the happening of any one of which the powers reserved to the defendants of determining the contract and entering on the works arose. One of these enumerated contingencies is, if the contractor "shall not in the opinion and according to the determination of the said architect exercise due diligence," &c. This default is put on the same footing with becoming bankrupt, and the other specific acts referred to in the condition. It is not necessary to refer to the distinction between the time originally specified for the completion of the contract and the time extended by the architect pursuant to the powers reserved to him in the 24th condition. In this 27th clause we have a judge agreed upon to determine whether the plaintiff was using sufficient diligence and making sufficient progress, and the powers reserved to the defendants by the 27th condition are made dependant on (amongst other things) the fact that, in the opinion and determination of the judge thus constituted, there was a want of diligence and progress. The clause gives power to the defendants, on receiving this report from the architect to enter. The third plea is evidently founded on the 27th condition, and it does not allege as a fact that there was on the part of the plaintiff such want of diligence, &c., but it states that in the opinion of the architect there was. The plea then goes on to state that a notice was given, the defendants subsequently entered, which is the breach complained of. It appears to me that the plea is good as founded on the true meaning of the 27th condition. Is it then answered by any replication? In the second replication, the plaintiff sets up against the opinion of the architect, the fact that he had been delayed and hindered by the extra work imposed upon him. Is that an answer? In order to settle this question one must look to the rest of the contract to see what powers were given to the architect. The fourth condition gives him power to vary or alter the original plans or instructions or order any further or other works beyond those originally contemplated. What then is the consequence of any delay on the part of the architect in furnishing plans, or of any subsequent variation of these plans? This is provided for by the twenty-fourth condition, which says that, in any such case, it shall be lawful for the architect to grant "such extension of time and to assign such other day or days for completion as to him may seem reasonable." It seems then that all matters relied upon in answer to the plea, are matters which the architect ought to have taken into consideration before reporting to the defendants. The replication virtually says, "There were circumstances which ought to have had an effect on the architect's mind different to what they actually had." It is then, as the counsel for the defendants put it, an appeal from the architect's decision. I am of opinion that this replication is bad. I come now to the third replication. This merely sets up matter which ought to have been acted upon by the architect. Another objection to be made to it is, that it shows no reason why the architect should not have come to the conclusion that there was not due diligence. If the contractor had been using due diligence and making proper progress, that ought to have been considered by the architect. This replication cannot be sustained. Besides, the opinion of the architect might have varied from time to time. He might change his mind. If the third fails, the fourth fails also. Coming now to the plaintiff's authorities, I do not in the least wish to impugn them. But there is this broad distinction between those cases and the present one, that in them the penalty, which was expunged by the conduct of those who employed the contractor, was to depend upon the happening of an event, viz., the failure to complete by a given day; and there the failure was due to the fault, not of the contractor, but of those who employed him, and who would, if the penalty had been exacted, have reaped the benefit of it. But in the present case the penalty was to accrue, not on negligence in fact, but on negligence in the opinion of the architect. This is the distinction between the present case and those cited for the plaintiff. It is impossible for us, after the architect has said there was want of diligence and progress, to say that there was not, and override his decision and its consequences. Our judgment must be for the defendants.

M. SMITH, J.—I am of the same opinion. I fully concur in the judgment of my learned brother, and as he has gone into the matter so fully, I have but little to add. The question mainly depends on the construction we put upon the 27th condition. The defendants have power given them by that condition to determine the contract on the happening of any of certain events. One of them is, that the contractor shall not "in the opinion of the said architect" make progress, &c. As a matter of fact, the plaintiff did not, in the opinion of the architect make due progress, and use due diligence. How then can it be contended that the defendants were not justified in acting as they did, on receiving the opinion of the architect? The answer given is, that the plaintiff's failure to make due progress arose from the extra work imposed upon him. Is this an issue to be determined by a jury? I think not. If we look to the 24th condition, it appears to me that the parties intended to make the architect judge and umpire between them, and neither is in a position to impugn his decision. It was the intention of the parties to leave all to his determination. The 4th condition gives large powers to the architect by way of alteration of, and addition to, the

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original scheme, and the 24th gives him power to extend the time for completion; as to the necessity of which he is to be judge. If this clause stood alone, there might be a foundation for the plaintiff's argument, but the 27th condition expressly leaves the question to be settled by the architect. To refer it to another tribunal would be to appeal from the architect to a jury. The architect has power to extend the time in case of inclemency of the weather. But could the question be put to a jury whether the inclemency of the weather ought to have entitled the plaintiff to an extension of time, when the architect had already decided it ought not? The cases cited for the plaintiff are quite distinguishable from this. In *Westwood* v. *The Secretary of State for India*, there was no clause like the 27th condition in this case, giving the defendant the right to determine the contract on the information of the architect. The parties in this case gave the architect power to take a certain course. The architect then was bound to take all the circumstances into consideration—his own acts and those of others—and shape his course accordingly. It is quite consistent to imagine that on some grounds the architect might have thought the plaintiff entitled to an extension of time, while he might at the same time have thought that the petitioner was not on the whole using due dilligence or making due progress.

Judgment for the defendants.

Shaw and *Tremellen*, attorneys for plaintiff.

Gregory, Rowcliffe, and *Rawle*, attorneys for defendants.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

May 8 and June 3.

COX *v.* LEE.

Libel—Charge of ingratitude—Statement of facts on which charge is founded—Imputation of pecuniary difficulties—Libel or no libel—Question for jury—When it may be withdrawn from them.

It is libellous, and affords good cause of action as such, to charge another with ingratitude, even though the facts upon which the charge is grounded be stated, and are insufficient to support the charge.

So held by the Court of Exchequer (Kelly, C.B. and Bramwell, Channell, and Pigott, BB.)

And per Kelly, C.B., to impute untruly pecuniary embarrassment to another, and the inability to purchase a certain property without the aid of a loan from a third party is libellous; even although it be at the same time stated that the loan was afterwards honourably repaid.

A judge is only justified in withdrawing the question of "libel or no libel" from the jury in cases where he is clearly of opinion that, if they were to find the matter a libel, their verdict would be set aside by the court above. (Per Kelly, C.B.)

The first count of the declaration was on a libel falsely and maliciously printed and published in a certain newspaper, called the *Leicester Mail*, by the defendant, of and concerning the plaintiff as proprietor and publisher of a certain newspaper called the *Leicester Advertiser*, in the words following:

That the *Advertiser* (meaning the plaintiff) should disparage Mr. Frewen is hardly accounted for by a little incident related the other night to his constituents by Mr. Frewen, except that that excellent educator of the people adds, to numerous other virtues not mentioned in the Litany, that which all true Englishmen abominate most—*ingratitude.*

The second count was on another libel, falsely and maliciously printed and published in the *Leicester Mail* by the defendant of the plaintiff, in relation to his being proprietor and publisher of the said newspaper, called the *Leicester Advertiser.* The libel set out in this count was an account of a public meeting held at Leicester, and which was addressed by Mr. Frewen as a candidate for the representation in Parliament of the Northern Division of the County of Leicester, and at which meeting Mr. Frewen, after some preliminary observations, spoke as follows:

He would now draw their attention to an article which appeared in the *Leicester Advertiser* of Saturday last (meaning an article published by the plaintiff in the said newspaper, called the *Leicester Advertiser*) and he would read them the following extracts:

"After the unsuccessful attempts of Mr. Frewen, in some of which we accorded him our support, to obtain one of the seats of the Northern Division, we feel impelled to state our opinion that his indiscretion, in making the present attempt, can have no other effect than that of disquieting the Conservative ranks, and of affording to the opposite political party an opportunity of testing their strength at the Conservative cost, and of gaining probably additional influence in that part of the country.

"There is no difference of sentiment on the Protestant Church question between the three candidates, and as Mr. Clowes has received so pressing and numerously signed a requisition to come forward as a candidate, while no public invitation has, so far as we are aware, been given to Mr. Frewen, we trust that that gentleman will yet reconsider the matter and save the Northern Division of the county from the excitement incidental to a contested election. The influential meetings at Loughborough and Melton, where it was unanimously resolved that Lord John Manners and Mr. John Clowes should be the recognised candidates in the Conservative interest, distinctly point to the issue of the contest, should one take place, and as unmistakeably indicate the course that Mr. Frewen should take, viz., to withdraw his name from the list of candidates for the representation of the Northern Division of Leicestershire."

Such a statement was most ungrateful on the part of Mr. Cox (meaning thereby the plaintiff), *who would never have been proprietor of that journal but for the help he* (Mr. Frewen) *had given.* (Cries of shame.) *He* (meaning thereby the plaintiff) *was in a great strait, and asked him* (the speaker) *to assist him. He would certainly say that the debt had been most honourably repaid, and he would never have mentioned it but for such ungrateful conduct on the part of Mr Cox* (meaning thereby the plaintiff).

The third count was on another libel, falsely and maliciously printed and published in the *Loughborough Monitor*, by the defendant of and concerning the plaintiff, as proprietor and publisher of the said *Leicester Advertiser*, in the words following, that is to say: "North Leicestershire Election. A meeting of Mr. Frewen's supporters was held at the George Hotel, on Wednesday evening the 23rd ultimo, and published in the *Leicester Mail* last Saturday. Some reference was then made by the speaker to Mr. Penn Cox" (meaning thereby the plaintiff), "which he complains is not true, and the same evening the proprietor of the *Mail*" (meaning thereby the defendant) "received a letter from his solicitors" (meaning thereby the plaintiff's solicitors), "of which the following is a copy:

"Leicester, Sept. 25th, 1868.

"Sir" (meaning the defendant),—"In your report of the meeting of Mr. Frewen's supporters at the George Hotel, on Wednesday last, an allusion is made to Mr. Penn Cox" (meaning the plaintiff), "which can have nothing to do with the election, and could only have been inserted out of personal malice to Mr. Cox, as there is not one word of truth in Mr. Frewen's statement respecting the purchase of the *Advertiser*, while the report is calculated to do Mr. Cox serious injury. It is his intention at once to commence an action, which will give Mr. Frewen and himself an opportunity of meeting in the witness box. We have no wish to put you to any personal annoyance in the service of the writ, so be good enough to hand this letter over to your attorney, who can receive the process for you. Your obedient servant, FREER and BREVE.

"Mr Thomas Wm. Rotting Lee.

"On the receipt of the above I communicated to Mr. Frewen the substance of that letter, and have much pleasure in giving our readers his reply to me this morning:

"Cold Overton Hall, Sept. 28, 1868.

"Dear Sir,—I have read your report in the *Mail* as to

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what I said on Wednesday evening last with reference to Mr. Penn Cox" (meaning the plaintiff); "and though I don't think I made use of the exact expression that your reporter has attributed to me, yet the report is calculated to convey to anyone who has not got a twist in his intellect the substance of my meaning, which was this—*that when Mr. P. Cox*" (meaning the plaintiff) "*wanted to purchase the* Advertiser (meaning the said newspaper called the *Leicester Advertiser*) "*he had not the means to pay for it, and he made more than one or two urgent applications to me for assistance, and I did assist him to the amount he asked me to do, which really was most honourably repaid, but yet I didn't think Mr. Cox*" (meaning the plaintiff) "*had shown his gratitude to me for what I had done for him.* I am not aware that there is anything libellous in saying that a man was in a great strait about ten years ago, and that he had, as far as I know, met all his engagements and paid everybody. If Mr. Reeve thinks that this is libellous let him bring an action against me on the part of Mr. Cox," (meaning the plaintiff) "and I will defend it, and not try to harass an inoffensive man like yourself" (meaning thereby the defendant), "whose only crime appears to be that you were bold enough to start that cheap and independent paper the *Leicester Mail*. Of course, you know that no action can be proceeded with at this time of the year, it being the Long Vacation.—I am, dear Sir, yours faithfully,

"Mr. T. W. R. Lee. C. H. Frewen."

To this declaration the defendant pleaded, 1. not guilty; 2. a justification; and thereupon issue was joined.

At the trial before Pigott, B. and a special jury, at the last spring assizes at Leicester, proof was given of the publication by the defendant of the libels charged in the declaration, and the following appeared to be the material facts with respect to them:—

The defendant was the proprietor and publisher of the *Leicester Advertiser* newspaper, and brought this action against the defendant, the proprietor of the *Leicester Mail* and the *Loughborough Monitor* newspapers, in respect of the alleged libels in question, published by the defendant in the last-mentioned newspapers.

For some years prior to 1857 the plaintiff had carried on and published the *Leicester Advertiser*, in partnership with one Cleveland, but in that year he dissolved partnership with Cleveland, and bought him out, paying a sum of 2050*l.* for the same. Upon this occasion, according to the evidence of the plaintiff, Mr. Frewen voluntarily offered pecuniary assistance to the plaintiff to enable him to buy the paper, which, however, the plaintiff stated he did not then want. Mr. Frewen, on the contrary, in his evidence on the part of the defendant, stating that the plaintiff at that time applied to him for a loan. As a fact, no money was then advanced by Frewen to the plaintiff. Some few years afterwards, however, viz., in 1863, the plaintiff being in want of pecuniary help to enable him to pay off a debt contracted by him, in the working of the paper, applied to and obtained from Frewen the loan of 300*l.* for that purpose, to be repaid by yearly instalments of 100*l.* each with interest at 5 per cent. In 1865 the plaintiff had repaid 150*l.* of the 300*l.* with the interest, and some time in that year previous to a then coming election, he had a private interview with Frewen on the subject of his candidateship for the county and, after remonstrating with him on some parts of his political conduct, strongly advised him not to offer himself as a candidate for the representation of the county. Frewen then applied for immediate payment of the balance of the 300*l.* loan, with which application the defendant complied, and paid the money. In his evidence in the witness box, the plaintiff denied entirely the truth of the statement that he had borrowed the money of Mr. Frewen to enable him to purchase the newspaper, or that without Frewen's help he would never have been the proprietor of it; but he admitted that when he borrowed the 300*l.* of Frewen in 1863 he wanted the money "to carry on the paper." Mr. Frewen, in his evidence, said he believed the plaintiff told him he "wanted the money to assist in purchasing the paper."

The learned judge defined the law, and left it to the jury to say whether the publication in question was or not, in their opinion, libellous. The jury found for the plaintiff, with 20*l.* damages, and in Easter Term last, a rule *nisi* was moved for and obtained by *Bulwer*, Q. C. on the part of the defendant, to arrest the judgment, or for a new trial on the ground that none of the counts in the declaration, or that some one or more of them do not, disclose any cause of action. Also on the ground of misdirection in that the learned judge ought to have directed the jury to find for the defendants on both the issues, and also on the ground that the verdict was against the weight of evidence, and that the damages were excessive.

May 8.—*O'Malley*, Q. C. *Keane*, Q. C. and *Merewether*, for the plaintiff, showed cause against the rule. It is said, *contra*, that the declaration discloses no ground of action; but to charge a man with "*ingratitude*" simply is a libel, and therefore the first count of the declaration is good: (*Hoare* v. *Silverlock*, 12 Q. B. 624.) The libels on which the second and third counts are grounded contain a direct attack and imputation upon the pecuniary and commercial credit of the plaintiff, to whom, as to everyone engaged in trade of any kind, his credit and pecuniary reputation is of the last importance; and it was a libel as false as it was injurious, there not being a word of truth in the imputation. True it is that facts on which the statement appears to be founded are stated, but so far from that lessening, it rather increased the injury, especially when it is seen that the facts are not correctly stated. There can be no doubt that such a charge furnishes a good cause of action: (*Fray* v. *Fray*, 17 C. B., N. S., 603; 34 L. J. 45, C. P.) The third count in effect reiterates the second.

June 3.—*Bulwer*, Q. C. and *Barratt Jacques*, for the defendant, *contra*, supported their rule.—Even if the first count, which charges ingratitude simply, be good, the two other counts cannot be supported, and therefore as the verdict was general there must be an arrest of judgment or a new trial. With respect to the second and third counts, the question is whether or not it is a libel to say of a man, "I lent him a sum of money to enable him to buy such and such a property, and he has honourably repaid me, but I do not think he was grateful to me afterwards in not supporting me at the election?" We apprehend that it is not. Surely the statement of the bare facts themselves, apart from the conclusions drawn from them, would not be libellous, for it would not be "calculated to injure the plaintiff's credit, or to expose him to hatred, contempt, or ridicule," which, to make it a libel, it should be, according to the definition of Parke, B. in *Parmiter* v. *Coupland*, 6 M. & W. 108. The statement that the plaintiff had honourably repaid the loan would rather, on the contrary, tend to raise him in public estimation. What then makes the statement libellous? It is said that Mr. Frewen's drawing his own conclusion from the facts makes the matter a libel; but if that conclusion was not a correct one from the facts stated, then it would be no libel; whilst, if his conclusion was a well warranted one from the facts, then the libel was justified. The case of *Hoare* v. *Silverlock* (*ubi sup.*), relied on by the plaintiff, is very wide of the present case. The libel here is not, as in that case, a charge of ingratitude as affecting the plaintiff's moral character, but simply with doing something which Mr. Frewen considered to be ungrateful. But at the very same time that Mr. Frewen complains of ungrateful conduct, the

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complaint is shown to be unfounded. It could not be ingratitude in the plaintiff to perform a public duty as a writer for the press, and no sinister or indirect motive is imputed to him. The case of *Fray* v. *Fray* (*ubi sup.*), relied on *contra*, would go too far if carried to the extent of the plaintiff's contention, and would establish that the question of libel or no libel could never, on any occasion, be decided by the court. We do not contend that the first count is bad in arrest of judgment; but as to the second and third counts, either the plea of justification was proved, or the charges relied on in those counts were not under the circumstances libellous, and so did not afford any good cause of action.

Kelly, C. B.—This rule was moved in arrest of judgment, on the ground that none of the counts in the declaration disclosed any cause of action. Now no doubt the verdict being for a lump sum as general damages, and not for damages apportioned to the different counts separately, if any one of the counts be bad the verdict cannot stand. We have, therefore, to determine not whether in point of fact a libel was published, but whether what was published has been stated in such a way as to render it compatible for the jury to find their verdict for the plaintiff, and give damages thereupon. The material allegation is, that when the plaintiff was desiring to purchase and set up a newspaper, he had no money of his own wherewith to effect his object, and therefore made several applications to Mr. Frewen for a pecuniary loan which was accorded to him, and which had been honourably repaid. I am of opinion that the matter there alleged is libellous. Without putting oneself in the position of the plaintiff at the time this statement was made, it is hardly possible, rightly and fairly to consider the question raised by it. Can there be a doubt that it would be exceedingly painful to the feelings of any man in the plaintiff's position in life to have such a statement concerning him made at a public meeting, in the very county in which he conducts and publishes his newspaper, and that, too, by a person like Mr. Frewen of considerable social standing and influence in the county? Passing by the bearing of the statement itself on the charge of ingratitude, and whether or not it would induce the hearers of it to conclude that a man who had so acted was truly guilty of ingratitude, surely to say of a man of business in independent circumstances, that before he could purchase the property now owned by him he was, being without the necessary means himself, obliged to borrow the money requisite for the purchase of a third person, is a statement which reflects on the man thus spoken of in a way likely to be not only most painful to his feelings, but injurious and disparaging to his credit and commercial reputation amongst his fellows and neighbours, and in the county generally. Anything in the nature of a charge against, or a doubt or suspicion concerning a man's pecuniary ability, particularly when published in a public newspaper, must have an injurious effect upon that man's position and reputation in the world. I cannot, therefore, looking at the position in life of the several parties, and the circumstances of the case generally, say that I think the damages awarded by the jury are at all excessive. But it was further urged by the learned counsel for the defendant that, in addition to the question whether or not the particular publication was libellous, it was for this court to say that the nature of the libel was such that it ought not to have been left to the jury, but to have been decided by the learned judge himself. But, in my opinion, a judge is only justified in withdrawing the question of libel or no libel from the consideration of the jury in where he is clearly of opinion that the matter complained of is not a libel, and that, if the jury were to find it a libel, their verdict would be set aside by the court above. In the present case I think my brother Pigott was fully warranted in leaving the question in the way he did to the jury, and that their verdict was strictly justified by the evidence. I am of opinion therefore that the defendant's rule should be discharged.

Bramwell, B.—I also am of opinion that this rule should be discharged. The libel, of which the plaintiff in his declaration complains, charges him with ingratitude, for although certain facts, on which that charge is afterwards grounded, are stated, yet nevertheless the plain and obvious meaning of the statement, alleged in the declaration, is to make the charge in question. Now it is admitted very properly, and, indeed, it is quite clear, that if a charge of ingratitude generally, and no more, were made against a man, and no reason for it were given, it would be libellous. That the first count, therefore, is valid is not questioned. But then with respect to the second and third counts, Mr. Bulwer has urged upon us that they contain no cause of action, because certain facts are stated showing what it is that Mr. Frewen called ingratitude, which facts show, at the same time, that in fact it was not ingratitude. On consideration, I do not think that that is so. It is true, doubtless, that the facts or reasons which induced Mr. Frewen to come to the conclusion that the plaintiff was ungrateful are stated by him, but nevertheless there is also the distinct charge of ingratitude made, and although the facts which were stated may not be sufficient to prove the charge of ingratitude against the plaintiff, yet anyone hearing or reading the statement might reasonably enough conclude and say that there were other matters behind which were not stated which would fully bear out the charge. But, if the facts are truly stated, I think the libels declared on not only contain the charge, but show the existence of ingratitude. It is easy to say that it is a patriot's duty, when an unfit person presents himself as a candidate for a public post, to proclaim his unfitness. But, like gratitude itself, this is a duty of imperfect obligation, and does not necessarily relieve him, who undertakes its performance, from liability to the charge of ingratitude. If having, after repeated urgent applications, obtained the desired loan from Mr. Frewen, the plaintiff had, without any further circumstance happening between them, withdrawn his political support from Mr. Frewen, and published in his newspaper a statement that the latter was not a fit person to stand for the representation of the county, would not that have been ungrateful? I think it would. But even if it was a duty incumbent on the plaintiff to call attention to Mr. Frewen's unfitness to be the county representative, surely he might have discharged that duty in a different manner, and one less calculated to bring Mr. Frewen's candidature into ridicule than that which he chose to adopt. It is not merely a qualified expression, or suggestion even of a possible doubt, but a direct and distinct charge of political unfitness and indiscretion. [His Lordship here read the article.] I think that it was an ungrateful thing for the plaintiff to write so of one from whom he had borrowed money, and to whom therefore he was under an obligation. In my opinion, however, the justification was not made out, and the argument on the part of the defendant fails on this ground, that the libel in the declaration contains both the charge and the proof of the existence of ingratitude. But then it is said that the libel was justified, because the statement made is true. I do not agree to that. Had *all* the facts been fully and truly stated it would have appeared from them that there was no ingratitude at all on

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the plaintiff's part, for it seems that Mr. Frewen, when told by the plaintiff that he could no longer afford him his support at the coming election, demanded repayment of the balance of the money which he had lent to the plaintiff, who thereupon repaid it; and that, I think, cancelled the former obligation, and left the plaintiff free to write as he did. Had these facts been stated the point urged by the defendant's counsel would have been raised, as, together with the charge itself of ingratitude, there would have been shown the proof that the plaintiff had not been ungrateful; the additional fact would have qualified the charge, not, indeed, as making it justifiable, but as lessening its injurious effect. The defendant's case fails then on two grounds. First, that a moral offence is charged and, supposing the facts stated in its support do not warrant it, yet it is still a libel, for a doubt is raised whether or not there may be other facts behind which would warrant the charge; and, secondly, if there were no other facts than those stated, ungrateful conduct was shown; although, so far as the facts were stated, they might be true, yet other facts which existed, and which would have shown that there was no ingratitude on the plaintiff's part, were not stated.

CHANNELL, B.—I am of the same opinion. I think that a judge who, in an action for libel, should tell the jury distinctly one way or the other, either that a plaintiff had or that he had not a cause of action, would be wrong, for Baron Parke, in the case of *Parmiter* v. *Coupland*, 6 M. & W. 107, after referring to the Act of 32 Geo. 3, c. 60 (Fox's Act), by which indictments for libel were put upon the same footing as other criminal charges, says, "It has been the course for a long time for a judge in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to constitute that offence are proved to their satisfaction; and that whether the libel is the subject of a criminal prosecution or a civil action." I think, therefore, that my brother Pigott directed the jury right, for certainly the use of the words in question at a public meeting is enough to raise the question for the jury whether they were used in such a way as that they amount to a libel. The bare charge of ingratitude is in itself a very opprobrious one, and the question was one entirely for the jury, who have thought it to be a case justifying a verdict for the plaintiff.

PIGOTT, B.—In my direction to the jury at the trial I followed as nearly as I could the rule which my brother Channell has referred to as having been laid down by Parke, B. in the case in 6 M. & W., and I stated to them what the law considered to be a libel, and then left to them the question whether the publication in question in the present case was, under the circumstances, a libel or not. The accompanying circumstances of each particular case must of course always have great weight in the consideration of the matter by a jury. The charge of ingratitude, no one can doubt, is a particularly hateful one, and calculated to bring, odium, and disrepute upon the party so charged. I confess I think if I erred at the trial at all it was not in being unfavourable to the defendant.

Rule discharged.

Attorneys for the plaintiff, *De Gex* and *Harding*, 4, Raymond-buildings, Gray's-inn, W.C.; agents for *Freer* and *Reeve*, Leicester.

Attorneys for the defendant, *Dale* and *Stretten*, 3, Gray's-inn-square, W.C.; agents for *C.* and *A. Stretten*, Leicester.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

May 23 and June 1.

(Before Lord PENZANCE, J. O.)

BROWN v. BROWN and ROBEY.

Matrimonial suit—Connivance—Wilful neglect—Costs.

In a husband's suit for dissolution on the ground of adultery, the respondent pleaded connivance, wilful neglect, and conduct conducing to adultery. In support of these pleas it was proved that the petitioner had permitted the co-respondent to visit frequently at his house in his absence, to send provisions into his house, and to make his wife an allowance of 1l. a week, and that he had sent his wife to borrow money from the co-respondent. Also that he had allowed him to escort his wife to London. The jury found the issue of adultery in favour of the petitioner, and they acquitted him of connivance, but they found that he had been guilty of wilful neglect and conduct conducing to the adultery:

The court refused to grant a decree nisi, and dismissed the petition. It also condemned him in his wife's costs, but made no order as to the co-respondent's costs.

This was a husband's suit for a dissolution of his marriage on the ground of his wife's adultery with the co-respondent, and damages were claimed. The adultery was not traversed, but the respondent and co-respondent pleaded connivance and wilful neglect and conduct conducing to adultery. The case was tried before the Judge Ordinary and a common jury.

The parties were married in 1854, and afterwards lived together at Lincoln, where the petitioner was employed on some engine works of which the co-respondent was the manager. In Nov. 1866 the respondent left her husband, and has since cohabited with the co-respondent.

In support of the plea of connivance and wilful misconduct conducing to adultery several witnesses were called who stated that the co-respondent was at the petitioner's house every day with the petitioner's knowledge; that he frequently sent supplies of provisions and other necessaries to the house; that he allowed the respondent 1l. per week, which was frequently paid in the petitioner's presence, and that when the petitioner was in want of money, he frequently sent his wife to ask the co-respondent for it. It was also proved that on one occasion the petitioner allowed his wife to go to London with the co-respondent, accompanied them to the station, and took tickets. When the petitioner left the co-respondent's employment, he went to Chelmsford to seek fresh employment, and left his wife at Lincoln. On his return a violent quarrel took place, and his wife left his house and went to cohabit with the co-respondent.

On the other side witnesses were called to prove that the petitioner was not aware of the improper intimacy between his wife and the co-respondent, and that he had complained of the frequent visits of the co-respondent to his house.

The jury found that the respondent and co-respondent had committed adultery; that the petitioner had not connived at the adultery, but that he had been guilty of conduct conducing to the adultery.

Cur. adv. vult.

June 1.—Dr. *Spinks* (*Inderwick* with him) now moved the court on behalf of the petitioner to grant a decree *nisi*, and to condemn the co-respondent in costs.

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Searle for the respondent.

Dr. *Tristram* for the co-respondent *contra*.

Lord PENZANCE, J.O.—In my judgment neither branch of this application can be granted. The facts of the case are perfectly fresh in my mind. The petitioner was a working engineer employed at iron works, where the co-respondent was in the position of superintendent or manager. At a certain date, which is not material, the petitioner's wife went to live in the co-respondent's house. At first the semblance was kept up of their occupying separate rooms, but after a time that was abandoned, and they slept together and lived as man and wife. That was the adultery of which the petitioner complained. But it turned out in evidence that for more than a year before this, the wife refused to cohabit with her husband, and that the co-respondent, with the knowledge of the petitioner used to call at the house two or three times a day for the purpose of seeing her. It was likewise proved that he used to furnish the respondent with money, 1*l.* a week, and that the petitioner was aware of it, that he was in the habit of sending provisions to the house for the use of petitioner or respondent, or both, and that the petitioner was aware of that, and further, that upon one occasion the respondent was allowed to go up to London with the co-respondent for medical advice. I quite agree in the remark on that head, and if there had been no previous connection between the respondent and co-respondent, the court would not be so suspicious as to put a bad interpretation upon the conduct of the husband in authorising the manager of the works at which he was employed to act as the escort of his wife on her journey to London. But when connected with the other facts of the case, the court cannot make that allowance. It is another fact in the case which tends to show that the petitioner for his own benefit was really casting his wife in the way of the co-respondent. The jury, it is true, have not found connivance. They have found that he was guilty of neglect, and of misconduct conducing to his wife's adultery. But it is extremely likely that if there had been no such plea as that upon the record, they would have found connivance. They had before them two issues, either of which, if found against him, stood in the way of the petitioner's relief, and they did what juries often do, seeing that practically justice would be effected without going to the full extent of finding the petitioner guilty of connivance, they adopted the other plea as involving less dishonour, and found him guilty of neglect and misconduct conducing to adultery. But whether that is so or not they have found that issue against him, and the court entirely concurs in the finding. I think that no harm has been done to the petitioner. I think the evil which has befallen him and his wife is one which he had a great hand in bringing about, and under those circumstances it is plain that he ought not to have a decree, and ought never to have instituted this suit. He must pay the wife's costs, because she has succeeded, but I don't condemn him in the co-respondent's costs. The petition must be dismissed with costs.

Petition dismissed.

Proctors for petitioner, *Scott* and *Co.*

Proctors for the respondent, *Swann* and *Co.*

Proctors for the co-respondent, *Swann* and *Co.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

April 23 and 24.

(Before the LORDS JUSTICES)

Re THE LONDON AND NORTHERN ASSURANCE CORPORATION (LIMITED);

STACE AND WORTH'S CASE.

Companies—Attempted amalgamation—Void or voidable—Ultra vires—Acceptance of shares as a consequence of amalgamation—Shareholder acting as director—Winding-up—Liability of shareholder.

The articles of association of the L. and N. Co. provided (in effect) that the power of appointing directors should vest in the shareholders, and that upon any amalgamation or sale of its business an extraordinary general meeting should approve and sanction it. That company entered into an agreement with the I. Co. for an amalgamation, and it was provided that the property of every kind of the latter should be transferred to the former; that the board of directors of the amalgamated company should consist of a stated number of members of each of the boards of the two companies, who were to be selected by themselves, and that the proposal should be sanctioned by the shareholders of both. S. and W. had been directors of the I. Co., and became entitled to shares under the agreement; they were entered on the register in respect of them, certificates were made out and forwarded, both of them were chosen to be directors of the amalgamated company, and both acted. The agreement was never ratified by the L. and N. Co., or by the amalgamated company:

Held, under these circumstances, that S. and W. were not contributories of the amalgamated company, inasmuch as the agreement for amalgamation was ultra vires, and therefore void from the beginning; and as the allotment of shares to S. and W. was purely part of the amalgamation, and not a separate and independent contract on their part to accept shares.

This was an appeal by the official liquidator of the above-named company, which is now being wound-up in the chamber of James, V. C., against an order whereby his Honour refused to settle on the list of contributories the names of the two respondents, Col. Stace, and Mr. Worth. The circumstances were as follows:—

Both of these gentlemen were in the summer of 1867 holders of shares in, and directors of, a company at that time carrying on business, entitled The Life Investment Mortgage, and Insurance Company (Limited).

At the time the company now in course of winding-up, the London and Northern Assurance Corporation (Limited), was also in existence, and was duly registered under the Companies Act 1862, with articles of association, which provided in the usual manner for the appointment of directors, and for calling general meetings of the company, their most material provisions being these:—

52. That until the holding of the first ordinary meeting, the number of the directors by whom the affairs of the company shall be managed, shall be such (not less than four, or exceeding twelve, inclusive of the managing director appointed by these presents) as the directors for the time being may from time to time deem expedient.

Then followed certain other clauses which provided for what was to happen until the holding of the first ordinary meeting, and what powers the directors were to have until that time. And the clause continued thus:

The number may at any time be varied, either by in-

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creasing or diminishing the same, by a vote of an extraordinary meeting under the provisions in that behalf contained in the 44th clause of these presents, so that such number be never less than three, and that every director shall hold not less than 100 shares.

Then the 53rd clause stipulated who should be the first directors of the company, and the 61st clause provided:

That every vacancy in the office of director occasioned by death, disqualification, or resignation, or any other cause, previously to the annual day of election, may be filled up by the remaining directors; and every shareholder who shall be so appointed a director, shall continue in office only until the next immediately subsequent ordinary meeting.

Then several of the intermediate clauses, which were very much in the ordinary form, provided for the appointment of a certain proportion of the board of directors, one-third the first meeting, another third the next meeting, and so on. Then followed provisions as to amalgamation with other companies, or the purchase of their businesses, the material passages relating to which were contained in the 78th and 133rd clauses as follows:

The 78th:

That the directors may also, from time to time, take over, or purchase, the whole, or any part, of the business and assets of any company or society, either for a consideration in money to be paid or received, or by the issue of shares.

And the 133rd clause:

That if at any time it shall be thought expedient that the company shall be dissolved, or amalgamated with any other company, or its business, estate, or effects disposed of to any other company, it shall be lawful for an extraordinary general meeting to declare that such dissolution or amalgamation of the company, or disposition of the business, estates, or effects thereof, shall take place, and the same shall take place accordingly.

The corporation, therefore, being thus constituted, an agreement for amalgamation between these two companies, which was now in question, was entered into on the 21st Aug. 1867, and its material provisions and stipulations were:

That from and after the 15th Sept. then next the two companies shall be amalgamated and form one, under the style or title of the above-named London and Northern Insurance Corporation (Limited), and under and subject to the terms and conditions of their articles of association.

That for the furtherance and carrying out of the aforesaid amalgamation, the said Life Investment, Mortgage, and Assurance Company (Limited) do hereby agree to sell, transfer, and assign to the said London and Northern Insurance Corporation (Limited) all their books, goods, chattels, premiums, income, investments, bills, loans, and all and every book-debts, agents' balances, capital in arrear and owing, and other assets, for and in consideration of, and subject to, the terms hereinafter contained; and the said London and Northern Assurance Corporation (Limited) agree to purchase and accept the transfer of the same accordingly.

That the London and Northern Corporation should issue shares in exchange for those of the Investment Company in manner following, that was to say, that shares of 5*l*. each, fully paid up and without further liability, should be given to every holder of fifty shares or upwards in the corporation, upon which 2*l*. per share had been paid, at the rate of two shares of 5*l*. each in the London and Northern Corporation for five shares on which 2*l*. per share had been paid in the Investment Company, with analogous provisions, which it is needless to state, for cases where a person was holder of fewer than fifty shares, or had paid less than 2*l*. per share.

Then the 10th clause of the agreement provided:

That the chairman of the London and Northern Assurance Corporation shall continue to be chairman of the amalgamated board; that the deputy chairman be chosen from the directors of the Life Investment, Mortgage, and Assurance Company (Limited) should they (that is, the directors of the Investment Company) desire it.

And the 11th clause provided:

That the directors of the amalgamated board shall consist of the present five directors of the London and Northern Insurance Corporation (Limited), and of seven of the directors of the Life Investment, Mortgage, and Assurance Company (Limited), to be selected by themselves.

The agreement itself also contained a clause providing that after the completion of the transfer of the business from the Investment Company to the London and Northern Corporation, a meeting of the shareholders of the company resulting from the amalgamation should be held, to sanction what had been done.

Notwithstanding this last proviso, no such meeting was ever held. An extraordinary general meeting of the Investment Company was held, which duly ratified the agreement, but it was never in any manner confirmed by the London and Northern Corporation, nor was the agreement ever registered.

The respondents, Col. Stace and Mr. Worth both held upwards of fifty shares in the Investment Company. Their shares were exchanged under the provisions of the agreement, and certificates of the shares to be held by them in the amalgamated company were prepared, but none were ever sent to Mr. Worth. Col. Stace received and retained those relating to his shares. Both of them continued as directors of the amalgamated company, and took part in its business as such. The amalgamated company appeared to have had transferred to it all the assets of the Investment Company.

In the winding-up of the amalgamated company the official liquidator inserted both names in the list of its contributories.

The case was brought before James, V. C., in court, in February last, when his Honour ordered both names to be removed, considering that the amalgamation was wholly void, and that all that took place was part of that amalgamation, and not an independent contract on the part of Stace and Worth to take the shares. His Honour, after giving that judgment, desired to have the case re-argued, which was accordingly done, and on the 16th March his Honour expressed his adherence to his original opinion, and removed the names.

Against this order the official liquidator appealed.

Amphlett, Q. C. and *Higgins* supported the appeal, and referred to or commented on

Re The Cachar Company's case, L. Rep. 2 Ch. App. 412; 16 L. T. Rep. N. S. 222;
Re The Financial Corporation, L. Rep. 2 Ch. App. 714; 16 L. T. Rep. N. S. 684;
Levita's case, L. Rep. 3 Ch. App. 36; 17 L. T. Rep. N. S. 337;
Clinch v. *The Financial Corporation*, L. Rep. 4 Ch. App. 117; 19 L. T. Rep. N. S. 334;
Alabaster's case, L. Rep. 7 Eq. 273;
Oakes v. *Turquand*, L. Rep. 2 Eng. & Ir. App. 325; 16 L. T. Rep. N. S. 808;
Hare's case, 20 L. T. Rep. N. S. 15;
The Marquis of Abercorn's case, 7 L. T. Rep. N.S. 225;
Austin's case, L. Rep. 2 Eq. 435; 15 L. T. Rep. N. S. 140;
The Imperial Bank of India, China, and Japan v. *The Bank of Hindustan, China, and Japan*, L. Rep. 6 Eq. 91;

The nature of the arguments sufficiently appears in the judgments.

Kay, Q.C., and *Bagshawe*, appeared for the respondents.

Lord Justice SELWYN said:—I think we ought not to call upon you, Mr. Kay, in this case, for neither the Lord Justice nor I entertain any doubt of the correctness of the conclusions at which the learned Vice-Chancellor has arrived, after having, as it appears he had, twice considered this case. He has decided that the names of these two gentlemen, Messrs. Stace and Worth, ought not to be included in the list of contributories of the London and Northern Insurance Corporation (Limited).

The questions that have arisen depend to a certain extent upon the construction of the articles of association of that company. It appears that the

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memorandum of association was dated the 21st July 1865, and that the certificate of incorporation was dated the 26th July of the same year. The company having been incorporated, as is usual, under a memorandum of association, and certain articles upon which a considerable portion of the argument has turned, it is necessary to refer to some of those articles, and in particular to those articles relating to the appointment of the directors, the powers of the directors, and especially their powers so far as the purchase or acquisition of the business of any other company is concerned. [His Lordship then referred to the provisions of the articles for the appointment of the first directors, the holding of meetings and otherwise, and proceeded:] The result of this is that these articles are very much in the ordinary form, providing first of all provisionally what is to happen until the first ordinary meeting of the company shall take place, appointing certain gentlemen to be directors until the first ordinary meeting, and afterwards vesting in the body of the shareholders, as is usual, the power of appointing, in certain proportions, the directors of the company. In substance, therefore, immediately after the first directors went out of office, the sole and exclusive power of appointing directors is vested in the general meeting of the shareholders, and in them alone; and although the 61st clause gives the power of filling up vacancies in the office of directors, there is, in my judgment, no authority whatever in this board of directors to do that which has been attempted to be done in this case—viz., on the occasion of the purchase of the business of another company, assuming this to be merely that, so to constitute the board as in fact to give to that company the power of appointing the majority of the directors. These are clauses of an ordinary character, and when reliance is placed upon the clause which says that, in matters not provided for, the directors shall have power to act as they may think fit, it is plain that cannot provide for the appointment of the directors themselves, which is so carefully provided for by those articles.

The result, therefore, is that, setting aside these merely temporary provisions, which relate to the period before the first ordinary meeting is held, and those temporary provisions with respect to the "death, disqualification, or resignation, or any other cause, previously to the annual day of election," the power of appointing directors is vested in the shareholders. That is expressly provided for by the articles, and, that being so, we come to the clause relating to the purchase of the business. [After referring fully to the agreement of the 21st Aug. 1867 his Lordship said:] The result, therefore, of this agreement is, that the directors of this company, who had under their articles of association no authority whatever for taking away from the shareholders the power which was vested in them by those articles of association of, from time to time, appointing the governing body, have by this agreement assumed the management of that which they term here the amalgamated company; that which, whether it be treated as an amalgamated company or as a company continuing the same as it was before, but only having purchased the business of another company, is nevertheless to have a governing body, so constituted that the majority of that governing body shall not be in the least degree chosen by the shareholders of the London and Northern Corporation, but shall be the nominees of the Investment Company, and shall be selected by them. Upon that I entertain no doubt whatever that it was wholly *ultra vires*, that this cannot be considered, as it has been treated in argument, as a collateral or outlying portion of the agreement, but that it is the very substance of the agreement, because it is agreed by this that the two companies are to be amalgamated, subject to the terms and conditions of the articles of association of the London and Northern Corporation as now existing, and upon the terms which are here mentioned, that is to say, as stipulated in the second clause that, subject to the terms and conditions thereinafter mentioned, they agree to accept the transfer of their business. Those terms and conditions are in the most essential and material part these—that the governing body of the company which is to exist after the date of this agreement is to be so constituted that the majority of that governing body are to be appointed by the Life Investment and Assurance Company, and not by the shareholders of the London and Northern Corporation. I think, therefore, that as to this essential part of the agreement it is wholly beyond the powers of one of the parties, at least, to enter into, and consequently that this agreement was wholly and entirely void.

But the matter does not rest there, because there is in this agreement itself a provision which seems to have had reference to some notion entertained on the part of its framers that without some subsequent sanction or confirmation it would not be valid. It is not disputed that, so far as the Investment Company were concerned, the ratification of the shareholders was duly obtained. But this agreement provides that on the completion of the amalgamation a meeting of the shareholders of the amalgamated company shall be called to confirm the same. It is plain, therefore, that the parties to this agreement considered that at all events it was proper that notice should be given to the shareholders of the amalgamated company, which, of course, would include all the shareholders of the original London and Northern Corporation, and that those shareholders should have the opportunity of meeting and considering and discussing the question and that they should be then called upon to confirm it. The agreement having been dated the 21st Aug. 1867, and containing that clause, it appears that the matter proceeded to a certain extent. It is said that there were no assets in fact to transfer, but that all that has been done is certain business, which otherwise would have been done by the Investment Company, which has in fact been done under the name of, and for, and by, the London and Northern Corporation; and that certain policies have been granted by the London and Northern Corporation under and in pursuance of that agreement, and that the matter so continued until the 9th June 1868, when the resolution to wind-up the London and Northern Corporation was passed, and which was followed on the 20th of the same month by the usual supervision order. But no explanation whatever is given of any reason why the meeting, which was provided for by this agreement, was not called, and indeed it must be taken as an admitted fact in the case, that the shareholders of the London and Northern Corporation have had no notice of this agreement, and have had no opportunity of considering or confirming the same. No such confirmation has ever taken place. Therefore, upon that which is the material question in the case, I entertain no doubt that the agreement was not, as it has been said, a voidable agreement, but one which was absolutely and entirely void.

That being so, there remains the question whether there has been any separate and independent agreement entered into by the two gentlemen who are the subjects of this appeal, Messrs. Stace and Worth, by which, notwithstanding the invalidity of that agreement, they have rendered themselves personally liable to be placed upon the list of shareholders in this company. It is said that the shares were allotted to them in pursuance of this agreement. The agreement stipulates for the issuing of

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certain shares by the London and Northern Corporation in exchange for, or in consideration of, the shares held by the shareholders in the Investment Company, and the property of the Investment Company, and the shares which were to be so issued in exchange were to be fully paid-up shares; and accordingly, and in pursuance of that agreement, certain fully paid-up shares were, it is said, allotted to these two gentlemen, and, although there may be some conflict of evidence about it, one at least of these two gentlemen, it is said, has accepted these shares, or has taken the certificate of the shares. But the issuing and registration of these shares as fully paid up shares was done in pursuance of the agreement which I have already said is, in my judgment, void. There is no evidence of any independent separate agreement whatever. I do not doubt, as in fact was expressed by the full court in that case which has been referred to of *Clinch* v. *The Financial Corporation* that, notwithstanding a void agreement of this kind, there may be a separate and independent transaction between different individuals by which they may render themselves liable to take shares in the company, although the general agreement may turn out to be invalid. The matter then goes on, as I have already said, until the winding-up; the company acquires no property; it does probably acquire some business by means of this transaction; there is no confirmation by the shareholders, and then the company itself is ordered to be wound-up. Under these circumstances I apprehend that the cases to which reference has been made, and especially that which was the decision of the House of Lords in *Oakes* v. *Turquand*, have no application to the facts of the present case; for if I am right in the conclusion to which I have already adverted, viz., that this was an agreement in itself absolutely void, and that there was no separate and independent agreement at all, then it cannot be said upon the authority of *Oakes* v. *Turquand* that the parties here were in a position which enabled them to give validity to the contract. In that case there was a voidable contract, which was capable of being adopted and ratified by the persons who were upon the list of shareholders. In the present case there is a contract which these persons could not have enforced against the company, and which the company could not have enforced against them. Therefore I think that the decision in *Oakes* v. *Turquand* has no application to the present case, and, entertaining that opinion, it appears to me to be clear that these two gentlemen cannot now be properly included in the list of contributories. And it is a fortunate circumstance that no creditor can possibly have been deceived or prejudiced by the result of the Vice-Chancellor's decision, which it is our intention to confirm, because even if a creditor had looked at the list of shareholders as it existed at any time, and even if he had been advised that this was a perfectly valid amalgamation, or a valid transfer of the business of one company to the other, still the list of shareholders so inspected by him would have disclosed the fact that the shares which had been allotted to Messrs Stace and Worth were fully paid up shares, and, consequently that it was not the intention of the parties to this transaction that any liability should be undertaken as between the creditors and these gentlemen, or by either of them. I think, therefore, that in this case the decision of the Vice-Chancellor must be affirmed, and the appeal motion be refused, with costs.

Lord Justice GIFFARD, having stated the facts, said that in his opinion the agreement was void and not voidable. His Lordship proceeded:—That being the case, the next question is whether, notwithstanding that, Messrs Worth and Stace ought still to be on the list of contributories. First of all, *Levita's* case was quoted as an authority to show that they must be; but when one looks at *Levita's* case, it is nothing more than an application for shares by Levita, and a state of things which precludes him from saying, not only as between himself and creditors, but as between himself and the company, that he was not a shareholder of the company. In point of fact there had been a simple individual application for shares by him, and events had taken place which precluded him from saying that he was not a shareholder. That of course puts that case entirely out of the question.

Then the case of the *Imperial Bank of China and Hindustan* has no application whatever, for all that I held in that case—although I set aside the agreement—was that the very large majority of the shareholders had bound themselves individually to give effect to their individual contracts. But that does not of course prove that there has been any individual contract in this case.

Now for the purpose of making out an individual contract in this case, it is said first of all that these gentlemen have taken shares. All that they have done is this—they have entered into this agreement, and upon the footing of that agreement with regard to one of them, certificates of shares have been handed over, and their names have been entered on the register in respect of fully paid up shares; besides that they have acted as directors, and signed their names to several policies, thereby probably imposing a liability on this company. But no one of those acts constitutes a contract between them and the company. There is in fact nothing in the shape of contract between them and the company except that agreement of the 21st Aug., which, as I have already stated, is an agreement which is void.

Although I quite agree that the facts of *Alabaster's* case do not go the length of this case, I think the principle to be deduced from *Alabaster's* case is included in this case; and I must, therefore, hold that these gentlemen ought not to be contributories, because there never was a time at which either they or anyone could have said to the company, "We are shareholders of the company, and you can't say the contrary," or a state of things which would have enabled the company to say to them, "You are shareholders of the company, and you cannot say the contrary."

That being so, there never having been an agreement which was enforceable either on the one side or the other, it is impossible that these gentlemen can be held to be contributories, and therefore the decision in the court below will be affirmed, and the appeal dismissed with costs.

Solicitor for the official liquidator appeal ing. *Snell.*

Solicitor for Messrs. Stace and Worth, *James Townley.*

April 28 *and* 29.

(Before the LORDS JUSTICES.)

DEAR *v.* VERITY.

Specific performance—Lease—Agreement by letters—Alleged parol variation—Uncertainty as to—Condition precedent.

By three letters which passed between the parties, the defendant agreed to demise to the plaintiff a dwelling-house and its appurtenances. The agreement was in the letters complete, but the defendant refused to grant the lease on the terms which the letters expressed, on the ground of a verbal understanding that the lease should contain a covenant by the plaintiff to expend

1000*l.* *in improvements. The plaintiff denied that this was any part of the terms, and resisted the insertion of such a covenant, but he expended upwards of* 500*l* *on the property:*

Held (affirming the decision of Stuart, V. C.), that the evidence in support of the alleged addition failing to establish it, the plaintiff was entitled to such a lease as the letters taken alone provided for:

Taylor v. *Portington*, 7 *De G. M. & G.* 328, *commented on and distinguished.*

This was an appeal by the defendant from a decision of Stuart, V. C., reported 20 L. T. Rep. N. S. 268, where the facts are fully stated.

Karslake, Q.C., and *Rowcliffe* supported the appeal, and referred to

Taylor v. *Portington*, 7 De G. M. & G., 328;
Clarke v. *Grant*, 14 Ves. 519;
Clowes v. *Higginson*, 1 Ves. and B. 524;
Swaisland v. *Dearsley*, 29 Beav. 430; 4 L. T. Rep., N. S. 432;
The Wycombe Railway Company v. *Donnington Hospital*, L. Rep. 1 Ch. App. 268; 14 L. T. Rep., N. S. 179.

Greene, Q.C., and *Cottrell* for the respondent, the plaintiff.

Lord Justice SELWYN said:—Mr. Greene, I think we ought not to call upon you in this case, because the court entertains no doubt as to the correctness of the conclusion at which the learned Vice-Chancellor has arrived. As I have before had occasion to observe in this case, I am not at all prepared to extend that which the Lord Justice Knight Bruce used to call "the boundary line" which divides negotiation from contract in such a manner as to convert letters written merely for the purpose of negotiation into a concluded contract; but in the present case there is, in my judgment, no doubt whatever that on the 27th Sept. 1865, both the plaintiff and defendant intended to enter into, and did in fact enter into, a concluded agreement. The documents are before us, and the plaintiff in his affidavit gives an account of the manner in which those documents were prepared, and after saying that he entered into a negotiation with the defendant he says, "I wrote and handed to the defendant a letter" (which is the first of the series in question) "in the words following: 'I make you an offer of 90*l* per annum for your house on a lease;'" and then there are the other matters with respect to the repairs and so on. Then he says: "I handed the last-mentioned letter to the defendant at the office of a Mr. Mason, a house agent in Windsor, and after perusing the same the defendant remarked that he should prefer the word 'agree' to be used instead of the word 'offer,' and accordingly, in compliance with the defendant's request or suggestion, I then wrote on the fly leaf of the sheet of paper on which the letter marked A was written a further letter in the words and figures following"—which is written on the same piece of paper on the second page. "'I agree to take this house on a lease of 3, 7, 14, 21, or 42 years at my option, rent to commence from the 29th Sept. 1865; and I further agree to do all the painting, papering, repairing, decorating, &c., during the term of lease, and I further agree to pay for the said lease not to exceed (say) eight guineas.'" Now this gentleman has been cross-examined, and the learned Vice-Chancellor has had the opportunity of seeing his demeanour during that cross-examination, and we have only had the opportunity of hearing his evidence read; but the Vice-Chancellor appears to have entertained no doubt whatever as to the accuracy of the testimony of this gentleman, and I must say the cross-examination appears to me to confirm the testimony of the written evidence; but that on which I place more reliance are the documents themselves. I think it is impossible to look at them without seeing that that is the correct representation of what actually took place, because it is the common case of both parties that the rent of 90*l.* was the rent agreed upon. Omitting that, as to the two letters, the letter on the first page and the letter on the second page, we have no other difference between them except this that the one is an offer and the other is a formal agreement. This gentleman did not know that an offer with a formal acceptance amounted to an agreement. Then it appears to me that the only reason why the trouble should be taken of writing this second letter was to get rid of the former imaginary difference between an offer made and accepted and the agreement; that is the only possible reason why that is written, and therefore that shows to my mind conclusively that the object of both parties was really to agree to something which would amount to a concluded contract between them. That was done at the suggestion of the defendant himself, and it must have been at his suggestion, because, as the plaintiff says, the words "I offer" were altered into "I agree." That is really the only substantial alteration that took place in these two letters.

That alteration having been made at the defendant's suggestion, he on the same day wrote a letter in which he says: "I agree to accept your terms for this house, as per your letter (or letters) dated the 27th Sept., 1865." It is in my opinion perfectly immaterial whether the word was "letter" or "letters," because here are these two documents themselves written on the same piece of paper. The rent is admitted to have been agreed to be 90*l.* a-year, and, whether it refers to one or to both letters, I think there was no concluded agreement between these two parties.

That being so, the question is whether the statement contained in the 8th paragraph of the defendant's answer relating to the circumstances of the collateral agreement which he says was entered into, and by reason of which he was induced to sign the letter I have just read, is established in evidence, or not, in every part of it; because, if that be established, it is perfectly clear that upon all the authorities the plaintiff would have no ground to come to this court and ask for specific performance. On the other hand if it is not made out, then I think there is no uncertainty at all in the contract contained in these letters; for it is to be observed that that which is to be done by the defendant is not, as was the case in the authority to which allusion has been made, upon a condition precedent to the agreement, something to be done by the landlord to the property before the lease was granted, but it is something which is to be done by the lessee himself, and which, of course, was to be done by him for his own benefit. He says, "I agree to do all the painting, papering, repairing, decorating, &c., during the term of the lease"—all that was to be done by him. I think that there is no such uncertainty as would prevent this court from decreeing specific performance of the agreement, and settling a proper lease between the parties.

I come then to that which is really the material matter in the case, namely, whether there was any such collateral agreement as that the lessee should agree to enlarge the dining-room, and to put a new storey to the house, and to do that at an expense of 1000*l.* In the first place it has been greatly urged upon us that all the probabilities of the case are in favour of the representation so made by the defendant. Having considered the evidence, his Lordship rested his decision upon the testimony of Mr. Mason, who took an active and important part in the transaction, and whose evidence he read as

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follows: "I was in my front office, and they came in, and the plaintiff asked my leave to make use of my pen and ink, and they then went into my inner room. I happened to want something in that room and went into it. They appealed to me as to the bargain they were making as to letting the house, and my impression is that the rent spoken of was 90*l.* I refused to give my opinion on the matter; but my impression at the time was that it was plenty of money for it. I said 'I shall leave you to fight it out,' and I went out of the room, and I heard no more than that they were wrangling to get the best of each other. My impression was that the defendant was gettting a good rent for his house, and that 70*l.* or 80*l.* was a reasonable rent for it at that time. My impression from his manner was that the plaintiff considered that he was making a good bargain, but he was not aware that, while the property at Sunning-hill was on gravel, the defendant's house was on dark clay, and was, therefore, much less valuable. Nothing passed in my presence as to the plaintiff laying out 1000*l.* in improving and enlarging the premises." Now, upon the conflict of testimony as between the plaintiff and defendant, I think the court is bound to incline the balance in favour of that side where you have a witness of the character of Mr. Mason making a statement so clear and positive, and I must say, so extremely probable, but which is entirely in opposition to the statement of the defendant. I think, therefore, that the explanation which Mr. Mason there gives really disposes of the whole truth of this transaction. It was in the autumn of the year, and the defendant was in possession of property which was in the occupation, up to that time, of a tenant who was entirely insolvent, who had neglected the house in such a manner as to reduce it to the position which is described by the witness as being entirely uninhabitable, and he was very desirous to get a respectable tenant willing to lay out a considerable sum of money in improving the property.

Under these circumstances, and bearing in mind the value which Mr. Mason puts upon the property, I think the contract which the defendant entered into was, so far from being unreasonable in its terms, much nearer the real value of the property, as established by the evidence, than the contract which he asks the court to perform, viz., that the rent of 90*l.* should be paid in addition to the double burden upon the lessee of laying out 1000*l.* upon these particular alterations and additions, and also undertaking the repair of the property. I think the simple question we have to decide is the question of fact, and that that question is decided in favour of the plaintiff by the probabilities of the case, by all the written documents in the case, but above all by the independent testimony of Mr. Mason. I think, therefore, that this appeal fails, and must be dismissed with costs.

Lord Justice GIFFARD said:—The defence in this case has been put upon two grounds—the one, that the letters, if they contain an agreement, are too uncertain for this court to perform it; the other, that the circumstances stated in the eighth paragraph of the answer, have in substance been proved.

Now, as regards the uncertainty, the case of *Taylor* v. *Portington* was relied upon, but I consider it unnecessary for this court to say on the present occasion whether *Taylor* v. *Portington* would or would not apply, because *Taylor* v. *Portington* is different in principle to this case. It was a case in which a lessor agreed, as a condition precedent to granting a lease, to do repairs, and decorations, and so forth; but it was not an agreement that there should be in the lease granted a specific covenant of a particular kind. Here there is no condition precedent at all, but the condition is that the lease shall be granted containing certain covenants, and that at once makes a distinction which puts *Taylor* v. *Portington* entirely out of the case, and it is no more than the ordinary case of a man agreeing to grant a lease, the lessee undertaking to farm in a particular manner; this court probably could not say that the farm was carried on in the particular mode, and could not on that account say that a lease could not be granted. I am, therfore, clearly of opinion that we need not consider *Taylor* v. *Portington*, and that there is no ground for saying that the terms of those letters are uncertain.

Then with respect to the facts of the case, the letters themselves are plain, and it is not a case in which parties were corresponding at a distance from each other, but it was a case in which they went both together into a room for the specific purpose of coming to an agreement, and these letters were written in that room, both parties being present for the purpose of coming to a formal agreement and for no other purpose whatever.

Then as regards the letters themselves, the Statute of Frauds is entirely out of the question; and the Statute of Frauds being out of the question, even if you take nothing but the second letter and the acceptance of it, and the seventh paragraph of the answer, I should be clearly of opinion that there was an agreement which this court would carry into effect. It is obvious that the rent was a mere accidental omission and mistake from the second of the two letters. The 90*l.* had been agreed upon when the first letter was written, and the answer admits that the 90*l.* was agreed to; and, there being no Statute of Frauds, the second letter and the acceptance would be abundantly sufficient. I think upon the evidence that it is quite clear you can refer not only to the second letter but to the first, and that there was an acceptance of everything which was contained in the two letters which preceded the acceptance.

That being so, we really come to the eighth paragraph of the answer, and the question is, whether the eighth paragraph of the answer can satisfy the mind of any rational person that this plaintiff, in point of fact, represented or promised that, if a lease was granted, there should be contained in that lease a covenant that he would lay out 1000*l.* That really and truly is the whole case. The property was in a wretched state of repair, there is no question about that; and I am satisfied that there has been a very considerable expenditure, probably to the full amount of 500*l.*, upon that property. That being so, let us just consider what it is that the eighth paragraph of the answer states. It first of all states that the parties met together for the very purpose of coming to the agreement. It states in the next place that the first letter was written by the plaintiff, and it states that the objection made to that first letter was that it did not contain any provision as to the plaintiff's laying out 1000*l.* in building out the dining-room and raising the house a storey, and that the defendant handed back the letter to him on that account. Now I ask what you would say to any man if you objected to a letter of that kind, and handed it back, and he changed the word "offer" into "agree," and handed back to you a letter in all other respects identically the same. I think any man would say at once, 'That is a most impudent thing to do, and I will not deal with you if that is the course of proceeding you are going to take.' But what is the defendant's story? The defendant's story is, that although he made that objection, he has handed back to him a letter which is in terms the same, except that it is much more in the form of an actual agreement than it was before, and then that he is satisfied with this that "the plaintiff said

that with a note of acceptance from me it would constitute an agreement between us." That is what he says took place between him and the plaintiff when the second letter, which was stronger than the first, was handed back to him, and when that term was omitted. Then the defendant says: "I objected to that letter as I had done to the first, that it did not contain any provision as to the plaintiff building out the dining-room;" and then he says that the plaintiff said: "All that will be put in the lease: we are not writing out a lease now, and cannot put everything in an agreement." But it does not rest there, because he literally rests his whole case upon this—that that being the conversation between the parties, that being the transaction, Mr. Mason comes in and does what the defendant describes, and Mr. Mason says he did nothing of the sort. I am satisfied the defendant was under a total misapprehension and mistake as to what did take place. It is quite clear that he has stated what is not accurate, when he says that he acted upon that advice and representation of Mr. Mason as concluding the whole thing, when this matter was going on between the parties. That being so, if he is inaccurate as to that, one must look pretty closely as to what the reasonable probabilities of the case are; and I say that no rational person can come to the conclusion that the transaction was such as is represented by the eighth paragraph of the answer. And when we look at the two letters, we find in the first letter the word "offer," which the plaintiff says the defendant objected to; and we find in the second letter the word "agree," which the plaintiff says was the thing which the defendant stated should be put into the letter in order that there might be an agreement, it being common ground between the parties that they met for the purpose of agreeing, and with no other object.

That being so, I am quite satisfied that, although the court does exercise discretion in enforcing specific performance, this is a very clear case for specific performance; and that, if in any case specific performance ought to be enforced in equity, unquestionably this is that case. The appeal, therefore, must be dismissed with costs.

Solicitors for the appellant, *Gregory, Rowcliffes,* and *Rawle.*

Solicitors for the respondent, the plaintiff, *Rickards* and *Walker.*

Thursday, June 3.

(Before the LORDS JUSTICES.)

CATT v. TOURLE.

Public-house — Demurrer — Conveyance in fee — Covenant for right of vendor to supply beer — Uncertainty — Want of mutuality — Restraint on trade.

The plaintiff, a brewer, conveyed land in fee to the trustees of a building society, who covenanted that the plaintiff, his heirs and assigns, should have the exclusive right of supplying all ale, beer, and porter which might be consumed in every house or other building which might be erected on the land, and which should be opened or used as an inn, public-house, or beershop. The defendant, who was also a brewer, bought a piece of the land of the trustees, and thereon built and opened a public-house, which he supplied with beer of his own brewing. The plaintiff then filed this bill, alleging that the defendant had purchased the land with notice of the covenant, and stating that he had always been and still was ready to supply to the defendant beer of good quality at fair market prices, and he prayed that the defendant might be restrained from supplying the house with beer from any other brewer than the plaintiff. To this bill the defendant demurred, but it was

Held (affirming the decision of Stuart, V. C.), that the covenant was not bad for uncertainty, or want of mutuality, or as being a restraint on trade, and the demurrer was overruled.

This was an appeal by the defendant against a decision of Stuart, V. C., overruling a demurrer to the plaintiff's bill for want of equity. The case when before his Honour is fully reported in 20 L. T. Rep. N. S. 551, and it is unnecessary to state the facts in this place.

Greene, Q. C. and *Townsend* supported the appeal, and

Karslake, Q. C. and *Ayrton* his Honour's decision.

The authorities cited were:

Collins v. *Plumb,* 16 Ves. 454;
Wilson v. *Hart,* L. Rep. 1 Ch. App. 463; 14 L. T. Rep. N. S. 499;
Mitchell v. *Reynolds,* 1 P. Wms. 131;
Lumley v. *Wagner,* 1 De G. M. & G. 604;
Holmes v. *The Eastern Counties Railway Company,* 3 K. & J. 675;
Rolfe v. *Rolfe,* 15 Sim. 88;
Hills v. *Croll,* 2 Ph. 60;
Tulk v. *Moxhay,* 11 Beav. 571; and on appeal, 1 H. & Tw. 105; 2 Ph. 774;
Piggott v. *Stratton,* 1 De G. F. & J. 33; 1 L. T. Rep. N. S. 111;
De Mattos v. *Gibson,* 4 De G. & J. 276; 3 L. T. Rep. N. S. 121.

Lord Justice SELWYN said: This is an appeal from a decision of Stuart, V.C. overruling a demurrer to the bill for want of equity, and the appellant therefore comes before us having thrown upon him the burden of showing that, under the circumstances stated in this bill, the plaintiff cannot be entitled to any relief whatsoever.

Now, the bill states that the plaintiff has for a considerable time carried on, and still does carry on, the business of a brewer, and that he was entitled to "certain land in the town of Brighton which was suited for building, and so capable of being and was intended by him to be dealt with in a manner to promote his business." It then states the purchase by a certain society of a portion of that land; it states the treaty which led to that purchase, and the deeds which were then executed; and after stating the deed by which the conveyance was made, it states the deed of even date which contains the covenant in question, which is a covenant (amongst other things not material to the present purpose), "that the said Charles Catt, his heirs and assigns, should have the exclusive right of supplying all ale, beer, and porter which might be consumed in every house or other building which might be erected on any other part of the said piece of land, and which should be opened or used as an inn, public-house, or beershop." It then states that "the defendant purchased the said lot with notice as a member of the said society or with notice in fact, or that but for his neglect to make proper inquiry into title in his said purchase, he would have had express notice of the hereinbefore stated indenture of covenants, or the defendant became otherwise bound by the same indenture." It then states that the plaintiff, in exercise of his exclusive right, has always been, and now is, willing, and previously to the institution of this suit has offered to the defendant, to supply to the orders from time to time of the defendant for consumption in the said Duke of Edinburgh beerhouse, ale, beer, and porter, all of good quality, in requisite quantities, and at market or fair and reasonable prices, as specified in the same offer; but the defen-

dant refuses such offer, and denies the plaintiff's said exclusive right, and insists that the defendant has the right of supplying the said beerhouse from breweries other than the plaintiff's. Then the prayer of the bill is in accordance with the paragraph which I have just stated, repeating the same offer, and asking for an injunction in support of the exclusive right so set up.

Now in answer to that case many objections have been raised to the legality of this covenant and to the jurisdiction of this court to enforce such covenant, or at all events as to the propriety of the court interfering in such a manner as to grant the relief which is sought; and it has been said that, even if the plaintiff has any right, he ought to be left to assert that right in a court of law. I think in the first place it is not very material to consider the question which has been discussed, as to whether covenants of this nature, or this covenant, actually do or does run with the land. We had occasion very recently to consider the authorities applicable to this question, many of which have been cited to us to-day. The first is the case of *Tulk* v. *Moxhay*, before Lord Cottenham, who says, "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there were a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." Then he went on to observe—with respect to questions which have arisen with reference to devolutions of covenants of this kind having been decided upon certain definite principles as regards the covenants running with the land. In like manner in the case of *Wilson* v. *Hart*, which was decided by the then Lords Justices, where the owner of a freehold house entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beershop, and the house was afterwards let to the defendant as tenant from year to year with express notice of the covenant, it was held, affirming the decision of the present Lord Chancellor, that although the covenant might not at law run with the land, the defendant was bound by it in equity; and the late Knight-Bruce, L. J., in the case of *De Mattos* v. *Gibson*, puts the matter as one of principle not depending upon any such distinction. He says at p. 282 of 4 De Gex and Jones, "Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

Now it appears to me that upon the statements in this bill the defendant is clearly bound by notice of the present covenant, and that, therefore, assuming the covenant to be otherwise unobjectionable, he cannot be heard to say that he, having purchased this property and no doubt having purchased it at a smaller price in consequence of the title being incumbered with the restrictions contained in this covenant, can now openly disregard the provisions of that covenant.

The objections which have been raised are: first, that this covenant is void for uncertainty; but I think the material question to consider is, what is it which the vendor here covenants for? In the first place, this is a covenant entered into as a part of a transaction which resulted in the sale and purchase of a piece of land; it is one of the covenants contained in the deed of even date contemporaneously with the conveyance of the land; it is a part of that transaction, and what the vendor covenants for is that he shall have the exclusive right of supplying all ale, beer, and porter which shall be consumed in any building erected on this particular piece of land which shall be used as a beer-house. Now that is a right which, of course, is capable of being abused, capable of being waived, capable of being lost; and if at any time, either in the progress of this suit or any other time, it can be shown that it has been so abused, so waived, or so lost, then there would be good ground for saying that this court ought not to interfere in favour of a person who might otherwise be entitled to the benefit of it. But I am at a loss to see how it can be said that there is anything like uncertainty in this covenant. It might be said that the covenant is too wide, that it is too general; but it appears to me to be impossible to say with any reasonable chance of success, when it reserves the exclusive right of supplying all ale, beer, and porter that may be consumed, that this is a covenant in any degree uncertain.

But then the authority of *Collins* v. *Plumb* is cited, and it is stated that that is a clear authority for the proposition that a covenant of this kind is so uncertain that a court of equity will not enforce it. I confess I entirely agree with the learned Vice-Chancellor, that the case of *Collins* v. *Plumb* does not in the least degree govern this case. Lord Eldon observed, as stated in the report, that it was very infirm in its terms. It was a covenant not to sell or dispose of water from a well to the injury of the proprietors of the waterworks, their heirs, executors, administrators, and assigns, and then Lord Eldon says, "I never met with such a covenant as this, upon which I must try in each instance whether the act of selling the specified quantity of water is a prejudice to the proprietors of these waterworks." He is there obviously referring to the very peculiar language of that particular covenant, and the question as to whether it was, or was not to the prejudice of the proprietors of the waterworks was necessarily involved in the very terms, and expressed by the terms of the covenant itself; of course it must, therefore, have been expressed in the terms of the injunction, and therefore he said that a court of equity could not have any jurisdiction which it ought to exercise upon such a covenant as that. But that covenant has no resemblance to the present covenant, because this is not a covenant not to sell ale, beer, or porter to the prejudice of the plaintiff; it is a covenant that he shall have the exclusive right of supplying all ale, beer, and porter consumed upon these premises. Therefore the question as to whether it is to his prejudice is one that cannot be raised, because the extension of a man's trade is of course to his benefit, and the diminution of that trade must be to his prejudice. Therefore it clearly appears to me that the case of *Collins* v. *Plumb* has no application to the present case.

Then it is said, secondly, that there is a want of mutuality. What I have already said with respect to the nature of this covenant, and the right which is acquired thereby by the vendor, and the circumstances under which that right was acquired, I think has disposed of that objection as to the want of mutuality. But I go even further than that, and I say that, even supposing it had been expressed in terms as being a mere option, supposing there had been a covenant for a valuable consideration being a part of the transaction of the sale and purchase of the land, that so long and so often as the vendor chose to exercise a particular right—that is, the right of supplying all

ale, beer, and porter—he should have that exclusive right, would it be said because it was optional on his part, therefore there was a want of mutuality, and therefore it could not be enforced? I apprehend that, being for valuable consideration, such a covenant, although it was expressed to be only conditional upon the exercise of a volition on the part of one side or the other, that being expressed in the covenant, would not be any objection to the validity. I think, therefore, there is no objection as to the want of mutuality. Of course a right so acquired is one which, like all other rights, must be reasonably exercised, and of course, as Mr. Greene put it, if a man having a right to sell ale, beer and porter were to sell some poisonous concoction which he chose to call ale, beer, or porter, that would not be a reasonable exercise of that right; neither would it be so if he were to sell good ale, porter, &c., at an unreasonable price.

Then the third objection that has been urged is, that this is an unreasonable restraint of trade. Now in the first place I think the rule which is laid down in the leading case which has been cited, and which is always referred to, of *Mitchell* v. *Reynolds*, is that, where the restraint is not general but partial, and does not have valuable consideration, then it cannot be said to be an unreasonable restraint. But here it is said that it is unreasonable in one respect, because it is perpetual. I think the rule upon that subject has been well settled by authority, and as I understand the rule, it is this—that where there is a restraint on a partner from carrying on trade, when it is unreasonable in law, then the partner carrying on trade can apply to the court to have it removed. The restraint may be limited as to space though general as to time, and falls within this rule that a restraint preventing a partner from carrying on trade within a certain limit of space, though unlimited as to time, may be good, and the limit of space may be according to the trade he carries on. As an instance of these covenants, I may mention also the case of *Wilson* v. *Hart*. It was a specific covenant entered into with a person, his executors and assigns. And then with respect to this particular covenant, it does seem to be one which the court cannot fail to take judicial notice of, as being a covenant which is extremely common. Every court of justice has had occasion to consider these brewers' covenants, and therefore the courts must be taken to be cognisant of the distinction between what are called free public houses and brewers' public houses, which last are subject to this very covenant. Certainly, in my opinion, we should be introducing very great uncertainty and confufusion into a very large and important trade, if we were now to entertain any doubt, or suggest any, as to the validity of a covenant so extremely common as this is. I think there would be no ground for that sort of distinction which has been relied upon, viz., that such a covenant might be good for 21, 50, or 100 years, but that it is not good if it is entered into as part of a transaction where the fee simple of a property is conveyed, and in accordance with such conveyance the covenant is made with the vendor, his executors and assigns. I think, therefore, that no such objections to the covenant can be sustained, especially when they are raised as they are raised at the present stage of this cause; because although at some future period of this cause, upon a motion, as in the case of *Hills* v. *Croll*, circumstances may be shown which render it improper for the court to interfere; or, as has been suggested, it may be shown at some future time either that the right claimed by the plaintiff is one as to which he has placed himself in such a situation that he ought not to be allowed to exercise it, or that the defendant had not notice of the covenant when he purchased the property, all these things may be proper grounds of objection upon the hearing of the motion, or upon the hearing of the cause, and then it might possibly be said that the case of *Hills* v. *Croll* might have some application to the question. But this raises the general abstract question whether a person stated to have notice of such a covenant is to be bound by it or not. Then if we are to look at those cases in my opinion it is very difficult to reconcile the case of *Hills* v. *Croll* with the case of *Lumley* v. *Wagner*, which last-mentioned case has been repeatedly followed, and if *Hills* v. *Croll* is to stand with that case at all, it can only be upon the particular circumstances of the case. What we have to deal with here is the general abstract question, and upon that I can only say that I entirely agree with the conclusion at which the learned Vice-chancellor has arrived, and I think this appeal must be dismissed with costs.

Lord Justice GIFFARD said:—The appeal in this case is from an order overruling a demurrer, and therefore the whole question to be decided is, whether upon the statements in the bill the plaintiff is entitled to any relief. One thing at least I think is certain, and that is, that if the plaintiff cannot sustain a bill in this court he is without remedy altogether. It is pretty plain that this is a covenant which does not run with the land.

Then with respect to the allegations in the bill, the transaction is a simple one; it is a sale by the plaintiff of land, and when he sold that land he stipulated for a particular covenant. The bill states that the plaintiff was at the date of the sale, and has been, and still is, a brewer, carrying on a particular business at a particular place in Brighton, and it states that the defendant had notice of the covenant in question; and then it states this, which is very material, in the 14th paragraph of the bill, that "the plaintiff in exercise of his exclusive right has always been, and now is, ready and willing, and previously to the institution of this suit, has offered to the defendant to supply to the orders from time to time of the defendant, for consumption in the said Duke of Edinburgh beerhouse, ale, beer, and porter, all of good quality, in requisite quantities, and at market or fair and reasonable prices, as specified in the same offer," and the terms of the covenant are, "that Charles Catt, his heirs and assigns, shall have the exclusive right of supplying all ale, beer, and porter, which may be consumed in every house or other building which may be erected on any other part of the said piece of land, and which shall be opened or used as an inn, publichouse, or beershop." And Mr. Catt himself is plaintiff; therefore we have nothing to do with what the state of things might be if he had assigned the deed, or if he had died, or anything of that description; but simply a question between Mr. Catt, being vendor, and this gentleman who was the purchaser of this property with notice of the covenant in question.

Now first of all upon that covenant it was said that the case was like *Collins* v. *Plumb*, which it certainly is not. If in the case of *Collins* v. *Plumb* the words had been left out at the end of the covenant "to the injury of the plaintiff," then the case would have been very like it, because the covenant in *Collins* v. *Plumb* was not to sell to the injury of the plaintiff, but that the defendants might sell water as long as they did not injure the plaintiff; and therefore on each occasion, as Lord Eldon said, it would have been necessary to try the question whether the sale was to the injury of the plaintiff or not. Nothing of that description would be necessary here. As I have already said, we must assume the 14th paragraph of the bill to be true, and therefore it must be admitted that there has been no breach of any kind on the part of the plaintiff in offering to make, and making the requisite supply

of that which it would be inferred he was bound to make from the contents of the indenture in question.

Then beyond that it is said that this covenant is uncertain, which it clearly is not. I do not see how anything can be more certain than that a man is to have the exclusive right of supplying a particular public-house with ale, beer, and porter. There undoubtedly is nothing uncertain about that. And again, it has been held in the case of *Holmes* v. *The Eastern Counties Railway* that a grant of an exclusive right of that description contained in a covenant, is equivalent to a negative covenant. That being so, it brings the case in principle completely within the cases which have been decided on negative covenants, the cases of *Holmes* v. *The Eastern Counties Railway Company*, *Rolfe* v. *Rolfe*, and *Lumley* v. *Wagner*. With respect to the case of *Hills* v. *Croll*, there is great similarity between that case and the present. Lord St. Leonards, in his judgment in *Lumley* v. *Wagner*, said that he decided that case under the particular circumstances of it. If the principle in *Hills* v *Croll* lays down this proposition that, wherever there is an obligation which the court cannot enforce, therefore it is to decline to act upon a negative covenant, all I can say is that the principle laid down in *Hills* v. *Croll* is distinctly opposed to *Rolfe* v. *Rolfe*, and is distinctly opposed to *Lumley* v. *Wagner*.

Then with respect to its being a covenant in restraint of trade, that again is clearly not so; and in point of fact it does not go beyond the ordinary brewer's covenant, except in this particular, that in the ordinary brewer's covenant you generally have the lessor and lessee, or the mortgagor and mortgagee, whereas this is a sale of a piece of land under different circumstances. If authority were wanted there is abundance of authority on the subject, that a covenant of this description is not void according to the principles which are clearly laid down in this court.

Upon all these grounds I am clearly of opinion that the demurrer was properly overruled in the court below, that there is no ground for this appeal, and that it must be dismissed with costs.

Solicitor for the defendant appealing, *H. Smith*, agent for *Dempster*, Brighton.

Solicitors for the plaintiff, *Senior*, *Attree*, and *Johnson*, agents for *Hill* and *Fitzburgh*, of Brighton.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Tuesday, June 29.

KIRKMAN v. LEWIS.

Will — Construction — Gift of residue — Statute of Mortmain—Illegal gift—Uncertainty.

A testator by his will directed the residue of his personal estate to be converted into money and the money applied in the construction of a well and the erection of a public pump and tank in any convenient place in the village of L., and if there was any surplus, he directed the same to be paid to the rector for the benefit of a school there:

Held, that the gift for the construction of the well, &c., was void by the Statute of Mortmain; and that, as it was impossible to ascertain what the surplus would be without sinking the well, &c., the whole gift was void, and the next of kin were entitled to the residue of the testator's personal estate.

This was a suit for the administration of the estate of Abraham Kirkman, which now came on for further consideration, the only question being as to the validity of the bequest of the residue of the testator's personal estate.

By his will, dated the 10th June 1865, Abraham Kirkman, after directing the payment of his debts and funeral expenses, gave various specific and other legacies; and as to all the residue of his personal estate and effects he directed the same to be converted into money, and the money applied in the construction of a well and the erection of a public pump and tank in any convenient place in the village of Llangorse, and if there should be any surplus, he directed the same to be paid to the rector for the benefit of a school there.

Sir *R. Baggallay*, Q. C. and *Bagshawe*, for the plaintiff, did not take any part in the argument as to the validity of the residuary bequest.

Wickens, for the *Attorney-General*, after an intimation of his Lordship's opinion that the gift for the construction of the well, &c., was void under the statute of Mortmain, submitted that since the decision in the House of Lords of *Philpott* v. *St. George's Hospital*, 6 H. of L. Cas. 338, the construction of the statute was by no means to be taken as it used to be, and that on the authority of that and other cases, where the purchase of land was not necessary, the gift was valid. Here the gift was not necessarily void, as it did not require the purchase of land. But even assuming the gift for the well, &c., to be void, the gift of the surplus for the school was valid, as the cost of the construction of the well, &c., was ascertainable; but he submitted that if the gift for the well failed, the whole residue would go to the purposes of the school. He cited

Fisk v. *Attorney-General*, 17 L. T. Rep. N. S. 27; L. Rep. 4 Eq. 521;
The Magistrates of Dundee v. *Morris*, 3 Macq. 134.

Jessel, Q. C. and *Kingdon* for the next of kin, contended that it could not be known whether there would be any surplus till the well, &c., were constructed, and that the gift of the surplus was, therefore, void for uncertainty. It was not a gift of the residue, but a simple direction that if there was any surplus, it should be paid to the rector for the benefit of the school. Moreover, the case was covered by authorities. They cited

Chapman v. *Brown*, 6 Ves. 404;
Fowler v. *Fowler*, 33 Beav. 616;
Attorney-General v. *Hinxman*, 2 Jac. & W. 270;
Mitford v. *Reynolds*, 16 Sim. 105; 1 Phil. 185.

Southgate, Q. C., *Cutler*, *Bury*, and *Sladen*, appeared for other parties.

Lord ROMILLY.—I cannot say that there has not been a considerable fluctuation in the decisions on the statute of Geo. 2 (Statute of Mortmain); but I do not think that any case has gone to this extent, that where a gift is made for a purpose which this court cannot carry into effect, and there is a direction that the surplus shall be carried to a good purpose, that gift is good. It is quite clear that the gift for the construction of the well, &c. is void by the Statute of Mortmain. It is impossible to ascertain what the expense of sinking a well would be; and till the well has been sunk and the tank and pump erected, it is impossible to say what the surplus will be, or whether there will be any surplus. I am of opinion, therefore, that the whole gift is void, and that the residue, if any, belongs to the next of kin.

Solicitor for the plaintiff, *Ralph Watson*.

Solicitors for the other parties, *Raven* and *Bradley*; *J.* and *R. Gole*; *G. H. Oliver*; *Kynaston*; *Gasquet*.

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April 29 and 30.

RUSHBROOK *v.* LAWRENCE.

Mortgage—Equity of redemption—Release—Agreement in fieri—Abandonment of agreement.

Mortgagees brought an action of ejectment, in July 1853, against the mortgagor, who was in possession of the mortgaged property. The action was compromised, upon these terms: that the mortgagor should give up possession to the mortgagees on the 29th Sept. then next, and should release to them (if required) all his right, claim, and interest in the mortgaged property, the release to be prepared at the expense of the mortgagees; the mortgagees agreeing, in consideration of the mortgagor agreeing to give such possession and execute such release, to forego all claim in respect of costs of the action, but in case default should be made by the mortgagor in the giving of such possession, or the execution of such release (if required), the mortgagees should be entitled to the costs:

A release was never required, and the mortgagor continued in possession till 1865, when the mortgagees sold the property under the trust for sale contained in the mortgage-deed, and realised more than sufficient to pay their principal, interest, and costs:

Held, that the compromise was an agreement in fieri, which had been abandoned by all parties and could not now be carried out, and that the mortgagor was entitled to the surplus proceeds of sale, after paying to the mortgagees their principal, interest, and costs.

This was a suit by the heir-at-law of a mortgagor against a mortgagee to recover the surplus of the proceeds of sale of the mortgaged property after payment of the mortgagee's principal, interest, and costs. The defendant resisted this suit on the ground that the plaintiff had released his equity of redemption.

By an indenture dated the 28th March 1825, Frederick Rushbrook, the father of the plaintiff, demised a piece of land in the borough of Cambridge to John Ingle the elder for the term of 1000 years, subject to a proviso for the cesser of the term on payment of 600*l.* and interest to Ingle or his representatives. In 1835 the mortgagor charged the same property with the payment of a further sum of 200*l.* to Ingle's executors.

By indentures of lease and release by way of mortgage, dated the 25th and 26th Aug. 1837, Frederick Rushbrook conveyed the same property and an adjoining piece of land to Aaron Chevell upon trust, if Rushbrook should fail to pay 200*l.* and interest on the day therein named, to sell the property, and out of the proceeds of sale to retain the 200*l.* with interest and costs, and to pay over the surplus to the person who would have been entitled to the equity of redemption in case the property had not been sold.

Frederick Rushbrook died intestate on the 24th Aug. 1841, leaving the plaintiff Frederick Henry Rushbrook his heir-at-law, then an infant of the age of eleven years.

No interest having been paid on the mortgage after the mortgagor's death, the executors of Ingle, the first mortgagee took possession of the mortgaged property in 1844, and remained in possession of it till May 1852, when the plaintiff came of age, and took possession of it.

Aaron Chevell, the second mortgagee, died in 1838, having by his will left all his property, subject to certain life interests, to his nephew J. P. Lawrence, whose widow, the defendant Elizabeth P. Lawrence, was now entitled to the 200*l.* secured by the mortgage-deed of Aug. 1837.

In June 1853 the defendant in the present suit and the representatives of Ingle, brought an action of ejectment against the plaintiff for the recovery of the mortgaged property; and on the 14th July 1853 the plaintiff, being unable to defend the action, signed a cognovit in the following words:

I, the above named defendant (i.e. in the action) do hereby confess this action, and that the above named plaintiffs are entitled to the possession of the whole of the hereditaments and premises comprised in the writ of ejectment in this action, subject to terms specified in a consent signed by my attorney and bearing even date herewith.

The consent was signed by the attorneys of both parties and was in these words:

We consent to an order to stay proceedings in this action upon the following terms, viz., the defendant to withdraw his appearance and the plaintiffs to be at liberty to sign judgment forthwith, they undertaking not to issue a writ of possession till the 29th Sept. next; defendant hereby consenting on or before the said 29th Sept. next, to give and deliver up to the plaintiffs or their agent quiet and full possession of all the hereditaments and premises now standing thereon, the possession whereof is claimed by the plaintiffs in the writ of ejectment in this action, the defendant being entitled to the rents and profits to the time of giving up such possession as aforesaid, and the defendant hereby undertaking (if required) to release to plaintiffs all his right, claim, and interest (if any) in the said hereditaments and premises, the said release to be prepared at the expense of the said plaintiffs; and in consideration of the defendant agreeing to give such possession, and execute such release (if required), the plaintiffs do hereby agree to forego all claim in respect of the costs of this action, but in case default shall be made by defendant in the giving of such possession or the execution of such release (if required) then plaintiffs to be entitled to costs to be taxed.

Dated this 14th July 1853.

J. G. B., attorney for the plaintiffs above named;

R. L. J., attorney for the defendant above named.

In pursuance of the arrangement contained in the cognovit and consent, an order by consent was made in the action, and was signed by Mr. Justice Williams. The judge's order was also dated the 14th July 1853, and was almost in the same words as the consent above set out.

The plaintiff stated that he entered into this arrangement through fear of being imprisoned, if the verdict was pronounced against him, and that he believed that the cognovit which he signed was intended only to give to the mortgagees the means of obtaining possession of the mortgaged property, so as to enable them to sell it, and that in signing the cognovit he never intended to prejudice his rights to the equity of redemption.

His attorney in the action stated that he had explained to the plaintiff the effect of the cognovit and consent, viz., that by agreeing to the terms, he would give up all his rights to the property, and that the plaintiff had then replied that he had made up his mind not to contest the matter any longer, as he knew that the property was mortgaged beyond its value, and that there would be nothing payable to him if it were sold.

On the 18th July 1853 judgment in the action by confession was signed according to the terms of the order, but the plaintiff was never required to give up possession of the property or to execute a release.

In March 1854, the plaintiff being about to leave England, gave to one James Cave the key of a messuage standing on the mortgaged property, and at the same time gave him a paper writing in these words:

I, Frederick Rushbrook, do hereby leave James Cave in possession of the garden in the Mile-road, known as Covent-garden, in trust to be delivered up to me whenever I may require it. FREDK. H. RUSHBROOK.

Witness, Mr. Barrance.

March 16, 1854.

On the 5th July 1865, the defendant sold the property by auction under the trust for sale contained in the mortgage-deed of August 1837, and in March 1867, she and Ingle's representatives conveyed it to the purchaser. The purchase-money was 3245*l.*, which after payment of Ingle's and the

defendant's principal, interest, and costs, left a surplus of 1500*l.*

Cave continued in possession of the property without paying any rent till March 1867, when, at the defendant's request, he executed a surrender to the purchaser upon being paid certain moneys which he had expended during his occupation.

The defendant, whose attorney in the action had died some years ago, did not know anything of the compromise of the action in 1853, till after the completion of the sale, when her solicitor in this suit casually found out that there had been such a compromise, and on inquiring into the circumstances of it, advised her that she was entitled under it to the surplus of the purchase-money.

Southgate, Q. C. and *Rigby*, for the plaintiff, contended that the consent was not a release, but an agreement to execute a release, if required. The plaintiff did not intend to part with his equity of redemption, and in transactions of this kind between the mortgagor and mortgagee, the court required strict proof of the intention. They cited on this point:

Vernon v. *Bethell*, 2 Eden, 110;

Ford v. *Olden*, 15 L. T. Rep. N. S. 558; L. Rep. 3 Eq. 461.

Moreover, the consent was never acted upon, but was abandoned by all parties; and eventually the defendant sold under the trust for sale in her mortgage deed, and the consent was so far from being acted upon, that the first mortgagee's representatives were paid the costs of the action of ejectment. But even assuming that the release mentioned in the consent was intended to be a release of the equity of redemption, it was not available as a defence to a suit of this kind, except by cross bill: (*Howells* v. *Wilson*, 12 L. T. Rep. N. S. 818; 34 Beav. 573.) The conduct of the defendant since 1853, and especially in the matter of the sale, amounted to a complete waiver of the compromise:

Watson v. *Marston*, 4 De G. M. & G. 230.

Sir *Richard Baggallay*, Q. C., and *G. N. Colt*, for the defendant, contended that the plaintiff must have intended to release his equity of redemption, for he had nothing else to release. At the date of the compromise, the equity of redemption was worth nothing, and, therefore, the relieving him from the payment of the costs of the action was a sufficient consideration for the release. The plaintiff had agreed to release his equity of redemption whenever required to do so, and it was not too late to require him to do so now. They cited

Knight v. *Marjoribanks*, 2 Mac. & G. 10.

April 30.—Lord ROMILLY.—Mr. Southgate, I think you are entitled to a decree in this case. In the first place, I do not think that the case of *Knight* v. *Majoribanks* (*sup.*) in any degree affects this case, because I do not think that the transaction is invalid by reason of its being a transaction between a trustee and *cestui que trust;* that is not, in my opinion, the reason why this transaction is invalid; it is invalid, in my opinion, because it was a mere proceeding *in fieri*, a mere agreement entered into which was abandoned by all the parties, and which is endeavoured to be set up after the lapse of fourteen or fifteen years after the transaction took place. I think the proper and fair way of considering this case, and the way in which I propose to consider it, is to assume the perfect accuracy and proof of the three documents upon which the defendant relies. I do not mean to cast the slightest doubt upon them from the fact of one not having been proved, but I mean to assume all the three documents as perfectly valid and existing documents at the time. Then I think it desirable to point out what are the transactions or facts which relate to this case. [His Lordship here stated the facts of the case and continued:] I think it is perfectly clear that the plaintiff was in possession of the property through Cave, and Cave's evidence upon cross-examination is perfectly distinct and plain upon the subject. None of the mortgagees ever took possession. In Jan. 1865 they put up the property for sale, and it was sold for a considerable sum, much more than sufficient to pay principal, interest, and costs upon both mortgages, and the question is, who is entitled to the surplus? The plaintiff's title as mortgagor is clearly made out, and if he has not conveyed away his equity of redemption, he is entitled to the surplus of the purchase-money; and it is to be observed that, the property being amply sufficient, the mortgagees are not much to be pitied if the result is that they only get their principal, interest, and costs paid in full. The state of the case is this: There are three documents, the cognovit, the consent, and the judge's order, which carried into effect the consents of the parties. The cognovit, which was executed by the plaintiff in the present suit was in these words:—"I, the above-named defendant, do hereby confess this action, and that the above-named plaintiffs are entitled to the possession of the whole of the hereditaments and premises comprised in the writ of ejectment in this action, subject to terms specified in a consent signed by my attorney, and bearing even date herewith." I pass over the fact that it seems to me very doubtful whether there was anything of even date therewith, because the document as produced certainly appears to bear date the 17th, and not the 14th, but I assume it to bear even date. The consent is in these words: [His Lordship read it.] It is to be observed that he (Rushbrook) was not to execute the release, unless he was required to do so. The conveyance of the equity of redemption was not to take place by this instrument; that is expressed; he does not say, "I hereby give it up," but that he undertakes to release it if required. It was to be by a written document to be executed by him, which was to be prepared at the expense of the plaintiffs in that action. All those things are perfectly clear. What was the penalty, if he did not do it? The penalty was that he was to pay the costs of the action; that is expressly stated. The mortgagees could have got possession at any time. They got judgment in the action; judgment was entered up on the 18th July; they could have possession at any moment they pleased; and if he did not give up possession, if he did not execute the release when required to do so, the only consequence was that he was to pay the costs of the action. That is the agreement between them. Now what takes place? They never require him to execute a release, no release is ever presented to him, he is never requested to give up possession, he remains in possession continually up to the time of the sale, and in addition to that, out of the produce of the sale, when it took place, they paid themselves the costs of the action—when I say they paid themselves the costs of the action, Mr. Ingle, who is the first mortgagee, does not insist upon this agreement at all; neither he nor his attorney insists upon anything more than that his principal, interest, and costs should be paid; he does not insist that he is to participate in the equity of redemption, which he clearly would be entitled to do under this agreement, if the defendant is entitled to it; but he does not claim anything of the sort. This transaction took place in July 1853, and all parties abandoned it, no party acted upon it in any respect till the 5th July 1865, when the sale took place, which produced more than sufficient to pay principal, interest and costs; therefore twelve years had elapsed. After that time, the agreement having been abandoned on all sides, and the sale having produced a considerable amou

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then the defendant says, "Here is the agreement, which you were bound by, though none of us acted upon it, by virtue of it, I, who was one of the two mortgagees (because there are two mortgagees who entered into the arrangement, which the other will not have anything to say to), am entitled to take 1500*l.*, which, except for this, would have belonged to the plaintiff whose property it originally was." It is a strong thing to say that. It is possible that at that time the equity of redemption was worth nothing. It is perfectly clear from all the evidence in the case that the giving up the costs against the defendant in the action amounted to very little, because they could have got no costs against him; he was not worth any costs at all; and they apparently did not take possession of the property for this reason, that they could not sell it, and they were afraid of the consequences of being treated as mortgagees in possession. If the plaintiff had simply executed a release to them, that would have been another thing, but it was to be at their expense, and they were to make it complete if they thought fit. Now by what possibility could the plaintiff insist upon that agreement, supposing the case were the other way? Could he come after the lapse of twelve years and say, "You might have had the release if you pleased; though I never offered to execute it, I am entitled now to say that you must not have the costs of the action?" It is quite clear that he could not do anything of the sort. It is, therefore, one of those cases which, it appears to me, are impossible to be supported, that the defendant can stay over for twelve years and say, "I will run the chance of this property in the neighbourhood of a large town becoming valuable, and if that should prove to be the case, I will insist upon having the equity of redemption and specific performance of the contract; if it does not prove valuable, then I will abandon it altogether, and add my costs to the mortgage-money." Because the agreement was clearly this, if the property had merely produced enough to pay the principal and interest, the mortgagees were not entitled to have any costs of the ejectment as against him. I am of opinion that the whole of this arrangement was abandoned on both sides; tacitly abandoned. It is quite clear that the defendant did not know of it at the time; she now says her attention was called to it by the circumstance of an entry in an attorney's bill of costs, which has led to the production of these three documents, all of which only come to this, that the plaintiff agreed to do something, if called upon to do it, which he never was, and which, if he had been called upon to do, might have given the defendant a right which she does not now possess. I am of opinion that the plaintiff is entitled to a decree with costs. In taking the accounts the defendant is to be allowed all sums of money which have been paid in respect of the mortgage to Mr. Ingle. It would be very difficult, I think, to say that this young man (Rushbrook), who was only just twenty-two at the time of this transaction, and evidently in a very low rank of life, could have possessed any real knowledge of what the value of this property was. In this case, if bound by the transaction, all that he would have got would have been, that he would have conveyed away a property worth 1500*l.* to a person who was only a mortgagee for 200*l.*, merely for the sake of being relieved from the costs of the action. The probability is, that if a release had been tendered to him, the suit would have taken another form, it would have been to set aside the release which had been executed by him.

Solicitors for the plaintiff, *Anderson* and *Stanford*, for *Whyley* and *Piper*, Bedford.

Solicitors for the defendant, *Kingsford* and *Dorman*.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Saturday, July 31.

CARTER *v.* CARTER.

Settlement—Construction—After acquired property—Will of husband.

On the marriage of C. and F., 5000l. was vested in trustees on the usual trusts, and C. and F. covenanted with the trustees that if F., her executors or administrators, or C., his executors or administrators in her right, should at any one time become absolutely entitled to real or personal estate of the value of 200l. or more, C. and F., their executors or administrators, should vest it in the trustees, on certain trusts. C. and F., his wife, went to New Zealand, where C. acquired real estate, which he left by his will as F. should appoint by deed or will, and in default to her children. The widow dealt with this property by absolute appointment to herself:

Held, that this property was not within the covenant, that the words "during the coverture" were intended to be inserted, and that the words "executors or administrators" made no difference.

The question in this case arose upon the construction of the settlement made upon the marriage of John Markham Carter and Frederica Josephine Fagan. This instrument was dated the 15th Aug. 1869, and made between Edward Carter the elder of the first part, the intended husband (described as son of Edward Carter the elder) of the second part, the intended wife of the third part, and John Bonham Carter, Charles Francis Cameron, and Edward Carter the younger (trustees) of the fourth part; and after reciting the intended marriage, and that Edward Carter the elder had transferred 5000*l.* Reduced Bank Annuities to the trustees upon trusts after mentioned, it was witnessed that it had been agreed between the parties thereto that the trustees should stand possessed of the 5000*l.* until the marriage, and after the solemnisation to continue or change the investment with the consent of the husband and wife and the survivor, and then at their own discretion, and to invest in Parliamentary stocks, or Government or real securities. Then followed trusts to pay the income to the husband for life, and then to the wife for life, and after the decease of the survivor, there was a trust for all or such one or more of the children, with such provisions for maintenance and advancement at such ages, &c. as the husband and wife should jointly by deed appoint, and in default as the survivor should appoint, whether covert or sole, or by his or her will. And in default of such appointment in trust for all the children equally, sons at twenty-one, and daughters at twenty-one or marriage with consent, and if but one, the whole to such one, with a hotch-pot clause. Then followed provisions for maintenance and education, and in default of children after the decease of Frederica Josephine Fagan, in trust for John Markham Carter absolutely.

The settlement then proceeded:

And this indenture further witnesseth that in consideration of the said intended marriage, they, the said John Markham Carter and Frederica Josephine Fagan do hereby for themselves, their heirs, executors, and administrators, and each of them doth separately for himself and herself, and his and her heirs, executors, and administrators, covenant, promise, and agree with and to the said John Bonham Carter, Charles Francis Cameron, and Edward Carter the younger, their executors and administrators, that if the said Frederica Josephine Fagan, her executors and administrators, or the said John Markham Carter, his executors and administrators, in right of the said Frederica Josephine Fagan, shall at any one time hereafter become absolutely entitled to any messuages, lands, tenements, and hereditaments, moneys, or personal effects (not consisting of house-

held furniture or personal ornaments) of the value of 200*l.* or more; then and in such case the said John Markham Carter and Frederica Josephine Fagan respectively, or their respective executors or administrators, shall and will, at the expense of the said John Markham Carter and Frederica Josephine Fagan, or either of them, or their or either of their executors or administrators, make, do, and execute, or cause or procure to be made, done, or executed, all such acts and deeds, assignments and assurances whatsoever as the said John Bonham Carter, Charles Francis Cameron, and Edward Carter the younger, or the survivors or survivor of them, or the executors or administrators of such survivor, or his or their counsel, shall think necessary and proper for effectually vesting such messuages, lands, tenements, and hereditaments, moneys, or personal estates in the said John Bonham Carter, Charles Francis Cameron, and Edward Carter the younger, or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of these presents; upon, for, within, under, and subject to such and the like trusts, powers, provisoes, and declarations for the investment, alteration, variation, and transfer of the same as are hereinbefore declared concerning the said sum of 5000*l.* Reduced Three per Cent. Bank Annuities, and subject thereto upon trust to pay and apply the interest, dividends, and annual produce thereof to and for the separate use of the said Frederica Josephine Fagan, during her life, and after the decease of the said Frederica Josephine Fagan, upon trust to pay the said interest, dividend, and annual produce to the said John Markham Carter for his life, and after the decease of the survivor of them the said Frederica Josephine Fagan, and John Markham Carter, upon and for such and the like trusts, intents, and purposes, and with under and subject to such and the like powers, provisoes, agreements, and declarations in favour and for the benefit of all and every, or any one or more exclusively of the others or other of the children of the said Frederica Josephine Fagan, including Christina Fagan, the daughter of the said Frederica Josephine Fagan as are hereinbefore expressed and declared of and concerning the said sum of 5000*l.* Reduced Three per Cent. Bank Annuities, and the interest, dividends, and annual produce thereof, or as near thereto as the deaths of parties, and other circumstances, will then admit of, with such additional trusts and powers for sale, and leasing or demising of any messuages, lands, or hereditaments to be so settled, as shall be deemed necessary or expedient.

Then followed a proviso that in case of the failure of children to take under the aforesaid covenants and trusts, then the trust property should be held by the trustees in trust for the wife absolutely if she survived her husband, but if he survived her, there was a general power of appointment given to her by deed or will, and in default to such persons as at her death would be her next of kin under the statute if she had died sole. Then followed a special covenant with respect to property which the wife was entitled to from her first husband. There were then clauses relating to the receipts of the trustees, and a power to appoint new ones. The marriage took effect, and the husband and wife in 1860 settled in New Zealand, where he acquired land and died in June 1863, having made his will dated 18th Sept. 1857, whereby he gave all his real and personal estate to trustees (his wife being one) upon trust for her for life and after to his children, including his step-daughter Christina Fagan, with powers of advancement and other clauses, on which no question turned. By a codicil dated in April 1863 he revoked the gift to one trustee and substituted others, and also the gift to his step-daughter in consequence of her marriage. John Markham Carter left his widow and six children (besides his step-daughter) surviving him, and his widow had dealt with the property so acquired by her husband in various ways. Questions having been raised as to whether the covenant in the marriage settlement applied to this property so left by the will of John Markham Carter, a bill was filed by the trustees and children against the widow, alleging that it did, and this suit was in the nature of a cross-bill to have the settlement rectified so as, without ambiguity, to exclude the property left by the will of the said John Markham Carter, and if not, that the deeds dealing with the property, without prejudice to the rights under it, might be set aside.

C. Hall, for the plaintiff, contended that on the construction not only of the covenant itself, but of the whole settlement, the property left by the husband's will was clearly excluded. The words "during the intended coverture" were certainly not inserted, but they must be implied; and it was observable throughout that the settlement contemplated everything being done by both husband and wife jointly, which could only apply during the coverture. If it were held that this property was within the covenant the effect would be calamitous, inasmuch as the property acquired in New Zealand, and the subject of the husband's will, had been dealt with by the wife. Nothing was within the contemplation of the parties but what took place during the marriage.

Dickenson v. *Dilwyn*, W. N. for 1869, 210.

Wickens and *Casson*, for the defendants, insisted that the covenant and settlement must be construed strictly, and no supposition could be entertained as to what was or what was not in contemplation of the parties. Where property was limited, as here, to a married woman for life with a power of appointment, it was settled law that although if the power was not exercised, the property would not be subject to the trusts of the settlement, yet if it was exercised, it would; and that was this case. Moreover, the words "executors or administrators" carried the time of the acquisition beyond the coverture.

Ewart v. *Ewart*, 11 Hare, 276;
Townsend v. *Harrowby*, 27 L. J., N. S., 553, Ch.;
Stevens v. *Van Voorst*, 12 Beav. 305;
Howell v. *Howell*, 4 L. J., N. S., 242, Ch.
[*Dickenson* v. *Dilwyn* (*sup.*), did not apply.]

The VICE-CHANCELLOR (without hearing a reply): —These cases are not very frequent; but I have had occasion very recently to consider the same question upon a very similar covenant to settle after-acquired property; namely, where the husband had predeceased the wife, and given property to her by his will, a very unusual case. I decided that case on full consideration and argument, and I do not at present see any reason why I should not adhere to the conclusion I then arrived at, unless I see that the present case is different from that. All the authorities were collected in that case, those mentioned to-day and others; and upon them I held that the covenant did not apply to property acquired after the determination of the coverture. In *Howell* v. *Howell*, (*sup.*), and other cases, Stuart, V. C. decided to the same effect, and those cases appear to me so satisfactory that any other decision would be contrary to common sense and reason. This covenant was intended to apply to such property only as was acquired during the coverture, and a well penned instrument would have so expressed it; but in the cases referred to by the defendant's counsel, the words were general, and the question was, whether the words "at any time hereafter," meant during the coverture, that is, the joint lives of the parties, and on principle those words meant that portion of time embraced by the coverture. On that ground I decided that, property passing under the will of the husband not being in the contemplation of the contracting parties, they could not have intended the covenant to apply to such a case. I consider that principle applies with fuller force to the present case, which is much the same as *Dickenson* v. *Dilwyn*. There is certainly the difference of the introduction of the words "executors and administrators," but I do not think they make much difference, if any. [The Vice-Chancellor read the covenants.] They are, in fact, merely put in as formal words. I am of opinion that the words used in the covenant, "shall at any one time" meant, "at any one time during the coverture," although it is not so expressed. The

fact that happened was, that the husband survived the wife, and as in the will in *Dickinson* v. *Dilwyn* there was a power of appointment to the wife by deed or will, and in default to the children. I entirely agree with Mr. Wickens's argument that when she appointed the property to herself absolutely, it was competent to raise the question as to whether property to which she became entitled after the determination of the coverture was embraced in the covenant. I think that the covenant only applied to property coming to her while the coverture subsisted, and I am therefore of opinion that it did not include this property. In *Dickinson* v. *Dilwyn*, I considered it impossible that the contracting parties could have contemplated that property given by the will of the husband could be included in the settlement. The difference here is, that the words "executors or administrators" occur, and it was said that they carried matters beyond the termination of the coverture; but what I think was meant by the introduction of those words was, to provide for the acquisition, and death of the party, in which case it would devolve on the executors or administrators, and would still remain liable to the covenant. Cases most similar to this refer to special property, but here the words "executors or administrators" were inadvertently thrown in and have no specific meaning. The demurrer therefore must be allowed, and there is an end of the motion.

Solicitors for all parties, *Williamson, Hill,* and *Co.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

Thursday, June 3.

Re THE EUROPEAN CENTRAL RAILWAY COMPANY; GUSTARD'S CASE.

Shares—Increase of nominal value of—Notice to transferror.

A railway company had increased the amount of the nominal value of its shares from 20l. to 40l. each, without formal notice to the original applicants for shares. G. applied for and obtained twenty shares, which were allotted to him. These shares with others were transferred by G. to H. The deed of transfer was left at the company's office for registration, but never was registered.

The company was ordered to be wound-up:

Held, that G. was only to be considered as a contributory in respect of the twenty shares for 20l. each allotted to him, and not for shares of which the nominal value had been so increased.

This was an adjourned summons from chambers.

It appeared by the evidence that the European Central Railway Company was incorporated in Jan. 1864. The capital by its prospectus and articles of association was stated to be 1,400,000*l.*, "subject to be increased and modified." It was also stated that the "first issue was to be 700,000*l.*, in 35,000 shares of 20*l.* each. The remaining 700,000*l.* to be raised hereafter in shares, bonds, or obligations as the board of directors may from time to time deem advisable. But the board may from time to time by a resolution passed by a majority consisting of not less than two-thirds of the whole number of directors, consolidate the shares into shares of a larger nominal value, so that the shares when consolidated shall together be equivalent in nominal value to the nominal value of the original shares before the consolidation."

On the 24th Jan. 1864 Mr. Gustard, at the request and solicitation of Mr. H. A. Holden, the promoter, and contractor for the works of the company, applied for twenty shares of 20*l.* each. These shares, on payment of the deposit of 4*l.* each per share, were, on the 22nd April 1864, allotted to him. On the 24th March preceding a resolution had been passed by the necessary majority of the directors, whereby the nominal value of the shares was increased from 20*l.* to 40*l.* each. This resolution was not registered by the registrar of joint-stock companies. It had been annexed as a printed memorandum to the articles of association of the company. By the deposition of Mr. Gustard it appeared that he denied all knowledge or notice of this resolution, and he stated that his application for shares was made on the faith of the statement contained in the memorandum and articles of association of the company that the shares were to be of 20*l.* nominal value. Certain transactions had taken place between Mr. Holden as the promoter and contractor of the company, and by articles of agreement dated the 5th April 1865, between them it was provided that Mr. Holden should produce transfers to himself of 1250 shares, which were to be delivered up to the company on their issuing to him 7500*l.* of debentures, payable in five years. The twenty shares which had been originally allotted to Mr. Gustard formed part of the 1250 shares delivered up by Holden to the company. The twenty shares before mentioned had been transferred by Gustard to Holden by deed of 16th May 1865. This deed had been left for registration at the office of the company, but it had never been registered there. Mr. Gustard had been induced to execute this deed of transfer under the belief that the arrangement between the company and Mr. Holden would have been carried out, and that he (Gustard) would, on the transfer of the shares being made, be released from all liability in respect of them. The question raised was whether Mr. Gustard was to be put upon the list of contributories at all, or, if so, whether in respect of twenty shares of 20*l.* each, or twenty shares of 40*l.* each.

Amphlett, Q. C. and *Locock Webb*, for Mr. Gustard, contended that, having no notice of the increase of the nominal value of the shares from 20*l.* to 40*l.* each, and twenty shares of the first-named nominal value having been allotted to him, he could only be held to be a contributory for such shares. And that inasmuch he had done all that was necessary for him to do, by having had the deed of transfer of those shares left for registration at the company's office, he ought not to be put upon the list of contributories at all, or held responsible for any liability in respect of them.

E. E. Kay, Q. C. and *Bardswell*, for the official liquidator of the company, contended that inasmuch as the increase of the nominal shares of the company was provided for by the original prospectus and articles of association, Mr. Gustard was bound by the provision therein contained that the directors should have the power of raising the additional capital by the issue of shares of increased nominal value, and that therefore he must be considered as a contributory for twenty shares the nominal value of which had been so increased by the resolution of the prescribed majority of directors.

The VICE-CHANCELLOR said that Mr. Gustard must be held to be a contributory of the company, the transfer of the shares allotted by him not having been duly registered. But his application for the shares having been made on the faith of the memorandum and articles of association of the company, he must only be held as a contributory for twenty

shares of 20*l.* each. He had distinctly sworn (and he was not cross-examined), that he never heard of the resolution to increase the nominal value of the shares until the month of May 1866. This was nearly two years after the date of that resolution. He was not affected, however, by *laches* as he had, at the time executed a transfer of these shares, and might well suppose that all liability in respect of them had ceased. He (the Vice-Chancellor), however, did not consider that the company had been bound to give any notice of the resolution to increase the nominal value of the shares, and their refusal to accept the transfer. It was his (Mr. Gustard's) business to have seen that the transfer had been complete, and duly registered.

Order accordingly.

Saturday, June 5.

Re The European Central Railway Company;

Holden's Case.

Attempted transfer of shares—Set-off.

H. applied for 100 shares in the above company. Eighty shares were allotted to him on the 22nd April 1864. In Nov. 1865 H. contracted to sell these shares to H. A. H. Calls upon them became due, amounting to 320l., which H. remitted to H. A. H. to pay to the company in respect of these calls. The company was alleged to be indebted to H. A. H. in a much larger sum. H. A. H. tendered to the secretary of the company twenty overdue coupons of the company of 15l. each in part payment of the 320l. This offer was refused. The transfer of the shares had never been registered:

Held, that H. was a contributory of the company in respect of eighty shares of 40l. each.

This case also came on as an adjourned summons from chambers.

It appeared that a Mr. Henry Holden in March 1864 applied for 100 shares in the company. Eighty were allotted to him in April 1864. On the 7th July Henry Holden signed a receipt for these shares of "40*l.* each." In Nov. 1865 H. Holden contracted to sell a certain number of shares to his cousin H. A. Holden, and on the 14th Dec. following executed a transfer of them to one Harris, the nominee of H. A. Holden. Calls were then due upon the shares. Amongst the shares so conveyed to H. A. Holden were the eighty shares of 40*l.* each allotted to H. Holden by the company. By the memorandum and articles of association the company might decline to register any transfers of shares whilst the transferror was indebted to the company. H. Holden remitted to H. A. Holden 320*l.*, the amount of calls then due upon the shares so assigned by him to be paid by H. A. Holden to the company. He, however, retained the 320*l.* but tendered to the secretary as a satisfaction and payment of the amount of calls so due, twenty overdue coupons or warrants payable in respect of debentures of the company which had been issued in his favour for work done by him on the railway. These coupons were for 15*l.* each. The secretary refused to receive them as part payment of the calls. The transfer to Harris, the nominee of H. A. Holden, had never been duly registered. The question now was, whether H. Holden was to be held as a contributory to the company and to what extent.

Amphlett, Q. C. and *Locock Webb*, for H. Holden, contended that he ought not to be held a contributory at all. The company were bound to have registered the transfer of the shares to Harris. The coupons were payable on demand, and as the amount of them must be considered as cash, the tender of the amount of them was a legal tender for the amount of the calls then due upon the shares allotted to H. Holden. At all events, he could be only held liable for eighty shares of 20*l.* each, following the decision of *Gustard's* case, reported above.

E. E. Kay, Q. C. and *Bardswell*, for the official liquidator, were not called upon by the court.

The Vice-Chancellor said that H. Holden must be declared a contributory in respect of eighty shares of 40*l.* each, as the circumstances in *Gustard's* case were entirely different. H. Holden had been accepted as the allottee of shares of 40*l.* each, and he had signed a receipt for them acknowledging that to be the nominal value of each share so allotted. He (the Vice-Chancellor) could not hold that the tender of the overdue coupons in payment of the calls then due upon those shares was a legal tender, and consequently the company were justified in refusing to register the transfer of the shares which brought the case precisely within the terms of the articles of association, giving power to decline the registration of a transfer on the ground of indebtedness to the company by the transferror. The transfer not having been duly registered, H. Holden consequently remained liable as a contributory in respect of the shares so allotted to him.

Order accordingly.

Solicitors: *G. E. Gustard; Fox* and *Robinson.*

Monday, June 28.

Cooper *v.* Cooper.

Appointment—Alleged fraud on power.

When a father agreed to appoint a share of a fund to his daughter, and to secure by bond an equal amount to the trustees of her marriage settlement under which he was to have a contingent reversion in both funds:

Held (in a suit to set aside the appointment), that as the transaction was intended substantially for the benefit of the daughter, and as the father gave a high value for the contingent interest, there was no fraud on the power.

By the marriage settlement of Mr. and Mrs. Daniel, dated the 8th Sept. 1806, property was settled upon the husband and wife successively for life, and after the decease of the survivor, in trust for all the children of the marriage as Mr. and Mrs. Daniell should by deed appoint, and in default of such joint appointment as the survivor should by deed or will appoint, and in default of appointment, in trust for all the children equally.

There were five children of the marriage, and previously to the marriage of one of them, Maria Gertrude Daniell with G. O. B. Trevanion, articles of agreement for a marriage settlement were entered into, by which Mr. Daniell covenanted that he and his wife would appoint a fourth part of the funds comprised in their marriage settlement in favour of their daughter. And that he would execute a bond to the trustees of his daughter's marriage settlement for payment to them in 1840 of the sum of 4567*l.*, with power for him to pay off the same at any earlier period with interest at 5*l.* per cent. in the meantime from the date of the bond. And it was agreed and declared that all the funds so provided for should be settled upon trust for Mr. Trevanion for his life, then to Gertrude M. Daniell for her life, and after the decease of the survivor upon trust for the children of the marriage, as the survivor should appoint. And that in case there should be no children of the marriage, that then the moneys intended to be settled by Mr. Trevanion should go to his executors, administrators, and

assigns, and that the moneys intended to be settled by Mr. and Mrs. Daniell should go to the executors, administrators, and assigns of Mr. Daniell.

The marriage took place on the 14th Feb. 1832.

By a deed dated the 10th April 1832, Mr. and Mrs. Daniell appointed a fourth part of the funds comprised in their marriage settlement in favour of their daughter, so that she took a vested interest in the sums transmissible to her executors, administrators, and assigns.

By a post nuptial settlement, dated the 11th April 1832, the fourth part so appointed to Mrs. Trevanion was settled in accordance with the marriage articles, and in default of issue of the marriage there was an ultimate trust in favour of Mr. Daniell, his executors, administrators, and assigns.

Mr. Trevanion died on the 10th Sept. 1832, and there was no issue of the marriage.

On the 17th June 1841, Mrs. Trevanion was married to the plaintiff. By the settlement made in contemplation of the marriage, and dated the 16th June 1841, all the life interest of Mrs. Trevanion under the first settlement was vested in trustees.

Mr. and Mrs. Daniell also appointed another fourth part of the funds comprised in their marriage settlement to their daughter, Sophia Daniell, then an infant, on her marriage with Captain England. By a settlement bearing the same date as the date of appointment, the fourth part so appointed was settled with a similar ultimate remainder in favour of Thos. Daniell, in the event of there being no issue of the marriage. There were, however, children of the marriage, and the share so appointed had been dealt with in favour of the children.

In April 1835, Thomas Daniell became bankrupt. By a deed dated the 15th May 1849, his assignees in bankruptcy executed an assignment (*inter alia*) of his reversionary interest in the one fourth part appointed to Mrs. Trevanion to the trustees of the Economic Life Assurance Society.

Thomas Daniell died on the 5th March 1866, and the funds, subject to the settlement of the 8th Sept. 1806, were divided by the surviving trustee of the settlement. A fourth part was paid by him to the surviving trustee of the post-nuptial settlement of the 11th April 1832, made on the marriage, and one-fourth to the trustees of the settlement made on the marriage of Sophia England.

The bill was filed by the plaintiff, the second husband of Mrs. Trevanion, to set aside the appointments by Mr. and Mrs. Daniell on the ground that an ultimate interest being reserved to Mr. Daniell, they were a fraud on the power of appointment given by the settlement of 1806.

Kay, Q. C. and *W. C. Druce* appeared for the plaintiff. They cited

Goldsmith v. *Goldsmith* 2 Ha. 197;
Birley v. *Birley*, 25 Beav. 299;
Lane v. *Page*, 1 Ambl. 233;
Topham v. *Duke of Portland*, 10 L. T. Rep. N. S. 360; 1 De G. J. & S. 517;
Sugden on Powers, 673, 8th edit.

Sir *R. Palmer*, Q. C. and *Hemming*, for the trustees of the Economic Life Assurance Society, contended that the appointment was valid.

Eddis, Q. C. and *Hamilton Humphreys*, for Mrs. England, also supported the appointment. They cited

Fitzroy v. *Duke of Richmond*, 27 Beav. 190;
Jebb v. *Tugwell*, 7 De G. M. & G. 633;
Sadler v. *Pratt*, 5 Sim. 632;
Palgrave v. *Atkinson*, 1 Coll. C. C. 190;
Rucker v. *Scholefield*, 1 H. & M. 36.

Fischer appeared for Mrs. Cooper.

W. F. Robinson, *W. H. Deverell*, and *B. B. Swan*, for the trustees and other parties.

The VICE-CHANCELLOR.—The case of the plaintiff in this suit appears to me to be an illustration of a class of cases in which rules laid down by the Court of Chancery for the prevention of fraud are endeavoured to be strained upon some technical grounds, for the purpose of producing fraud in such a way, that one cannot sometimes help wishing that there were a court of equity to correct what the Court of Chancery is doing in these matters. Luckily in this case one is able to deal not with any technical rule, but with the substance and truth of the case, which is this: A father and mother had a power of appointment among their children. Upon the marriage of one of the daughters, who is now the wife of the plaintiff, the father and mother executed an appointment of one quarter of the fund to the daughter. The terms on which the appointment is made are perfectly unimpeachable; it is an appointment to the daughter absolutely, so as to be a vested and transmissible interest in her. But it is said that looking at the whole transaction, and looking at the articles of agreement which were made before that appointment was in form executed, the court is able to see that there was some corrupt purpose, some indirect and sinister purpose in the mind of the father which makes this appointment a fraud in equity. And the sinister purpose is said to be this: That it was agreed by those articles of agreement that there should be a marriage settlement by which in certainly not a very probable event, or a remote event at all events, the fund so appropriated should come back to the father. The fund was settled upon the daughter for life, remainder upon the husband for life, remainder for the children issue of the marriage, and then with an ultimate trust in default of issue to the donee of the power—the appointor. That no doubt, if it stood alone, would be a grave ground for impeaching the settlement. I do not mean in the slightest degree to question those cases which hold that if a donee of a power, directly or indirectly, obtain for himself a personal benefit by reason of the execution of the power, that such exercise of the power is invalid. But you must look at the whole transaction, and in this case the father not only executes the power of appointment by appointing a sum of 5000*l.* for his daughter, but he binds himself (and he being at that time a man in credit the bond was not a sham) in a bond of 5000*l.*, the interest on which seems to have been paid for a great number of years, and even after his bankruptcy has realised for this very trust the not inconsiderable sum of 1500*l.* He himself puts into settlement that bond of 5000*l.*, and gives an immediate interest to the wife, an interest to the husband, and an interest to the children in this fund. Therefore, taking the whole thing together, it is this: He says, "I will appoint to you the 5000*l.* (or whatever the exact sum is), provided you will enter into a bargain with me that for 5000*l.* more, which I am going to pay down directly, you will give me a contingent reversion in this fund." I must look at the substance of the thing. Was that an indirect advantage to the father? Was it any advantage to the father at all that he should be buying a future reversion at such a high price? It appears to me the substance of the transaction was intended substantially for the benefit of the daughter who was the object of the power, and that the contingent benefit which the father got was a thing for which he gave value over and over again, and therefore it is not within the rules at all which apply to those cases. Upon that ground I am of opinion that the appointment is perfectly good. And it seems to me that, upon other grounds, it would be utterly impossible for me, on behalf of this plaintiff, whose wife was a party to the whole transaction, who took the whole benefit under the settlement,

and who, when he married his present wife took, and who is now taking the benefit of the purchase-money under the father's bond, to set aside the appointment. I do not know that I should have heard the case out upon that ground; but I thought possibly he might have some ground for setting aside the appointment to Mrs. England, which he was not estopped from impeaching by reason of his being a participator with his wife in the appointment to her. But I think it is impossible to allow him to question the appointment to Mrs. England, for it seems to stand on the same footing as the appointment to Mrs. Cooper; and, independently of that, there is a second ground that the money had got home to the trustees of Mrs. England, and there having been this acquiescence and consent, I do not think I should allow him to disturb the whole family arrangement made on the footing of that acquiescence and consent. Both of those are subsidiary grounds. I base my judgment upon the broad principle, that there was no corrupt, fraudulent, or sinister purpose in the father, but that it was an honest settlement made by him in execution of the power of appointment for the benefit of his daughter. The bill must be dismissed with costs.

Solicitors for the plaintiff; *Druce, Son*, and *Jackson*.

Solicitors for the defendants, *Johnson* and *Wetherall; Young* and *Jackson; Walters, Young*, and *Deverill; W. H. Haycock*.

Saturday, July 31.

Re PATENT FLOOR CLOTH COMPANY.

Practice—Winding-up.

Where an order to continue a voluntary winding-up under supervision had been made on the assumption that the voluntary winding-up had been regular, but which it appeared had not been regular, the proper advertisements not having been inserted—and the official liquidator having sold property, to the title to which the purchaser had objected this irregularity:

By consent, ordered that the order for continuing the voluntary winding-up should be discharged, and the petition reheard, and order made, without the insertion of the necessary advertisements.

An order had been made by this court, dated the 1ct May 1869, to continue the voluntary winding-up of the above company under the supervision of the court.

The official liquidator of the company subsequently caused to be sold the works of the company. On the abstract of title having been forwarded to the purchaser's solicitor, an objection to the title had been raised that the order of the 1st May was irregular, the resolution for the voluntary winding-up of the company having been come to without the formal notices (required by the Companies' Act) convening the meetings having been duly inserted, as provided for by the Act.

W. N. Lawson now moved that the order of the 1st May 1869 might be discharged, and that the petition upon which it had been made might be reheard before the Vice-Chancellor for the purpose of an order to be made thereon curing the defect.

H. A. Giffard, for the official liquidator, having been instructed to consent to this,

The VICE-CHANCELLOR made an order discharging the order of the 1st May, and on the following day, on the same matter being again mentioned, made an order for a compulsory winding-up without requiring fresh advertisements of the petition to be inserted.

Solicitors: *Reed, Phelps*, and *Sedgwick*.

In Parliament.

Reported by FREDERICK CLIFFORD, and PEMBROKE S. STEPHENS, Esqrs., Barristers-at-Law.

COURT OF REFEREES ON PRIVATE BILLS.

Monday, April 19.

(Before Sir T. E. COLEBROOKE, M.P., in the chair; Mr. ST. AUBYN, M.P.; and Mr. RICKARDS.)

KINGSTOWN TOWN BILL.

Objections to *locus standi* of the DUBLIN, WICKLOW and WEXFORD RAILWAY COMPANY.

Township commissioners—Waterworks—Railway Company—Rating powers.

The Commissioners for the township of K. were empowered to construct waterworks and to levy water rates, but did not exercise the power, and in default of such supply, a railway company constructed, at their own expense, an aqueduct for the supply of their station within the township. A Bill was now promoted constituting a new body of commissioners, and empowering them (inter alia) to contract with the corporation of D. for a supply of water for the township and to levy for that purpose such rates as the existing commissioners were authorised to levy.

Held, that though the Bill proposed to give no new rating powers, the railway company had a limited locus standi against clauses relating to water supply.

The Bill was one "to amend 'The Towns' Improvement (Ireland) Act, 1854,' so far as relates to the town of Kingstown, and for other purposes." The petitioners were owners of the line from which they took their names, and were also lessees in perpetuity of the Dublin and Kingstown line. The township of Kingstown was under the management of commissioners appointed under an Act of 1861, which incorporated the Towns Improvement (Ireland) Act, by which Act the Commissioners were empowered, if they thought proper, to construct waterworks to supply the town with water, and to levy rates upon the township to the extent of 1s. 6d. in the pound, where the enactments of the Act with respect to water had been adopted, and to the extent of 1s. in the pound where such enactments with respect to water had not been adopted. It appeared that the Kingstown Commissioners did not exercise that power of making waterworks in the town, and consequently from 1861 to the present time the only rate levied under the Act of 1854 had been the rate of 1s., the town having been principally supplied by springs and wells. In 1863 the Dublin, Wicklow, and Wexford Railway Company finding they required a considerable amount of water for the supply of their stations and locomotives, made, at a considerable expense, an aqueduct extending for about two miles within the township of Kingstown.

The Bill now proposed to divide Kingstown into four wards, to abolish the present commission, and provide a new body of commissioners for the four wards, in the election of which body it did not appear by the Bill that the railway company would have any voice. Clause 36 in the Bill recited as follows: "Whereas by the Dublin Corporation Waterworks Act 1861 the Lord Mayor, aldermen, and burgesses of the borough of Dublin (in the Act called the corporation) are authorised to bring water from the River Vartry for the supply of the inhabitants of Dublin and of certain extra-municipal districts therein named, and to lay down mains for the purpose thereof: After the passing of this Act the commissioners may give notice to the corporation requiring them to supply water for all public and domestic purposes to the commissioners, to be distributed by the commissioners in the township, and

thereupon the corporation shall, within six months after the service of the notice, supply, and thenceforth continue to supply, a quantity of water of not less than twenty gallons per head per day for the population of the township from time to time, and the commissioners shall pay, and thenceforth continue to pay, to the corporation for such supply out of the rates levied under the Act of 1854, a yearly rent equivalent in amount to the sum which would be produced by 6*d.* in the pound on the Government valuation from time to time made of the rateable property in the township as rated under the provisions of this Act." And clause 37 provided for the mode in which the money was to be collected by the corporation. In the last clause of the Bill there was a provision that the expenses connected with the obtaining of the powers of the Act should be defrayed out of the rate, "and the same shall be paid, deducted, and retained by the same persons and in the same proportions as if the same were a rate or rates levied for the relief of the poor, in the township; provided also that nothing in the enactment or in this Act shall be construed to alter or increase the maximum of such rates respectively as fixed by the said Acts." It was contended by the petitioners that such legislation would alter their status, and render them liable to rates for water which they did not want, the fact being that owing to the neglect of the commissioners, the petitioners had been obliged to provide a supply of water for themselves.

The *locus standi* of the petitioners was objected to on the following grounds:—

1. That the said Bill does not seek to originate authority to levy under its powers any new rate or rates, or to alter or increase the maximum of any existing rate or rates for the purposes of the proposed water supply as in the said petition is alleged, the rating powers and provisions at present enforced under the Towns Improvement (Ireland) Act 1854, which it is not proposed to alter or increase, being ample and sufficient for such purposes.

2. That the Bill does not propose in any manner to alter or increase the maximum of the rating powers of the commissioners of the township as at present existing under the Acts now in force in the township.

3. That in seeking to procure water from an admittedly superior and available source, the Bill only seeks power to apply towards the rent or sum to be paid for the proposed new water supply, the water rate or rates which can be levied under the Acts now in force in the said township, and there is no allegation or complaint by the petitioners that such rate or rates are excessive or will be increased.

4. That the proposed Bill does not authorise the taking or interfering with the lands, stations, water reservoirs, or aqueducts, or other accommodations of the petitioners, nor does the said Bill in any way propose to alter, interfere with, or in any manner affect their rights, privileges, or interests.

5. That the grounds of complaint of the said petitioners, if any, are really not applicable to the said Bill, but are applicable to past legislation.

6. That the petitioners disclose no right to be heard against the preamble of the Bill, as the petition discloses their class interests to be limited to the proposed water supply, and not to extend to the wider and general public objects of the Bill.

7. That the *locus standi* of the petitioners should in their petition have been limited to their appearance against the clauses of the Bill alleged to be injurious.

8. That the said petition does not distinctly specify the ground on which the said petitioners object to the provisions of the said Bill.

Thesiger for the petitioners.—If the Bill passes, the position of the Dublin, Wicklow, and Wexford Railway Company will be altered, for as the commissioners have not availed themselves of their power to provide a water supply, and as we have been obliged to make an aqueduct at considerable expense for the purposes of our undertaking, it would probably be held that we have an equitable right as against the existing commissioners. At all events, no rate has been levied upon the railway company in respect of water, though in other respects they are large ratepayers. The promoters, however, instead of merely putting themselves in the place of the present commissioners, propose at once to make a contract with the Corporation of Dublin, and to impose rates which would be at all events 6*d.*, if not 8*d.*, in addition to the rates already levied. We object to the constitution of any other body of commissioners, with power to levy increased rates, against whom we should have no equitable rights, unless those rights are reserved by clauses. No doubt the railway company would be properly liable to pay a water rate for public purposes, but under the Bill they would be liable to be rated for water for the supply of the houses throughout the town, and would be obliged to pay their share according to their rateability, whether they took the water or not.

Hume Williams.—We seek to impose no new taxation, and the argument on the other side only goes to this—that the petitioners are entitled to a *locus standi* limited to the clauses referring to the supply of water.

The COURT allowed the *locus standi* of the Dublin, Wicklow, and Wexford Company so far as they were affected by clauses 36 and 37 (relating to water supply).

Locus standi allowed, as limited.

Agents for petitioners, *Holmes, Anton, Greig,* and *White.*

Agent for the Bill, *Sharkey.*

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, ESQ., Barrister-at-Law.

Wednesday, June 30.

(Present: The Right Hon. Sir WILLIAM ERLE, Sir JAMES W. COLVILE, Sir JOSEPH NAPIER, and Lord Justice GIFFARD.)

JEAN BAPTISTE GIRAUD (app.) *v.* JOHN BORTHWICK PATERSON (resp.).

Constantinople—Lease—Imprisonment of lessee—Collection of crops by lessor—Re-entry on abandonment—Appeal as to nominal interest.

A. leased a farm at Smyrna to B. for six years. B., after one year's occupation, was imprisoned, and A. then sent a person to collect the crops in B.'s absence. B. on leaving prison abandoned the farm, of which A. thereupon resumed possession:

Held (affirming the judgment of the Supreme Consular Court at Constantinople), that B. was not entitled to damages against A.

In a suit in which damages only are claimed, the proof by the appellant of a nominal interest, which might be the subject of an action, with a mere nominal claim for damages, will be no ground for the Judicial Committee to reverse a judgment, given in favour of the respondent in the court below.

This was an appeal from a judgment of Her Majesty's Supreme Consular Court at Constantinople.

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The original action was brought in the Consular Court at Smyrna by the appellant, a French subject resident at Smyrna, against the respondent, an English merchant carrying on business there.

The appellant's petition in that court, so far as material, alleged that on April 30, 1860, the respondent leased to him the farms of Bergame and Carabouna in the Sandjak of Smyrna, for the term of six years, to be computed from the following October; and that the respondent, without any forfeiture on the part of the appellant, in July 1861 re-entered on the farms, sold the farming implements and stock, and retained the proceeds. And the petition claimed damages for breach of contract and wrongful seizure and sale.

The respondent's answer to this petition, so far as material, alleged that the appellant was in June 1861, for certain illegal acts committed in the said farms, condemned by the Ottoman Supreme Criminal Tribunal at Smyrna to three months' imprisonment and forbidden to re-enter on the said farms; and that the appellant paid no rent while in occupation of the farms, but committed breaches of covenant, and in Aug. 1861 abandoned the farms.

The cause was tried by the Consular Court at Smyrna, in June 1866, with judgment for the respondent, and an appeal to Her Majesty's Supreme Court at Constantinople was dismissed with costs.

This was the subject of the present appeal. Other facts and the effect of the evidence are stated in the judgment.

Montague Bere, Q. C. was for the appellant.

Manisty, Q. C. and *Butt*, Q. C. were for the respondent.

Judgment was delivered by Sir WILLIAM ERLE:—The petition on the part of the appellant in this case was, in substance, for damages in consequence of his being wrongfully deprived of his property in a certain farm, and the stock that was thereupon. The matter was litigated in the court at Smyrna, and afterwards in the Supreme Consular Court at Constantinople. The judgment of the Consular Court at Constantinople is, that the appellant had no right to the damages which he sued for, and upon the appeal from that judgment the question is raised whether such judgment is right, and their Lordships have come to the conclusion that it is their duty to recommend that the appeal should be dismissed. The interest of the appellant in the farm in question is derived under the indenture of demise, which gave him an interest of six years, to commence in Oct. 1860. There were the usual terms between landlord and tenant for the reparation of a farm in the country where these farms are situated, and covenants for the payments of rent, for the keeping in repair, and for some course of cultivation, as to which their Lordships would make the general remark that it was essential that the lessee should continue in the occupation in order that he might be enabled to do his duty as tenant, in respect of those covenants. There is another provision in the deed, which bears upon the stock. There was a covenant on the part of the lessor for advances to be made by him amounting to 1055 Turkish liras, 555 down, and 500 by way of further advances; and the lessee, Giraud, in consideration of those advances, and by way of security for them, mortgaged, pledged, and made over to Mr. Paterson all the stock upon the farm. It appears that Mr. Giraud entered upon the farm and continued in occupation. There are provisions about rights to the labour of the labourers, and other rights which led to contests, and which led to an unsatisfactory conduct of the farm. Before a year had elapsed there were proceedings, perhaps of a criminal nature, against Mr. Giraud for assault, under which he was arrested and taken to prison, where he was confined for forty-seven days. Before the time of his going to prison, there had been an omission on the part of Mr. Giraud to collect in the crops at the time when they were ripe, and persons were put upon the farm to collect in those crops for the mutual interest of the landlord and the tenant. Upon the whole of the evidence, as it was reviewed by the judge of the Consular Court, and as far as it has been brought to our attention, the fact of Mr. Paterson putting in persons to come upon the farms and collect in the crops in 1861 was not an eviction by Mr. Paterson of Mr. Giraud. Very much turns upon the point whether or no Mr. Paterson can be considered to have been the cause of, or in any way accessory to bringing about the arrest of Mr. Giraud and taking him to prison. The imputation has been made. It has been attempted to be supported here by a report heard by Mr. Giraud from some of the witnesses that they had been paid by Mr. Paterson to come; but their Lordships are of opinion that there is no sound ground upon which they can rely in fixing upon Mr. Paterson an imputation of such very grave guilt as procuring Mr. Giraud to be wrongfully arrested and confined in prison in order that during the time that he was so confined he might take advantage of his absence, take possession of his farm, and otherwise damage him in respect of his property. Their Lordshigs can find no ground for that imputation. Then, having cleared the ground so far, their Lordships come to that which is the cardinal point on which their opinion turns; and the cardinal point upon which the judgment of the consul in the court below turned. He states that the point is, who first by his own act annulled this contract? Mr. Giraud says that the imprisonment was substantially the breaking of that contract; but it is not found that that was caused by Mr. Paterson. Then whilst Mr. Giraud was in prison it seems that he had formed the intention of what may be described as abandoning the farm. He came to the conclusion that his imprisonment had been procured through Mr. Paterson, and his evidence at page 19, line 63, is in effect that he did not return to Bergame because he knew it was in possession of Mr. Paterson's agents whom he had seen there—the agents that were put there to collect the crops, as we understand the evidence. He goes on to say, "I did not go near Mr. Paterson after I was released, and I did not go back to the farm, and did not intend to go, as I intended to sue him, Mr. Paterson; and as far as I was concerned, I did not care what became of the farm." Their Lordships in this case find a great conflict of evidence about many of the facts, but the cardinal fact of the case, in their judgment, is established by the plain explicit statement of Mr. Giraud himself. They have no hesitation in relying upon that statement, and they gather from it that he, knowing that the farm was vacant, intentionally avoided returning to that farm, intentionally left it for Mr. Paterson at his peril to deal with it as he might choose, but it was a vacant possession which the tenant had abandoned; and according to the passage that I have read it is an abandonment, not without example, probably, in many parts of the British dominions, where the tenant, believing that he has got an interest for some time, does not intend to do his duty as tenant, and cultivate the farm, and keep up as well as he can a performance of the duties which are cast upon him by the lease, but means to keep the nominal interest in the farm, and rest entirely upon the litigation and the damages which he may obtain in the course of the litigation. We do not at all pretend to judge between Mr. Giraud and Mr. Paterson, further than as to the facts upon which our judgment is founded.

Mr. Giraud was of opinion that Mr. Paterson was the cause of his imprisonment. If he was wrong in that, we think that he was not justified in abandoning that farm, and not justified in bringing any litigation upon Mr. Paterson for preventing that farm from being ruined, and taking possession of it, and taking care of it. Mr. Giraud did not intend to go back. So far as the interest in the farm is concerned, their Lordships think that there would be no claim to damages. Then, with respect to the stock that was left on the farm, the amount of the stock is a matter upon which there is much conflicting evidence. Upon one side, Mr. Giraud makes a large claim; on the other side, there is no evidence upon which the consul in the court below could rely, and the provision in the indenture of lease that the whole of the stock on the farm should be considered as mortgaged to secure repayment to the plaintiff of the advances of 1055 Turkish liras, comes in aid of Mr. Paterson to prevent any claim for substantial damages in respect of the stock that was upon the farm, and which was charged as a mortgage security. The term had not, in time, come to an end, but the term virtually, as between landlord and tenant, was at an end; the interest of the tenant was abandoned, and in substance the intention of the parties to that mortgage would be carried out by holding that the landlord, with that mortgage, was entitled to secure himself by the stock upon the farm. This being a suit in which damages alone are to be recovered, if there was a nominal interest which might be the subject of an action in some of the courts of common law, that species of nominal interest for the mere nominal claim for damages would be no ground before the Judicial Committee of the Privy Council to recommend that the judgment of the court below should be reversed, and the appellant to be entitled to their Lordships' judgment. Their Lordships will, therefore, recommend to Her Majesty that this appeal be dismissed with costs.

Judgment affirmed.

Agents for appellant, *Randall* and *Angier.*

Agent for respondent, *T. R. Kent.*

Common Law Courts.

COURT OF COMMON PLEAS.

Reported by W. GRAHAM and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

Tuesday, May 4.

WAYGOOD AND ANOTHER (Petitioners) v. JAMES (Respondent).

TAUNTON ELECTION PETITION.

Parliament—Election petition—Effect of decision of judge seating a candidate claiming the seat—Second petition—31 & 32 Vict. c. 125, s. 11, paragraph 13.

A petition was presented against the return of C. and claiming the seat for J. The judge decided that C. was not duly elected, and that J. was:

Held, that the decision of the judge was final, and that no further petition could be presented against the return of J.

This was a rule calling on the petitioners to show cause why an election petition should not be taken off the file under the following circumstances:

It appeared from the affidavits that at the late election for the borough of Taunton there were three candidates, Cox, Barclay, and James. The election took place on the 18th Nov. 1868, when Cox and Barclay were declared to be duly elected. A petition was subsequently presented against the return of Cox by two electors, who prayed the seat for James; and the grounds of the petition were bribery, treating, and undue influence. Cox, the respondent, duly gave notice that he intended to object to the return of James, on the grounds of bribery and treating, but at the trial no witnesses were called by the respondent, though his counsel cross-examined the witnesses for the petitioners with a view to prove bribery and treating on the part of James, and in his speech contended that such bribery and treating was proved. The trial took place before Blackburn, J., who, on the 5th March, certified that Cox had been guilty of bribery by his agent, that James had not been guilty of bribery or treating, and on the scrutiny that James was duly elected. The Speaker communicated this certificate to the House, and the House ordered the clerk of the Crown in Chancery to attend the House with the return. On the 9th March the clerk of the Crown attended at the Bar of the House with the return, and erased the name of Cox, and inserted that of James, but made no other alteration in the return. On the 29th March, and within the proper time if any petition could under the circumstances be presented, Sundays and Good Fridays not being counted, this petition was presented by two voters against the return of James, on the ground of bribery, treating, and undue influence. This rule was subsequently obtained calling on the petitioners to show cause why the petition should not be taken off the file, on the ground that the judgment of Blackburn, J. was final, and that no fresh petition could be presented.

Manisty, Q. C. and *Cohen* now showed cause. By the 31 & 32 Vict. c. 125, s. 5, it is enacted that a petition may be presented against an undue return or undue election. That section is general and absolute in its terms without qualification. By sect. 6 the petition is to be presented within twenty-one days after the return has been made to the clerk of the Crown in Chancery, unless the petition alleges corrupt payments after the return, in which case it is to be presented within twenty-eight days after such payment. There was, therefore, no means of petitioning against the return of James open to any of the constituents up to at least the 5th March, as he was not returned till that date, or the 9th March. By the 7 & 8 Will. 3, c. 7, s. 5, every return must be entered in a book kept by the clerk of the Crown. The entry could not in this case be made before the 9th March, and the entry is to be made within six days after the return comes into the office of the clerk of the Crown. Therefore, as James was not returned until the 9th March, this petition is justifiable and in proper time, unless there is something in the Act to prevent its being presented. By sect. 11, par. 13, of the 31 & 32 Vict. c. 125, the determination of the judge is to be final to all intents and purposes, and he is to determine who is duly elected or returned; and by sect. 53, where the seat is claimed, the respondent may give evidence to show that the election of the petitioner was void in the same way as if he had presented a petition. Under that section Cox might have gone into the question of the undue election of James if he had liked, but it was not compulsory; and the argument on the other side is, that if he avails himself of that power any other petitioner is barred, and that it is immaterial whether he does so in a hostile manner or not. [WILLES, J.—It is the same as if two petitions were tried, and another petitioner proposed to try the question over again.] Any number of petitions may be presented in the first instance, and by sect. 32 if they are not prosecuted vigorously the judge may call

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witnesses, which seems to meet the case of a petitioner not acting *bonâ fide*; but there is no such provision for a case like this. If this petition is not allowed, the constituency are at the mercy of the sitting member, who, as soon as his seat is declared void, has no interest in the matter. [WILLES, J. referred to the *Southampton case*, Rogers on Elections, 8th edit. 470, where a petition was disallowed, on the ground that the charges might have been brought forward on a former petition.] Under this statute there is no discretion vested in the court, and all the arguments of the other side would apply to a case where the recriminatory case had not been gone into at all. By the 5th section a petition may be presented by any member of the constituency within twenty-one days after the return, and there is nothing in the Act which says that that section does not apply to a case like the present. If this petition is not allowed the result will be that a candidate may become a member against whom no petition could ever be presented, and none but the sitting member could advance a recriminatory case.

Mellish, Q. C., *Giffard*, Q. C., and *Griffits*, in support of the rule.—This is a judgment *in rem* to determine who is elected, and the question cannot be reopened as if it was an inquiry *inter partes*. That it is not a mere proceeding *inter partes* is shown by the provisions in the Act for changing the petitioner and respondent. The House is to take the decision of the judge as final, and it would be an enormous inconvenience that where a gentleman has been charged with bribery, and has fought it out and been declared innocent, any elector may raise the question again. The candidate who claims the seat and thus presents a recriminatory case, is in the position of a petitioner, and the law presumes that the sitting member will duly represent his party; and if the respondent abandons the defence, any elector may come in and conduct the recriminatory case. The whole scheme of the Act is against the contention of these petitioners, and therefore the court ought to give effect to the plain words of sect. 11, which say that the decision of the judge shall be final.

BOVILL, C. J.—In this case a petition, which was presented by two voters, sought to avoid the election of Mr. Serjeant Cox, and claimed the seat on behalf of Mr. James, and upon such petition it is clear, according to the Act of Parliament, that a distinct issue was raised on each point involved in the petition. Sect. 53 of the Act gives jurisdiction to the judge to try the issues with respect to the candidate on whose behalf the seat is claimed. By rule 7 of the rules framed by the election judges, and other rules, provision is made for carrying into effect the intention of the Legislature, and trying all the issues raised on the petition. It is true that the candidate may be no party to the petition, but that was known to the Legislature, and from the nature of things it is probable that the inquiries in such cases will be conducted without collusion. The inquiry is one not as between party and party, but affecting the constituency, and the members and the House of Commons itself. Some inquiry is to be made, and that is now to be before one of the judges, and he is to determine the issues raised. One of those issues may be if a candidate was duly elected at the election. That was an issue distinctly raised in this case, and the parties might go into it or abandon it; but there was an opportunity to discuss and determine it. If the decision be against the candidate, he is disqualified. If it be in his favour, the consequences follow that the return is amended, and there are provisions in the Act to carry out the decision of the judge. In the present case, of all others, the matter is *res judicata*, as not only was the issue raised, but it was gone into; evidence was not produced by the sitting member, but he was contented with the cross-examination, and in that way evidence was submitted to the judge, and counsel argued the question. Therefore, the issue was raised, evidence upon it was gone into, and the judge gave his decision. I am at a loss to distinguish this case from one where witnesses have been examined, and a scrutiny has been gone into lasting several days or weeks, and a decision given in favour of the candidate. In such a case could it be the intention of the Legislature that exactly the same question should be gone into again, possibly before another judge, and in fact an appeal, without any power of appeal being given in the Act? Sect. 11, paragraph 13, expressly declares that the decision of the judge shall be final to all intents and purposes. Can it be final unless it is to conclude the parties on the matters which were in issue? That it is to be final is shown by the express words of the Act, and there is no power of appeal; and by sect. 13 the House of Commons, on being informed by the Speaker of the certificate and report or reports of the judge, is to order the same to be entered in their journals, and to give the necessary directions for confirming or altering the return, or for issuing a writ for a new election, or for carrying the determination into execution as circumstances may require. In this view of the case it seems that in every instance where the seat is claimed, whether the matter is gone into or not, as it is a case the judge may determine, his determination is equally conclusive whether evidence is given or not. Therefore, if the seat is claimed there can be no new petition; and I can understand why that should be the scope of the Act, as that was substantially the practice which obtained before the Act was passed Where the seat was claimed Parliament would not allow the matter to be gone into again, and here the question was not only raised, but was gone into. Under the former practice, where the petition proceeded on technical grounds, it seems that it was necessary to apply for special permission to allow a petition to be presented. It is sufficient to say that in this Act of Parliament there is no clause to authorise a new petition being presented. The status of the member is decided by the judgment, and that is binding on every person, both electors and candidates. Therefore, I am of opinion that the present rule should be made absolute, not to take the petition off the file, as the petition has been presented, but, on the ground that the matter has been already determined, I think all further proceedings upon it should be stayed.

WILLES, J.—I am of the same opinion. I agree that it is better to stay proceedings on the petition, in order that the court may have jurisdiction over the deposit. On the main question the only doubt I have had is this, that unquestionably James has been subjected to assaults from a less numerous body of opponents than if he had been returned in the first instance, as then any voters might have presented a petition; but, as matters turned out, he was only exposed to the recriminatory charge at the suit of Cox, or, if he had withdrawn, at the suit of any person who might have been substituted as a respondent. It has been said that a member not returned in the first instance goes through a less searching ordeal; but I do not think that that is a practical objection, because, though each voter may present a petition against a person returned, he is not entitled to do so in respect of any private claim—he does so as the representative of the electors of the borough; and the object of the Legislature was that there should be an ample opportunity for investigation. If an unsuccessful candidate petitions and does not claim the seat, no harm

can befall; but if he claims the seat, then the respondent is entitled to protect himself, and before the scrutiny to prove a recriminatory case, to show that the petitioner cannot stand in the place of the respondent. If he prove a recriminatory case, the petitioner may go into a scrutiny to turn him out, but he cannot get the seat himself. But the interest of the person who claims the seat, and the person who for the time has it, is sufficient to insure a proper inquiry and all proper means being used. That may account for the Legislature being content with its being in the option of the respondent to bring forward a recriminatory case. Besides this, a respondent who proceeds to trial gives pledges of good faith, and if he feels disposed to cry craven, the Act provides for his doing so, when no great costs are incurred. And then the Act furnishes ample means for advertising, and any other person coming in. We must be guided by the Act of Parliament, and it appears to me not to be competent to bring forward this matter again, especially as it has once been disposed of. There is also the opinion of a distinguished Speaker (see the *Southampton* case) that these proceedings could not be taken under the old practice. If there should be a case of collusion and fraud, I conceive that under the terms of the Act, if beyond our competence, it is within the general competence of the House of Commons to deal with the return of their members. Therefore, I think that this rule should be absolute.

M. SMITH, J.—I am of the same opinion. The original petition involved not only the question whether Cox was duly elected, but also if the person for whom the seat was claimed was duly elected. On those questions the decision of the judge must be given, and I think that decision is final. Language could hardly be stronger that that of paragraph 13 of sect. 11. On the trial of the petition, the judge is to determine whether the member whose return or election is complained of, or any and what other person was duly returned or elected, or whether the election was void. The judge was therefore bound to determine who was duly elected, and to certify such determination to the Speaker, and on such determination being certified, it is to be final to all intents and purposes. How can it be said that the determination of the judge that Mr. James was duly elected is not final? The statute gives no means of reviewing it, but, on the contrary, says that it is to be final to all intents and purposes. Mr. Manisty pointed out certain consequences which might arise from the electors not being able to question a decision under such circumstances; but more serious consequences might arise if a second petition were allowed, as besides the expense and vexation of a second inquiry, two judges of co-ordinate jurisdiction might give opposite decisions on the same evidence. If the evil suggested by Mr. Manisty exists, the Legislature must supply the remedy by letting voters in to present a counter petition against a person claiming the seat. The whole scheme of the Act is that there shall be but one inquiry, and that the decision on that is a decision *in rem*, and shall be final.

BRETT, J.—I am of the same opinion. It seems to me that there are two questions, first, whether under the circumstances any petition could be presented, and, secondly, if it could, whether it is proper that it should be tried. Neither question could arise except in a case where the seat is claimed on the first petition. As to the first question, I think that this petition could not properly be presented before the decision in the first petition, as till that decision was given the candidate claiming the seat was not returned. Then, after the decision by sect. 13, there is not to be a new return made, but the old return is to be altered, and when altered it bears the original date. Therefore I think that this petition could not be presented; and that does not tend to any injustice, as a candidate who claims the seat lays himself open to all the consequences to which a successful candidate is liable on petition. If, however, this is not so, then the next question is if there can be a second trial, and I think not, as the judgment in the first case is a judgment on the status of a person, and binding on all the world. It is to be binding not only on the persons, but also on the House of Commons, as they are obliged to carry out the decision of the judge, and that is strong to show that it is final against all the world. That is also shown by the power which is given by the Act of changing the petitioners and respondents. Two objections were argued by Mr. Manisty—first, that, assuming that the respondent's case was not conducted with strength, and yet without fraud, the decision is binding on the constituency. That is to some extent true, but sect. 32 is the means adopted by the Legislature to meet such a case. It may be that sect. 32 is not effective; but I can give no meaning to sect. 32, except that it was passed to meet the difficulty suggested. Then it is said that the petitioner and the respondent may fraudulently collude, but a judgment *in rem* may be set aside on the ground of fraud, and it might in such a case be argued that the judgment was not final. What would be the means of re-opening the question I cannot say; it may be that there could be a new trial with substituted parties, or, as suggested by my brother Willes, the House of Commons might themselves deal with the question. But suppose that is not so, then all that can be said is that this is a *casus omissus*, and does not alter the construction to be put upon the Act. I am, therefore, of opinion that this petition could not properly be presented; and, if properly presented, I think it cannot be proceeded with.

Rule absolute, with costs, to stay all proceedings on the petition.

Attorney for the petitioners, *W. A. Boyle.*

Attorneys for the respondent, *Wyatt* and *Hoskins.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law

Jan. 23, *and April* 16 *and* 30.

LENEY AND ANOTHER *v.* TAPLIN.

Vendor and purchaser—Sale and purchase of goods—Contract contained in a series of letters—Proposal and acceptance—Cheque to be sent on account—Agreement in writing to be drawn up—Conditions precedent to contract—Introduction of new term—Construction of contract—Pleading.

After a personal treaty between plaintiffs and defendants, for the purchase by the former of certain ricks of hay, at which no bargain was come to, defendant, on Tuesday, the 14th July, wrote as follows to the plaintiffs: "Since I saw you, I have been offered 4l. 12s. 6d. per ton, fetched from my farm two of the ricks, and I am to draw the two others to W., five miles. If you like to take the four ricks at 4l. 15s. per ton, delivered at W., reckoning the four ricks to contain sixty tons by rough estimation, and you to give me a cheque for 270*l.* on account of it, and to have an agreement drawn up to what we agreed to." *On the 15th, plaintiffs replied as follows: "We will take the four ricks (say about sixty tons), at 4l. 15s. per ton, delivered at W.,* as per

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your letter of 14th. *We have deferred sending you a cheque, as your name is not signed quite plain enough for the writing of one. We shall therefore be glad if you will send us your name, and we will send you a cheque by return of post." Nothing further passed between the parties till the 18th July, when plaintiffs wrote to defendant the following letter: "We now inclose you cheque for 270l. on account of your hay, and an agreement for you to sign and return to us. We should have sent you a cheque before, but could not make out your name correctly." In this letter there was also inclosed with the cheque a written agreement in the following form: "18th July 1868. Received of Mr. S. Leney 270l. on account of four ricks of hay, about sixty tons, as seen by Mr. E. Leney, at 4l. 15s. per ton, delivered to W.,* Mr. Leney to take only such as is fit for market." *To this the defendant replied on the 20th July, returning the cheque, and saying that, not having heard from the plaintiffs, as he expected to have done, on Thursday the 16th July, he had sold the hay at 4l. 12s. 6d. a ton, to another purchaser, who was to bind and take it away. Thereupon, plaintiffs brought an action for breach of the defendant's contract to deliver the hay, and it was*

Held, by Kelly, C. B., and Bramwell, B. (making absolute the rule to set aside a nonsuit), that the plaintiffs' letter of the 15th July was a clear and unconditional acceptance of the proposal in the defendant's letter of the 14th, and that thereupon there was a completed contract between them, on the breach of which by the defendant an action lay for non-performance.

The sending of the cheque was not a condition precedent to the constitution of a contract, but as soon as the contract was made there was an obligation on the plaintiffs to send the cheque forthwith. And (per Bramwell, B.) had there been a plea that it was not sent within a reasonable time, that is, forthwith, according to the contract, the defendant, upon such a plea, might have succeeded.

Also, per Bramwell, B., upon receipt of the plaintiff's letter of the 18th July, containing the agreement with the new and additional term relating to the plaintiffs' taking only such hay as was "fit for market," the defendant should at once have replied, objecting to the introduction of such new term:

Held, contra, by Martin and Cleasby, BB. (discharging the above rule), that there was no completed contract between the parties, the plaintiff's letter of the 15th not complying with, and being no fulfilment of the terms of the defendant's letter of the 14th July, inasmuch as neither a cheque nor an agreement was sent therewith. And the agreement that was afterwards sent, on the 18th July, was not what the defendant stipulated for, as it contained a fresh term in addition to the original proposal. There never was, therefore, in this case, that "concurrence of intention in both parties" which is necessary for the completion of a contract.

The plaintiffs who were hay contractors living at Paddington, sued the defendant, a farmer of Great Missenden, in the county of Buckingham, for a breach of contract in failing to deliver two ricks of hay, and a rick of clover, and a rick of sanfoin, the four ricks containing together about sixty tons, which the defendant had bargained and sold to the plaintiffs, and the plaintiffs had bought of the defendant at the price of 4l. 15s. per ton, to be delivered by the defendant for the plaintiffs at Wycombe, and which contract of delivery the defendant had disabled himself from performing by selling and delivering the said goods to another person, whereby the plaintiffs lost certain sums, &c.

The defendant pleaded a plea denying the contract, on which plea issue was joined.

At the trial before Martin, B., in Middlesex, on the 8th Dec. last, it appeared that, in the month of July 1868, one of the plaintiffs called on the defendant at his farm, and treated with him for the purchase of certain ricks of hay, but no bargain was then come to between them. On Tuesday, the 14th of the same month, however, the defendant wrote and sent by post the following letter to the plaintiffs:

July 14, 1868.

Dear Sir,—Since I saw you I have been offered 4l. 12s. 6d. per ton, fetched from my farm two of the ricks, and I am to draw the two others to Windsor, five miles, when I go for coals. If you like to take the two single ricks in the fields, and the clover and sanfoin ricks in the rick yard, at 4l. 15s. per ton, delivered at Wycombe, reckoning the four ricks to contain by rough estimation sixty tons, and you to give me a cheque for 270l. on account of it, and to have an agreement drawn up to what we agreed to. I keep the rough rick for my own feed.—Yours obliged, OWEN TAPLIN.

In reply to this letter the plaintiffs, on the 15th July, wrote and sent the following answer by post to the defendant:

20, Bridge-terrace, Harrow-road,
Paddington, London, 15 July, 1868.

Dear Sir,—We will take the two ricks hay and the rick of clover and sanfoin (say about sixty tons), at 4l. 15s. per ton, delivered at Wycombe, as per your letter of the 14th inst. We have deferred sending you a cheque, as your name is not signed quite plain enough for the writing of one; we shall therefore be glad if you will send us your name, and we will send you cheque by return of post.—Yours truly, S. and E. LENEY.
Mr. Owen Taplin. Per WM. GIBSON.

Nothing further passed between the parties until, on the 18th July, the plaintiffs wrote and sent to the defendant a letter, inclosing their cheque for 270l., and also an agreement for the defendant's signature, which letter and agreement were as follows:—

20, Bridge-terrace, Harrow-road,
Paddington, London, 18th July, 1868.

Sir,—I now enclose you cheque for 270l. on account of your hay, and an agreement for you to sign and return to me. I should have sent you a cheque before, but could not make out your name correctly. Your reply by return will oblige.—Your's truly, S. LENEY.
O. Taplin, Esq. Per WM. GIBSON.

Rignall Farm, Great Missenden,
18th July 1868.

Received of Mr. S. Leney the sum of 270l. on account of four ricks of hay about 60 tons, as seen by Mr. Edward Leney. Two ricks standing in the fields, and a rick of clover and a rick of sanfoin, both standing in the rick yard, at 4l. 15s. per ton delivered to High Wycombe Station. *Mr. Leney to take only such as is fit for market*, 270l.

In reply to that letter the defendant wrote the following letter to the plaintiffs:

Rignall, July 20.

Sir,—I was away from home when your first note came, or I should have replied to have saved you the trouble of sending me a cheque for the hay, and which I return to you. I wrote to you on Tuesday about the hay, and of course thought I should have your reply by Thursday, and not hearing from you, having made arrangements with another party to look at the hay, and having driven seven miles the second time, they bought it of me at 4l. 12s. 6d.; they to bind it, and take it away within five weeks. I am very sorry to disappoint you, but not hearing from you I quite came to the conclusion that you had declined it at the price.—Yours truly, OWEN TAPLIN.
To Mr. Samuel Leney.

The above letters were all put in evidence, and the learned Baron was of opinion at the close of the plaintiff's case that there was no contract, no part payment, and no delivery or acceptance, to satisfy the Statute of Frauds, and he directed a nonsuit to be entered, reserving leave to the plaintiffs' counsel to move; and accordingly in Hilary Term last a rule *nisi* was moved for and obtained by *J. O. Griffits*, for the plaintiff, to set aside the nonsuit, and to enter a verdict for the plaintiffs for 30l. (the agreed amount of damages), pursuant to the above leave, on the grounds that there was evidence in support of the contract declared on; that the letters proved at the trial amounted to a contract, and that upon the evidence the plaintiffs were entitled to the verdict. Against which rule,

Powell, Q. C., *A. Codd*, and *F. Turner* for the defendant showed cause.—The ruling of Martin, B. was correct. This was a proposal to sell the four ricks reckoning them as sixty tons at so much a ton, and then a cheque was to be sent on account and an agreement in writing to be drawn up. But the proposal was not accepted in its original terms. No agreement or cheque was sent until the offer was withdrawn, and the agreement, when it was subsequently sent, contained a new term. The defendant was clearly, therefore, released from his original offer. A proposal must be accepted in its precise terms in order to complete a contract thereon. *Vollans* v. *Fletcher*, 1 Ex. 20; 16 L. J., N. S., 173, Ex.; and numberless other cases, establish that point. (They were here stopped by the court, who called on)

O'Malley, Q. C. and *J. O. Griffits* for the plaintiffs, to support their rule, who contended that the letters of the 14th and 15th July constituted a complete agreement between the parties. With regard to what was called the "new term" in the acceptance of the proposal, it was in evidence, and was not contradicted, that it was usual in the hay trade to insert such a condition, and that such a condition was incorporated in every bargain for so large a quantity of hay at such a price. [CLEASBY, B.—Your main point, of course, is that the two letters of the 14th and 15th July constitute a contract.] That is so. There is no plea of the party not being ready and willing to perform the contract, or that a cheque was not sent in proper time. The simple question is, aye or no, was there a contract? The plaintiff's letter of the 15th is a clear acceptance, word by word, in the terms of the defendant's proposal of the 14th. Had the market been falling and the plaintiffs failed to send a cheque, the defendant might have sued them for breach of contract in not sending it; or, if the hay had not been sent, the defendant might have been sued by them. [CLEASBY, B.—Do you say that the seller was bound if the purchaser did not send the cheque?] The contract was complete, though he may not have been bound to *deliver* until the cheque was sent. We contend that the letter of the 15th is *simpliciter* an acceptance; and in the defendant's letter, written at the time of a rising market, there is no attempt to excuse himself on the ground now put forward. *Thomas* v. *Dering and others*, in the Rolls, 1 Keen, 729, 6 L. J., N. S., 267, Ch., is an authority in favour of the plaintiffs. Lord Langdale says, "It is true that mention is made in the letters of an intended formal contract to be afterwards drawn up, but there are many cases in which a correspondence, referring to the future execution of a more formal agreement, has been held to constitute in itself a valid contract; and I think that the correspondence is equivalent to a contract in the present case." That is precisely this case.

A. Codd and *F. Turner*, for the defendant, *contra.*—*Thomas* v. *Dering* does not apply, for we say that the letter of the 18th is not in compliance with the letter of the 14th, and is not, therefore, a contract *ad idem.* [KELLY, C. B.—Suppose the letter of the 15th had contained a cheque, would there then have been a binding contract?] No. There was to be an agreement drawn up. The letters of the 14th and 15th July formed no contract, and no action would lie upon them. The letter of the 18th introduced a new term, as to the plaintiff's liberty of selecting such hay only as he chose, which he had no right to insert, and the defendant was not bound to accept. The case of *Thomas* v. *Dering* (*ubi sup.*), relied on by the plaintiffs, has been much shaken in the House of Lords: (see Sug. V. & P., last edit., p. 141); *Ridgway* v. *Horton*, 6 H. of L. Cas., per Lord Wensleydale, at p. 306; *The Governor and Guardians, &c., of the Poor of Kingston-upon-Hull* v. *Petch*, 10 Ex. 610; 24 L. J., N. S., 23, Ex. (per Parke, B.) where it was held that the acceptance of a tender, where it was the intention of the parties that a written contract should be executed, was not a binding contract. The written agreement in the present case was an equally important term of the contract, and was meant to obviate all chance of dispute: (*Honyman* v. *Marriott*, 6 H. of L. Cas. 112. [CLEASBY, B.—Is not the effect of the letter of the 14th July rather this: If you will send me a cheque for 270*l.* on account, then I will enter into an agreement with you?] There was no complete contract between the parties.

Cur. adv. vult.

April 16.—The learned judges differing, and being equally divided in opinion, the following judgments were now delivered *seriatim:*

CLEASBY, B.—The only question for our consideration in this case is, whether or not there was a completed contract between these parties; and I have come to the conclusion that there was none. In order to the completion of a contract it is necessary that there should be, in the words of Lord Coke, "a concurrence of intention in both parties," and until that is the case there can be no complete contract, and, until there is such a complete, contract either party is at liberty to withdraw from the arrangement. Where a proposal for a contract is made by letter the person making it cannot withdraw until the time limited for its acceptance by the other party, when, if it be not accepted, he is at liberty to withdraw. The contract here relied upon by the plaintiff is contained in some three or four letters. The first of them is the letter of the 14th July 1868, from the defendant to the plaintiffs, and it is as follows. [Reads the letter.] Now the effect of that letter, to my mind, is this: I have certain ricks of hay on my farm containing, as I estimate them, so many tons weight, which I will enter into a contract with you to sell to you at 4*l.* 15*s.* a ton, delivered, if you, the plaintiffs, will do two things, that is to say, send me a cheque for 270*l.* on account, and have an agreement in writing drawn up stating the terms of our contract. I can see no other construction to be put upon it. It cannot be that the defendant meant to let the plaintiffs take the hay whenever they liked, and as much or as little of it as they liked, and to pay for it whenever they liked. That being so, then comes the plaintiffs' answer to that letter; it is dated the 15th July, and is in the following terms. [Reads the letter.] That letter does not comply with, and is not a fulfilment of the terms of the previous letter of the defendant, for neither a cheque nor an agreement is sent to him; and, according to my construction of it, there was then no contract; nor have I any doubt in my own mind that Taplin, the defendant, might then have written to the plaintiffs, and have said, "As you have not complied with the terms of my letter of the 14th by sending me a cheque for the 270*l.*, and an agreement in writing, I shall withdraw from the bargain altogether." Presently afterwards, however, on the 18th July, comes another letter from the plaintiffs, and it is said by the learned counsel who have argued the rule on their behalf, that, even if before this date the contract was not completed, yet this letter, coupled with the two previous letters, makes it so. That letter is as follows. [Reads the letter.] With that letter there is sent to the defendant a receipt, which they call an agreement, and which is in these terms. [Reads the agreement.] I cannot help reading the cheque for 270*l.*, and the agreement together,

for I find them put together on the 14th July, when the defendant writes. [Reads this letter.] And the plaintiffs so understood it, for on the 18th they send a cheque for the amount, and what they call an agreement. But is it such an agreement as the defendant stipulated for? I think it is not; it contains something additional, a fresh term in addition to the terms originally proposed in the letter of the 14th. Had the plaintiffs sent the cheque, and such an agreement as was intended by the original proposal, in proper time, the contract no doubt would have been complete. They did not do so, however, and meantime the other party, the defendant, had withdrawn from the contract and sold the hay to another person at a lower price. Here then we have on the 14th July, a proposal of the defendant for a contract, the terms being that a cheque and a written agreement should be sent to him by the plaintiffs. On the 15th a letter from the plaintiffs, agreeing to the bargain, but containing no cheque and no written agreement, is sent; and on the 18th a cheque is sent, together with an agreement, differing in some of its terms from that originally contemplated. There has been, therefore, no "concurrence of intention in both parties" in the present case, and accordingly I am of opinion that the plaintiffs' rule should be discharged.

BRAMWELL, B.—I think that this rule ought to be made absolute. There is a difference of opinion upon the bench; and perhaps this case may be cited to prove that what is the common notion about the uncertainty of the law is correct, but the fact is, there is not the slightest doubt in the mind of any one of us as to what *the law* is. The only question is as to its applicability to the facts of the case. Here a man contracts as follows:—"I will sell you certain ricks of hay at 4*l.* 15*s.* per ton, to be delivered at Wycombe." Then there is written this, "reckoning them to contain by rough estimation sixty tons, so then you may safely pay me down 270*l.*, and that will leave a balance of 15*l.* coming to me." The meaning of the expression, "You will give me a cheque for 270*l.* on account" to my mind, is "you will pay cash, 270*l.*" There is no magic in the *cheque*, but the meaning is this, "I will sell my ricks of hay at 4*l.* 15*s.* per ton, and you must pay 270*l.* on account, and by rough estimate there may be at least sixty tons." What do the plaintiffs say? "We will take the two ricks of hay, and the rick of clover and sanfoin, say about sixty tons, at 4*l.* 15*s.* per ton, delivered at Wycombe as per your letter of 14th inst." Whatever the meaning of the first letter was, that is the answer. My brother Cleasby, it seems, understands the meaning of the parties to be that there was to be no contract even until the cheque was sent. With all respect for his opinion, I think it should be taken in this sense, that, as soon as the contract was made, there was an *obligation to send* the cheque, but I do not think the sending of the cheque can be any part of the contract. Suppose the agreement had actually been to pay in cash 270*l.*, the payment of cash was to immediately follow. I test the case in this way, suppose the plaintiffs had simply said, "We accept your offer which is contained in your letter of the 14th July," could it be doubted that the defendant could have maintained an action for the 270*l.* cash down? If that be so, there was a contract between them by those two letters. In every case, where a man says "I will sell you such and such goods, and on the terms of ready money," there is no contract until the ready money is paid. It seems to me the two letters mean this, and that is all; the defendant says "I will sell you the hay at 4*l.* 15*s.*, and you pay 270*l.* down," and the plaintiffs say, "We buy it on those terms," then that is the contract between them. It places the parties at once under a contract, and, as I read it, it was the duty of the plaintiffs to send the cheque within a reasonable time, and that is *forthwith*. They ought, therefore, immediately to have sent the cheque, and had there been a plea that it was not sent within a reasonable time, or forthwith, according to the contract, the defendant, upon such a plea, might have succeeded. But there is no such plea here. There was here, in my opinion, a contract which involved the duty of sending the cheque, which duty is not actually performed by the plaintiffs. As I understand the proposition of my brother Cleasby, it is that these letters are not quite *ad idem* with what the defendant contends he offered and the plaintiffs accepted. But I do not think so. Again, if the agreement had been in conformity with the original proposition, and the defendant had taken it, there would have been a good contract, because there would have been an acceptance, although afterwards revoked. Then it is said the agreement is not in conformity with the original offer. It certainly is not. The agreement is only to take some of the ricks at a price; that does not seem to alter the matter, as what the defendant ought to have said thereupon was, "You have accepted my offer, and now you send me an agreement not in conformity with it." Suppose a man says to me, "I will give you a lease for a whole term in consideration of a premium of 50*l.*, which you must pay down," and I write to him and say, "I accept the offer, and I send you a cheque for the 50*l.*, and also the lease," and the lease contains certain covenants that are not usual, is he not entitled to say, "I object to those covenants"? I should say yes. Therefore in the first place, in my judgment, the sending of the cheque was not a condition precedent to the constituting a contract; and, even supposing it were so, then, when the plaintiff's second letter was sent, the defendant was bound to object to the new clause in the agreement. It seems to me, therefore, upon these two grounds, more particularly upon the first, that the plaintiffs are entitled to succeed.

MARTIN, B.—I am of opinion that my brother Cleasby's view of this case is right, and that there was no contract between these parties. I quite agree with my Brother Bramwell that there is no difference amongst us as to the law upon this matter, but only as to how a contract of this sort ought to be read. I think it should be according to the obvious, natural, meaning of the words used, and it is not because there may be a condition as part of it, that there should be a different construction put upon the words of it from that which their common, ordinary, and natural meaning justifies. The only safe course for a person who professes to make a contract without answering a legal proposition, is simply to say, "I accept this offer;" and if a person, not a lawyer, goes into the matter and makes statements he will most likely defeat his own object. That opinion is not the result of what I have heard in this case, but of long experience in other similar cases. I have known many cases fail exactly upon the same ground. The offer is this: "If you like to take these two single ricks in the fields, and the clover and sanfoin in the rick yard, at 4*l.* 15*s.* per ton delivered at Wycombe, you can have them." There is no doubt upon that. Then come the following words: "Reckoning the four ricks to contain, by rough estimation, sixty tons, and you to give me a cheque for 270*l.* on account of it, and to have an agreement drawn up to what we agreed to." In my opinion the plain, obvious, and natural meaning of the words, neither twisting them in one way or the other, is this: "I consider that by rough estimation, as between you and me, these four

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ricks contain sixty tons, and the proposition is to sell them at 285*l.*" The answer to that proposal is, "We will take the two ricks of hay and the ricks of clover and sanfoin (say about sixty tons) at 4*l.* 15*s.*, to be delivered at Wycombe." That is not accepting it at all, but proposing a different thing altogether from the original proposal of the defendant, which was that a cheque for 270*l.* was to be sent back with the acceptance of the offer. As it seems to me the proposal was to sell certain hay, taking it at sixty tons, and the condition is made that a cheque for 270*l.* should be sent, and it was not sent. It is said, and perhaps truly enough, that the reason why it was not sent was that the name of the defendant was not written plainly enough, that is, the letter says it could not be easily understood. If it be, as I believe it to be, a portion of the bargain, that there was to be no binding contract upon the defendant, unless the cheque was sent, that is immaterial. It was not sent. If it was a condition precedent, it must be done before the contract, the thing itself, can be performed. The first two letters are those of the 14th and 15th, but then upon the 18th July the plaintiffs write this letter, "I now enclose you cheque for 270*l.* on account of your hay, and an agreement for you to sign, and return to me. I should have sent you a cheque before, but could not make out your name correctly." Mr. Codd argued that it was essential, in order to the completion of this contract, that an agreement in writing should have been drawn up. Now I am not of that opinion. The case which he cited seems no doubt to establish that it must, in every case, be a question whether that is or not a condition precedent to the matter being concluded. But then there, is in the present case the receipt, or agreement, which is as follows. [His Lordship here read the receipt contained in the plaintiff's letter of the 18th July.] In my opinion, however, the defendant, in point of truth and fact, never intended to agree to the contract as contained in the first letter. There was, I think, no contract between these parties, and I am of opinion, therefore, that a nonsuit ought to be entered, and the present rule accordingly should be discharged.

KELLY, C.B.—I am of opinion that this rule should be made absolute. The question between the parties is whether the proposal of the defendant, contained in the letter of the 14th July, is accepted by the plaintiffs in their answer of the 15th, and the first objection which is made arises upon certain words in the defendant's letter of the 14th July. That letter is as follows: [Reads it, and the plaintiff's answer.] Now I am of opinion that that is a clear, direct, and unconditional acceptance of the proposal made by the defendant in his letter of the 14th. The question is made, and indeed necessarily arises upon the meaning of this clause in this letter, "reckoning the four ricks to contain by rough estimation, sixty tons." And perhaps I may add that to me individually, as a difference of opinion exists as to its construction, this is ambiguous; it may mean that the four ricks are to be taken to contain sixty tons. If so, one would naturally ask why are the words, "by rough estimation," introduced? If they are taken to contain sixty tons there is no rough estimation in the business. "We agree that, whatever may be the amount, it may be taken to be 60 tons;" or it may mean this, "we reckon the four ricks to contain by rough estimation sixty tons," and that is the more literal construction of these words, and I think if we are bound to put a construction upon the words, we must put that construction upon them which is most in conformity with the language actually used; I therefore that a man writing "reckoning the four ricks to contain by rough estimation sixty tons," must be held to mean, "I reckon the four ricks to contain by rough estimation sixty tons, whatever may be the weight." I think that the answer of the plaintiffs, if they meant that they were to be taken at sixty tons without weight or measurement at all, or that the defendant reckoned them to contain about 60 tons, is conclusive, direct, and positive, and is not, like the letter of proposal, ambiguous, but entirely plain and unambiguous. They say, "We will take the two ricks, and the two other ricks, say about sixty tons, at 4*l.* 15*s.* a ton, *as per your letter of the 14th instant.*" Now, we must not construe letters between parties of this description on a nice use of terms to be found in them, but we must take them according to a reasonable and correct calculation of their real meaning in the best way we can. I think when we find such a letter containing three or four terms or conditions of the contract, and the answer referring one by one to those terms, "we take the two ricks and the two others, say about sixty tons, at 4*l.* 15*s.*, delivered at Wycombe, as per your letter of the 14th instant," that the reasonable construction of this answer to the proposal is that the plaintiffs, by this answer, did in its language accept the proposal in the terms in which it was made in the letter to which the answer refers; and this language is, "*as per your letter of the 14th inst.*" I think that those words govern the whole of the antecedent matter, and show that the writer really intended to accept the proposal, as he says, "as per your letter of the 14th inst." I think it must be held to be a complete, final, and unconditional acceptance of all the antecedent matter there introduced. If that construction is wrong, the fault must rest with the person who writes a letter in terms so ambiguous that not only are the judges unable to agree as to what its meaning is, but even of the five learned counsel who have argued the case, not one can take upon himself to give a determined or positive construction of its language. Another objection is made, that the 270*l.* cheque was not sent. Now, the language of the letter upon that point is this, after proposing the sale of the hay and mentioning the quantity and price, "You to give me a cheque for 270*l.* on account of it," and that is contended to be a condition precedent, not as to the performance of the agreement, but a condition precedent to any contract being made between the parties. I own that, but for my high respect for my learned brothers who have put a different construction upon the letter, I should have been inclined to say, it is quite impossible to come to such a conclusion without totally disregarding all that the parties have said, or written, or done in this matter. The plaintiffs say, in effect, "We agree to what you have proposed, according to the terms of your letter, and with regard to the 270*l.* we will send you a cheque for it, but we cannot make out your name, but will send it as soon as you tell us your name." Is that a condition? Is it anything other than this, as put by my brother Bramwell, "I propose to sell to you a quantity of hay, which I consider to weigh sixty tons, at 4*l.* 15*s.* a ton, and you are to pay me in ready money, and so it will come to about 285*l.* You must send me a cheque for 270*l.* on account." I think there is no doubt that when the contract was accepted the sending of the cheque, if sent, was a part performance of the contract, and no doubt a condition precedent to the right of the plaintiffs to put an end to the contract, and, if so, to maintain the action. And the question that arises is not that upon which no doubt can exist, whether it was a part of the contract that the 270*l.* should be sent, or, in other words, and substantially speaking, whether the price should be paid for the hay on the day on which the contract itself was

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completed and signed. I cannot understand upon what ground it is suggested that the defendant did not mean to part with the property in the hay. I can quite understand that he did not mean to part with the possession of it. It would be impossible ever to effect and complete a contract in any case, if the act to be done, independently of the letter or proposal, in pursuance or part performance of the contract, is to be made a condition precedent to the contract itself being made and completed. With respect to the sending of the 270*l.*, the plaintiffs did all they could. In the first place, there is no plea upon the record that they did not send it; but what they did is this—they said, "We agreed to your proposal; we purchased the hay at the price of 4*l.* 15*s.* a ton, or, in other words, at the price of 285*l.* We quite agree to your proposal that a cheque should be sent for 270*l.*, which we would have sent, but we cannot understand your name," and as soon as they have ascertained what the name was they sent the cheque; and it is to be observed here that no time is mentioned. It is not "Send me a cheque by return of post, or within twenty-four hours;" nothing of the kind is even suggested. The question merely is, whether all the terms of the contract have been completely stated by the defendant, and completely accepted by the plaintiffs. The defendant said, "You are to give me a cheque for 270*l.* on account;" and they did give him a cheque for 270*l.* on account, and I think that they did so within a reasonable time. Then we come to the remaining question, whether, before this contract was made, before there was any contract at all between the parties, it was necessary that there should be a further agreement in writing, in addition to the letters of proposal and acceptance. I cannot imagine upon what conceivable ground such a construction can be put upon the defendant's letter of the 14th. But on whatever ground it is put, my opinion is that by the letter of the 15th July the plaintiffs accepted the proposal contained in the defendant's letter of the 14th; and I quite agree that it was part of the proposal or contract which the plaintiffs accepted that there should be an agreement, just as, in the case of a lease, there is an informal and incomplete agreement for a lease, and the more formal agreement is afterwards prepared and executed by the parties; that is not only expressly assented to, but it is acted on by the plaintiffs themselves just as they had acted upon the former condition, not to the making of the contract, but to the performance of it with respect to the cheque. What they say is this, "When we saw his name we sent him a cheque for 270*l.*, and, as he also required that there should be a written agreement between us, we inclosed one." But then a term is introduced which is not warranted by the preliminary agreement. The answer to that, as has been already observed, is this, "You accepted in your letter of the 15th the proposal in my letter of the 14th, and you accepted my terms, and I do not find in my letter to you, or in yours to me, a single word about that which you now propose, namely, that we are to take only that which is fit for market." Admit, though it appears both parties were equally bound under this preliminary agreement or contract to execute some agreement that should contain the terms of the contract, and no other, that but for the decision expressed by a high authority, I should have no hesitation in saying I was clearly, and without approach to a doubt, of opinion that this proposal was completely and positively accepted upon the part of the plaintiffs, and as they have performed the conditions precedent they are entitled to maintain this action, and the rule to set aside the nonsuit should be made absolute. As, however, the court equally divided in opinion, if the parties desire to have the opinion of the court of error, the usual course in such case will be adopted, and my brother Cleasby will withdraw his judgment, and in that case the rule will be made absolute.

The judgment of the court subsequently was that the rule should be made absolute, unless the defendant consented within a fortnight to a *stet processus*, which was eventually consented to, and entered accordingly.

Stet processus entered.

Attorney for the plaintiffs, *Clarke*, 13, St. Mary's-square, Paddington, W.

Attorney for the defendant, *Alfred T. Cox*, 20, St. Swithin's-lane, E.C.

NISI PRIUS (IRELAND).

Reported by OLIVER J. BURKE, Esq., Barrister-at-Law.

COURT OF EXCHEQUER.

June 29 and 30.

(Before PIGOT, C. B. and a Special Jury.)

MURPHY AND OTHERS *v.* PALGREAVE.

Collision at sea—Reasonable apprehension of—Negligence—Amending summons and plaint at the trial.

Plaintiffs on the 1st Feb. 1869 were, it being then daylight, in their yawl, which was at anchor, fishing in the bay of Dublin, when the defendants' steamer, on board of which there was no look-out at the time, bore down upon them. Plaintiffs, to save themselves from a collision, jumped overboard into the water.

Said plaintiffs then brought their action, and Pigot, C.B., before whom the trial was had, told the jury that if the plaintiffs, through a reasonable apprehension of danger ensuing to them from the negligent acts of the defendant, committed acts themselves, namely, jumping into the water, whereby they suffered damage, however slight, that the defendants should be liable in damages for the consequences.

The summons and plaint in this action contained two counts for negligence. The first stated that the proprietors of a steam tug named *William Hall*, by means of their servants so unskilfully and negligently managed the said steam tug in the Bay of Dublin, that they ran foul of and struck against a certain yawl boat, in which the plaintiffs were at the time fishing. The second count complained that, by the negligence of the defendants' servants a great and dangerous swell was produced, whereby the plaintiffs' yawl boat was swamped, and the plaintiffs thrown into the water. The defendants filed several defences, traversing the doing of the acts complained of, and traversing also their negligence, and that of their servants, and alleging that the accident was caused by the plaintiffs' negligence, and a further plea of contributory negligence on the part of the plaintiffs.

The facts, as elicited from the evidence adduced by the plaintiffs and the defendants, are shortly these:—On Sunday, the 2nd Aug. 1868, the plaintiffs, four in number, with a little child, hired a yawl, and proceeded in her down the river Liffey and anchored in the Bay of Dublin outside the Poolbeg Lighthouse, for the purpose of enjoying a day's fishing, as they were accustomed to do for many years. The defendants were the proprietors of a steam-tug ship, named the *William Hall*, which used to ply between Dublin and Kingstown as a passenger boat. On the day in question, the plaintiffs had not long been moored at their fishing ground when they perceived the *William Hall* turning the lighthouse very short, and altogether out of what was proved to be the usual course for steamers, and bearing down directly, from a distance of about fifty or sixty yards, on their yawl.

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The plaintiffs stood up and shouted, and when the steam-tug was within ten yards of their boat three of the men, who could swim, jumped into the water, believing that it was the only chance they had for saving their lives. The steam-tug passed the yawl-boat, merely touching her without injuring the remaining man and child, who did not jump out. The tug reversed her paddles and took up the men who were struggling in the water, and having proceeded to her destination, landed them in Dublin on her return. It was proved by passengers on board that there was no look-out that day in the bow of the vessel, and the captain of the steamer confessed that he turned the lighthouse so short that he could have done nothing in so short a distance either in directing the helm or stopping her, so as to avoid running down the yawl-boat, if the steamer was directly pointed towards her.

Ebrington, Q. C. and *Corrigan*, for the defendants, asked his Lordship to nonsuit the plaintiffs, as the evidence did not support the summons and plaint, which alleged a collision and upsetting into the water, and it was proved that no collision took place.

Butt, Q. C., *O'Driscoll*, and *Boughey*, for the plaintiffs, then asked to amend the summons and plaint so as to make it conformable to the state of facts proved.

PIGOT, C. B. said that, on the evidence, he should nonsuit the plaintiffs, but as he thought, on the authority of *Jones* v. *Boyce*, 1 Stark. 193, the plaintiffs were entitled to recover damages if, in jumping out of the yawl-boat, they acted under a reasonable apprehension of danger to their lives, he would allow the plaintiffs to amend their summons and plaint. He thought there was ample proof of negligence on the part of the defendants in not having a look-out at the bow of the vessel, and, according to the captain's confession, in managing the vessel, and putting her in such a position that he could not avoid the consequences of his own act. The plaintiffs were entitled to be moored fishing on the high seas in the ordinary course of a steamer, and the steamer should, in such a case, alter her course, if it be not attended with risk and danger to herself. The steamer was within a few yards of the yawl-boat when the fishermen saw her; and it was for the jury to say if, taking human nature as it ordinarily is, the occupants of the boat had not acted under a reasonable fear and apprehension of danger from the approaching steam-tug when they jumped into the water.

The jury, however, much to the surprise of his Lordship, found for the defendants.

Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

STAFFORD BOROUGH ELECTION.

Thursday, May 13.

(Before BLACKBURN, J.)

Charities—Charitable gifts may be bribery—Intimidation by vigilance committee—Treachery by agent—Acts not affecting the election—Costs.

A member was in the habit of sending down to his agent annually a sum of 250l. to be distributed in Christmas gifts. He gave no directions as to how it should be expended, and made no inquiries:

Held, that the giving of Christmas gifts was not a matter to avoid the election, unless it was shown that the gifts dispensed by a responsible agent had influenced votes.

Where there is some evidence of intimidation, in considering whether the freedom of election has been so interfered with as to affect its validity, the extent of the majority obtained by the sitting members must be considered.

A member is responsible for the act of an agent done contrary to instructions, but if the agent treacherously or traitorously agrees with the other side, then if he does a corrupt act it would not vacate the seat unless it is proved that the corrupt act was at the especial request of the member himself or that some untainted and authorised agent of the member directed the act to be done.

But the seat would be affected if a man being an agent is tricked by the other party into committing a corrupt act, he himself honestly still intending to act as agent.

It was shown that committees were formed, having at their heads paid agents for the purpose of getting the men together, so that they might be corrupted at any moment at which it might become necessary. It was not proved that "the tip" to vote was given, but it was proved that several of the voters so collected together did not vote for the other side. Further, the names of many voters were written by an agent upon a card, and it was

Held, that the proceedings of these organisations and of the agents amounted to bribery.

An agent of the sitting member organised a vigilance committee for the purpose of detecting bribery on the other side, and in a public speech exhorted his audience not to allow their voters to vote. This advice was followed on the following day:

Held, intimidation for which the member was responsible.

Semble, it is illegal to employ a number of persons to actively search for corrupt practices on the part of opponents, and if they use violence in so doing it will amount to intimidation.

There being cross petitions, and each side having failed in part and succeeded in part:

Held, that they should bear their own costs.

At the last election for Stafford borough there were three candidates, Mr. Pochin, and Mr. Chawner in one interest, and Col. Meller in another. The first and the last were elected. Petitions were presented on both sides, and Mr. Chawner claimed the seat on a scrutiny, but Mr. Pochin having been unseated for intimidation by his agents, Mr. Chawner as his colleague was ineligible as a candidate, and therefore the scrutiny was not gone into.

In the petition, *Chawner* v. *Meller*, *Fitzjames Stephen*, Q. C., and the Hon. *Chandos Leigh* supported it, and

Giffard, Q. C. and *Motteram* were for the respondent.

Ballantine, Serjt. and *F. W. Wheeler* appeared for Mr. Pochin.

BLACKBURN, J. commenced by referring to the corruption which had prevailed at previous elections. In doing so, his Lordship said:—There is one thing further I wish to observe upon with regard to former elections. It appears that during the period since 1865 (I have not inquired whether it was before that), each sitting member has been in the habit of distributing in the borough at Christmas what are called "charities" and "Christmas gifts." Col. Meller's account is that he has habitually at Christmas sent down a cheque for 250l. It is to be observed, that he sent down that sum to his agent Mr. Fernie, without any directions

at all, and without looking after how he spent it, and without any inquiry as to what was done with it. Col. Meller tells us that it was done under the impression that it was to be distributed in charity equally among friends and foes. I dare say Col Meller was good enough to think so at the time. I do not think, after what he has heard now, he will entertain that opinion any longer. That was the course taken then. Then it appears that Mr. Bass, the sitting member, did not, according to Mr. Brough's account, send down a particular sum; but Mr. Brough spent what sum he pleased in charity, without any directions from Mr. Bass, and without any inquiry from Mr. Bass as to what were the amounts; and Mr. Brough had the amounts disbursed in charity repaid to him. It appears that he spent habitually 300*l.* a year at Christmas in charities; and at Christmas 1867, when it was well known that there would be soon an election coming on, the sum which was distributed swelled up to 720*l.* Now, I do not for a moment mean to say that there may not be very many munificent charities distributed to that amount, and more, by many people; but when I find that charities are distributed in a borough by those who are seeking to contest it as candidates, and are distributed without check by the election agent of the borough, I am not charitable enough to draw any other conclusion than that they do it with the intention of giving the voters money, in the hope and expectation that it will influence the future election. And there is the further very great danger attending it, that the knowledge that they have been doing so will cause men at the future elections to give their votes in the expectation and hope that they will hereafter receive payment. When that is brought home to any person, I think it would undoubtedly mean corruption. In the present case, I have hesitated and paused about it in this way. With regard to corrupt practices, whether they be bribery, or whether they be intimidation, I take it that there is this important distinction to be made. By the statutes, and by the usages of Parliament before them, where any candidate is by his agent, or by himself, guilty of any corrupt practice, the seat must be vacated, and the member is incapable of sitting again during that Parliament; but it is required that it should be shown to be brought home to the agent. Any corrupt practice, whether bribery, intimidation, or treating, brought home to the agent, will vacate the election. But there is another principle which I apprehend, though it has been very little acted upon, still exists in Parliamentary law, and it is in itself good sense, and I think will probably be acted upon whenever it is required, that is, that although it does not appear to have been done by any agent, yet, if there has been general corruption, something that makes the election no longer a fair and free one, either general corruption preventing the election representing what it ought to represent, namely, the feelings of the constituents, or general intimidation, so that you may say it is evident that the election was not a free one: in that case, although it is not brought home to the agent, the election would not be good by the common law of Parliament. It must be very difficult in such a case to prove, and very difficult to be able to say whether or not a case is of sufficient magnitude to amount to that. I have hesitated and paused before coming to a decision on the question of the Christmas gifts after the last election; it is not brought home to any particular voter, any man who at the election has voted for Col. Meller upon the ground of his having received a payment after the election, so as to bring it distinctly under the Corrupt Practices Act. As Mr. Bass is not himself a candidate, I cannot inquire further into that; and though there was a point which passed through my mind as to whether any previous corruption upon the part of Mr. Brough might not affect any person who adopted him as his agent, I think that could hardly be sustained, unless it was made out more specificaliy that there were particular votes influenced by it. I do not see that I can treat the giving of Christmas gifts as a matter to avoid the election at present. The other view I took was, could there be such extensive corruption as would avoid the election? I am not quite sure whether that is a matter that has ever been acted upon; and though it passed through my mind, and I thought about it, I think I could not go to that extent. I therefore think I must proceed to consider what it was that happened at this election, and then to see what has been proved. I may remark, since I am now talking about what will generally avoid an election, that the same thing applies to intimidation. There is no doubt at all, and common sense would have no doubt about it as being the only true view of the terms of the Act of Parliament. Amongst other corrupt practices mentioned is this: "Every person who shall directly or indirectly, by himself, or by any other person on his behalf, make use of, or threaten to make use of, any force, violence, or restraint, or inflict or threaten the infliction by himself, or by or through any other person, of any injury, damage, harm, or loss, or in any other manner practise intimidation upon or against any person in order to induce or compel such person to vote, or refrain from voting, or on account of such person having voted, or refrained from voting at any election, shall be deemed to have committed the offence of undue influence." I think the reading of those words requires no explanation. It is obvious that when a mob has possession of a town, and beats those who come to the polling booth, or otherwise intimidates them, that is plainly exercising intimidation, and is undue influence, and in my opinion it is the very worst kind of undue influence. It is very bad for a master to threaten and dismiss his men: it is very bad in a landlord to eject his tenant. All these are very bad, improper acts, but they are justifiable acts if it were not for the effect they would produce upon the freedom of election, because they have a right to do so if it were not done to interfere with the freedom of election. But to riot, and to beat people, and disturb the peace of the town is worse. It is a crime in itself, and is committed for the purpose of producing an undue effect upon the election. This is a thing that is very likely to happen without the members or the agents being guilty of it. Where this happens to such an extent as not to let the election be free, though not traced to the agent, it will make the election void; but whether it has happened to such an extent as to make the election not free, is a question requiring very great consideration; the judge must exercise his own common sense, and say whether he thinks it is so great an intimidation as would prevent its being a free election; and that, as in every other thing in which discretion is to be exercised, one cannot always feel sure that one is right, and it is tolerably certain that wherever a man decides upon his discretion, there will be plenty of people who will say that he is wrong. In my own experience, it seldom happens when I have to decide a matter by discretion, that I do not myself feel very serious doubts, whichever way I decide, whether I am right or not. I frequently hesitate, and come to the best conclusion I can, and act upon it, and I feel great doubts frequently in such matters whether I am right or not. In the present case I come to the conclusion that I do not think the evidence given of rioting and intimidation was sufficient to avoid the election upon that ground. I quite assent to the

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distinction which Mr. Giffard pointed out. While I say that I think it was not sufficient to avoid the election, I assent to the observation he made, that in considering whether an election was free or not, it would be necessary to see what is the positive majority; and if we had entered into a scrutiny here, and it happened that Mr. Chawner had succeeded in establishing that he had a majority of one or two votes, or a very small majority of that sort, over Col. Meller, then no doubt the intimidation which would not have been enough to upset the election of Mr. Pochin, who was returned with a majority of eighty, might well have affected the election; whether it would be enough for that, would be a question to be considered afterwards. If it were so proved that in the majority of good votes received, Mr. Chawner was in a majority, but a very small one, that would be a question that would arise hereafter. But then it is equally clear that whenever intimidation is brought home to the agent it would upset the election, however slight the intimidation might be, provided it be intimidation.

Evidence had been given that committees were formed for collecting and holding the voters together. On this his Lordship said: — I cannot help feeling that where there are committees of the sort, formed in this way, where a paid agent is put at the head of the committee, to get the men together in that way, and where at a meeting he has always a body of committeemen round him, and a chairman of the committee at the head, it seems to be exactly the sort of machinery and organisation which anyone would devise who intended to have the ready means of corruption at hand if at any time it should be thought desirable that there should be corruption practised. It may easily be imagined that the scheme of a man in conducting electioneering matters may be of this kind: We are not going to bribe yet, but I will so arrange matters and have such an organisation, that if at any moment it become desirable to do it it may be done; I will arrange an organisation by which I may do it at a moment's notice. Such an organisation as this would consist of getting paid agents, to whom you could give the word at the time, and who could be trusted for that purpose, and putting each of them in communication with the more corrupt and corruptible voters, and being in readiness (as the phrase has been used more than once here) "to give the tip" that so much would be paid to them. I acknowledge I think that was the intention of that organisation as it seems to me; and accordingly a great part of the evidence which has been given by the people themselves tends to point to the fact that that was what was expected. It is very true that many of those who came and gave evidence were voters who having been upon the committees no doubt professed that they would vote for Col. Meller; with probably an understanding expressed or implied to this effect: if Col. Meller's agents will tell us we are to be the better for it hereafter we will vote for him; and there is no doubt that many of these did vote for Pochin and Chawner afterwards; but when one looks at the evidence they gave, the whole effect of it seems to show that they assembled together in just such bodies as I have mentioned. In the *Unicorn* case the witnesses may have meant to say simply that they had entered into that committee in order that they might be in the way to get any bribe which would afterwards be offered. Whether they went there with the pre-determination, being really adverse to Col. Meller and friendly to Pochin and Chawner, to take any bribe which was offered and then to tell about it, or whether they went there with the determination of doing the double treachery, of getting any bribe they could get and earning what they could afterwards, I cannot say. But this appears plain that at the Unicorn a witness called to-day says they did demand to be paid; that it was to be "No tip, no vote;" and that Machin, the chairman at the Unicorn, one of the paid agents, was endeavouring to get them the promise of this tip, as it was called, which a witness who was called to-day says he positively refused to give for two very good reasons; one that he did not wish to go to gaol himself, and the other, that he had no authority to do it. That leads me to the conclusion that there was such matter of fact at the Unicorn at least; but I must observe this, that if the evidence was to the effect that Machin, though he was then a paid agent of Col. Meller, was at that time planning to betray Col. Meller, that it was what is called a plant, then I do not think that Machin could any longer be considered an agent of Col. Meller, so that his acts would vacate the election. I wish to point out the distinction which I make, that according as the law stands at present, if a member employs an agent and that agent contrary to his wish, and contrary to his directions, commits a corrupt act, the sitting member is responsible for it; but where he employs an agent, and the agent treacherously or traitorously agrees with the other side, then if he does a corrupt act it would not vacate the seat unless it is proved that the corrupt act was at the especial request of the member himself or some untainted and authorised agent of the member who directed the act to be done. The distinction is pretty obvious, and I mention it to avoid any difficulty or doubt that there might be hereafter, from its being supposed that I have said anything more than I do say; I say if Machin was a treacherous agent he loses the power of upsetting the seat by reason of his unauthorised acts of corruption; it would require actual proof of authority in order to make it so. It is a very different affair if a man being an agent has been tricked by the other party into committing a corrupt act, he himself honestly still intending to act as an agent. As to the particular case of the Unicorn, it seems to me that what took place there shows that they were quite prepared to do what I have already stated that I believe the organisation was intended to do. They were quite prepared, upon receiving notice that a particular sum would be given then or hereafter, to act upon it and give their votes corruptly; but I think it is very doubtful whether Machin was not in treacherous collusion with the other side, and it seems pretty plain from the fact of what took place that the notice or tip was not given, and that the men who were at the Unicorn did go and vote for Pochin and Chawner just because they were not satisfied that anything was going to be given; I feel no doubt, therefore, that as far as that part of the case was concerned, they were not satisfied that anything was going to be given to them, and that the notice that there would be payment made was not made to that party, at any rate. Then we come to another case upon which we have had evidence to-day; that is, the committee at the Fountain, at which Arrowsmith presided. There we find exactly the same thing; Arrowsmith is one of the paid agents; and my impression is, upon the whole, that these people were all there ready to corrupt, but that it was not intended that they should corrupt; that they had no instructions to corrupt, and that Arrowsmith volunteered and went beyond his directions; but it would equally upset the election as if he had done it with instructions. I have tried in vain to imagine to myself any reason why Arrowsmith should write the names of these men, and why they should be anxious to have their names written upon the cards as a kind of voucher, not only that they had voted, but that they had been

members of Arrowsmith's club at the Fountain, when they did vote, except what the witnesses said, namely, that it was done in order that they might be the better for it hereafter, when, if there was anything going upon the part of Colonel Meller, they were to be paid it; and that Arrowsmith wrote the names as part of his promise that it should be so. I can therefore come to no other conclusion than that it was an act of corruption quite sufficient to upset the election on the part of Colonel Meller, and I must act upon it. My impression is, of course, that though there was every preparation for corruption, it did not come to any actual corruption, notice being given. Therefore, according to the evidence, upon the whole, the result is that upon this part of the case, as far as it goes, I do not think I can say that there is reasonable ground for believing that corrupt practices extensively prevailed at the last election. It is the last election only that I speak of; if the Act of Parliament had extended to the two previous elections I should not have had the slightest hesitation in giving my opinion upon them. [Having considered the alleged bribery, which he held not to be proved, his Lordship went on:] But then it appears that Mr. Follows, who was an agent of Mr. Pochin and Mr. Chawner, on the night of the nomination did proceed to organise what they were pleased to call a vigilance committee. As far as I could understand Mr. Follows's account of it, what was intended was that there should be seven men named who were to be a vigilance committee, and that he was to get some thirty or forty people, non-electors, who were to go about the town, and in some way or other discover corrupt practices on the other side; in fact, however, as I understand it, something occurred which took the nomination of these people out of his hands, and it was by no means the people whom he named alone, but a very considerable number of others, who went about that night. Now, I must mention, in bearing upon the question of intimidation, what follows: I cannot myself see how any large body could be legitimately or properly employed in a matter of that sort; I can understand that when you have reason to believe there are corrupt practices going on upon a particular side, that, in order to discover where they are going on, you may employ a single scout or spy to act as a detective to find it out; but the essence of his finding it out must be that he is to go quietly and without alarming them. I cannot imagine how you can legitimately employ a number of persons for any such purpose. It seems to me the only thing you could expect, if you sent a number of persons round, would be that they would commit violence and intimidation; and, accordingly, so it happened. No sooner did the men go to the different houses than you find that the windows were broken there by the mob, and that there was intimidation. Then during the night it appears that the same people kept going about, and they were allowed to come in to make their reports and to drink. And certainly refreshing them with drink under those circumstances would very considerably increase the probability of violence the next day. The first thing that happened the next day was, as one witness who was called, the foreman to some stationer, describes, that going early in the morning, at half-past seven, to his work, carrying some documents belonging to his trade, a number of men surrounded and seized hold of him, and insisted upon it that he was bribing, took his papers away from him, satisfied themselves that they were not bribery papers, gave them back to him and then dismissed him, telling him that if he dared vote for Colonel Meller they would break his neck; and he says this produced the effect of terrifying him and making him not come to vote afterwards. Whether he did or not would depend upon whether he was very anxious to come and vote for Colonel Meller, or whether he was a bold man or not; but this much is plain, that this is just the sort of thing you would expect a vigilance committee sent about in this way to do. I do not say that the mere employing of a vigilance committee of that sort would be conclusive evidence that intimidation was intended, but it would very likely be the means of producing it. When, very shortly after they were appointed, there was found to be violence used, all who employed such people were certainly bound to take care that they did nothing to encourage violence afterwards. Then during the course of the day there appears to have been a good deal of violence, and various people were struck and beaten. Now, we come to the question, "Is there sufficient ground, besides what I pointed out in the employment of this vigilance committee, for saying that this intimidation, as to which I have already expressed my opinion that it was not sufficient to avoid the election upon the ground of general intimidation, was exercised by any of the agents of Mr. Pochin and Mr. Chawner?" The matters upon which that turns are what Mr. Follows did, and what Mr. Brough did. As far as Mr. Follows is concerned, it appears plainly enough that he having taken the notion into his head that there had been bribery to some of these seven men at the Shoulder of Mutton [evidence had been given of this], and which afforded strong ground for suspecting some one had bribed them, came to the conclusion immediately that he was therefore justified in rushing after Mr. Lea and Mr. Brookfield, and preventing them continuing their canvass at all. Whether he did this deliberately, upon the notion that now had come the time when they were in a majority, and therefore to stop the poll would be a good thing, or whether it was only in his excitement at the time, he undoubtedly did take a course more calculated to increase any violence going on than otherwise. He knew what sort of violence was likely to happen. He had witnessed the day before when, in much less excitement, there had been an attack upon Mr. Vincent. Nothing could justify the knocking him off his horse. He had witnessed that, and knew perfectly well what was likely to happen. Then we have a statement of the speech he is said to have made from the cannon, and the exhortation in terms not to allow Meller's people to vote. If that is an accurate report of the speech, it undoubtedly was an exhortation to do that which was afterwards done by the mob, which is enough to prevent the seat being held when it is shown to be done by an agent. As to that, Mr. Follows hardly denies that he was in a state of excitement, and that he did use such language, or something like it. And I must place a good deal of weight upon what Mr. Giffard says, that in such a matter as that it is not very likely that a person would deliberately write down words the day following, and come here a long time afterwards and swear unless he really and truly believed that they were accurate. I therefore cannot but come to the conclusion that Mr. Follows did encourage violence with the view of intimidating persons from exercising their votes; and, having come to that conclusion, that must prevent both Mr. Pochin and Mr. Chawner being eligible candidates for this borough. Under those circumstances, I must certify that the election in both cases is void. I have only further to add this about the costs. It seems to me that in this case, in which each side has been successful, and each side has failed, I should not saddle either side with the costs of the other. I treat the two petitions as really and substantially the same thing; the petition against Mr. Pochin, whether or no Col. Meller him-

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self is substantially the petitioner I do not know, but one of the persons who were put forward as petitioners acknowledged, when he was called as a witness, that he bore a grudge against Mr. Pochin for having refused to pay him some demand upon the last election, and, viewing it in that way, if he is an independent petitioner, I cannot think him a very meritorious one. And in each case, I must say that each party must bear his own costs.

Agents: *Chilton* and *Co.*, 25, Chancery-lane, for *Thomas Lawrence Brough*, of Stafford; *Baxter*, *Rose*, and *Norton*; *Wyatt* and *Hoskins*.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Feb. 2, 3, and 19.

(Present, The Right Hon. LORD CHELMSFORD, SIR JAMES W. COLVILE, and SIR JOSEPH NAPIER.)

GIBLIN AND OTHERS *v.* MCMULLEN.

Victoria—Deposit of property at a banker's—Liability of gratuitous bailees—Gross negligence—Nonsuit.

A box containing debentures and other securities was deposited at a bank, the depositor keeping the key. The bank received no payment for their care of the box, which was kept in a strong room with similar boxes of other customers, and with property belonging to the bank.

The debentures were stolen by the cashier of the bank.

In an action by the depositor against the bank, the jury found a verdict for the plaintiff, but a rule to enter a nonsuit was afterwards made absolute.

On appeal to the Judicial Committee,

Held, that the bank were not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary care which men of common prudence generally exercise about their own affairs.

It is not, however, sufficient to exempt a gratuitous bailee from liability, that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence.

The term "gross negligence" is not intended as a definition, but is useful as expressing the practical difference between the degrees of negligence for which different classes of bailees are responsible.

The modern rule as to nonsuit is that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly find a verdict for the party producing it, upon whom the onus of proof is imposed.

A nonsuit may be directed even after the defendant has entered on his case, and evidence given by the latter may be used for the purpose of a nonsuit.

This was an appeal against a judgment of the Supreme Court of Victoria. The then plaintiff, Mr. Richard Lewis, brought an action against the defendant (the present respondent), as inspector of the Union Bank of Australia.

The declaration stated that the plaintiff delivered to the said bank certain railway debentures to be safely kept and taken care of by the bank for reward, and the bank received the debentures into their care and keeping, for the purpose and on the terms aforesaid, yet the bank kept the debentures in a negligent manner, and took no care of the same, whereby they were lost to the plaintiff. The second count charged the bank with negligence as gratuitous bailees.

The defendant pleaded not guilty, and a traverse of the delivery and receipt of the debentures by the bank.

At the trial, in Nov. 1866, on the close of the plaintiff's case, the counsel for the defendant applied for a nonsuit. The judge refused to stop the case, but gave leave to move to enter a verdict for the defendant. It was understood, however, that the rule, if absolute, should be for a nonsuit, and not to enter a verdict. The defendant then called evidence, and the jury found a verdict for the plaintiff for 10,450*l.*

The rule to set aside the verdict and enter a nonsuit was subsequently made absolute, the respondent thereupon signing final judgment.

The appellants were the executors of Mr. Lewis, who died in Nov. 1867.

The circumstances of the case are fully stated in the judgment.

The Solicitor-General (Sir J. D. Coleridge, Q.C.) for the appellants.—In all cases where negligence is imputed to a bailee, whether gratuitous or for hire, the question is, what amount of attention, care, and skill can be insisted on by the bailor, so that on damage for its omission he may have an action against the bailee. This question is one of fact for a jury. A confusion has arisen from the use of the word "gross," as expressing the degree of negligence for which gratuitous bailees are to be liable, and from misusing the term "negligence" as if it were an affirmative word. Willes, J. stated the principle correctly in *Grill* v. *General Iron Screw Collier Company*, 14 L. T. Rep. N. S. 715; 35 L. J., N. S., 330, C. P. "I own I entirely agree with the *dictum* of Cranworth, L. J. in *Wilson* v. *Brett*, 11 M. & W. 113; 12 L. J., N. S., 264, Ex., that 'gross negligence' is ordinary negligence with a vituperative epithet. That was the law laid down in *Wyld* v. *Pickford*, 8 M. & W. 443, and upheld and recognised in the Exchequer Chamber in the judgment of Crompton, J. in *Beal* v. *South Devon Railway Company*, 3 H. & C. 337; 11 L. T. Rep. N. S. 184. The confusion seems to have arisen in using the word 'negligence' as if it was an affirmative word, whereas in truth it is a negative word; it is the absence of such care, skill, and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed. Then, if you begin with that, what is the amount of care, skill, and diligence which a man ought to bring? In the case of a gratuitous bailment it is said, if you employ a man of no skill to ride your horse, he is bound to use such skill as he possesses, and that you can require no more, and that he is liable for gross negligence in that sense. But if you employ a man to ride your horse who professes to be a groom, he would be answerable unless he had competent skill in horseriding. Therefore, the word "gross" is a word which, as pointed out by Sir Patrick Colquhoun in his summary of the Roman civil law (ss. 1530-3), is used as a description, not as a definition. If we have to separate law from fact, and to leave the question of fact to the jury, we could not get nearer to a practical definition of 'gross negligence' than such negligence as is actionable." This, then, was a question rightly left to the jury, and their finding ought not to be disturbed. And the evidence given at the trial was sufficient to support the verdict. When a banker takes charge of extremely valuable securities every care for their safety ought to be supplied, and that such was not taken may be presumed from the fact that additional precautions have been adopted since this loss occurred. It may be true that Fletcher had been long in the employment of the bank, and the

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nothing was known against him, but it would appear from the evidence that a gentleman from England called on the manager of the bank and told him that he had expected to receive money from Fletcher and had not received it. This should have put him on his guard against Fletcher. Then there is evidence that violence had been attempted on the box, and it was suggested that Fletcher took the box away, had it picked by a locksmith, and then returned it. If this were possible, there must have been negligence in the arrangements at the bank. The mere fact that the bank took as great care of Lewis's strong box as they did of their own property would not rebut their liability. Lord Holt's dictum in *Coggs* v. *Bernard*, 1 Sm. L. Cas. (5th edit.) 179, was that if a mere depository "keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his honesty. . . . As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own, yet he shall not be charged, because it is the bailor's own fault to trust such an idle fellow." But this was clearly overruled in *Doorman* v. *Jenkins*, 2 A. & E. 256, where Denman, C.J., directed the jury that it did not follow from defendant's having lost his own money, at the same time as the plaintiff's, that he had taken such care of plaintiff's money as a reasonable man would ordinarily take of his own; and he added that that fact afforded no answer to the action if they believed that the loss occurred from gross negligence. [Lord CHELMSFORD said the degree of negligence for which a particular bailee is liable must be a matter of law on which the jury would have to be directed by the judge, and referred to *Shiells* v. *Blackburne*, 1 H. Bl. 159.] The case of *Shiells* v. *Blackburne* has been misunderstood, and has been supposed to show that the question of negligence is a matter of law, but the verdict was there set aside because the court thought that there was no evidence of negligence to go to a jury, and that they had found the fact erroneously: (See the comments of Patteson, J., in *Doorman* v. *Jenkins*, 2 A. & E. 263.)

Watkin Williams (*Beresford* with him) on the same side.—The rule to set aside the verdict and to enter a nonsuit ought not to have been made absolute, but should have been discharged. The judge at the trial below ought to have left to the jury the question whether the bank was guilty of that particular degree of negligence for which gratuitous bailees are liable. The defendant at the trial instead of relying on the objection that plaintiff had not made out a case for the jury chose to go into evidence of his own. Some of this evidence, particularly the fact of the change made in the bank arrangements after the discovery of the loss, was favourable to the plaintiff. This evidence might have been in answer to the application for a nonsuit. [*Mellish*, Q.C. agreed that it should be considered whether upon the whole evidence there ought to have been a nonsuit.] We admit that the bankers were gratuitous bailees; that they are not liable for deposited property stolen by a clerk or servant employed about the bank, unless they have knowingly hired or kept in their service a dishonest servant, and that they were only bound to take ordinary care; but whether they took this care is a question for the jury. The rule given by Lord Loughborough in *Shiells* v. *Blackburne*, 1 H. Bl. 168, is that "if a man gratuitously undertakes to do a thing to the best of his skill, where his situation is such as to imply skill, an omission of that skill is imputable to him as gross negligence." Here the bankers if they neglected precautions which their business ought to have suggested were guilty of gross negligence. As observed by Lord Denman in *Doorman* v. *Jenkins*, 2 A. & E. 265, it is "impossible for a judge to take upon himself to say whether negligence is gross or not." In *Wilson* v. *Brett*, 11 M. & W. 113, a person conversant with and skilled in horses, rode a horse at the owner's request, for the purpose of showing it for sale; the horse fell and was injured, and the judge in summing up told the jury that the rider, the defendant in the action, having been shown to be skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it. The jury found a verdict for the plaintiff, and the court refused a new trial on the ground of misdirection. Alderson, B. observes: "This defendant being shown to be a person of competent skill, there was no difference between his case and that of a borrower; because the only difference is, that then the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant had it." And in the judgment of Rolfe, B., who tried the case, occurs the passage, "If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability? I said I could see no difference between negligence and gross negligence—that it was the same thing with the addition of a vituperative epithet—and I intended to leave it to the jury to say whether the defendant, being as it appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence." [Lord CHELMSFORD said that *Wilson* v. *Brett* was a case of misfeasance, not of negligence, and that he saw no objection to the term "gross" negligence, which was useful in expressing the degree of negligence for which certain classes of bailees are responsible. The term, moreover, had been approved by Lord Holt, Sir William Jones, and other eminent authorities.] A similar rule was laid down in *Beal* v. *South Devon Railway Company*, 3 H. & C. 341; 11 L. T. Rep. N. S. 184. See, too, the cases of

Peninsular and Oriental Steam Navigation Company v. *Shand*, 1 Moo. P. C. N. S. 272; 12 L. T. Rep. N. S. 809;

Dansey v. *Richardson*, 3 E. & B. 144.

Mellish, Q.C. for the respondent.—Where bankers take charge of their customers' goods under such circumstances as the present, it must be understood that the customers will take their chance of loss. If whether they have taken proper care is to be a question dependent on the opinion of a jury, what banker would accept such a liability without reward? There was no evidence of negligence, except that the cashier was allowed to have access by himself to the strong room. The plaintiff knew that this was the custom of the bank, and after the deposit of his property if any change was made it was for his benefit, rather than to his disadvantage. And, indeed, to allow access to the confidential servant alone would probably involve less risk than to let two go together. The boxes were kept in the strong room for the convenience of depositors, and it cannot be contended that there was any negligence in the bankers because they did not put these bonds in the one of the two inner rooms which they reserved for bullion and unsigned notes. Lord Holt, in his judgment in *Coggs* v. *Bernard*, in saying that, when a man takes goods into his custody to keep for the bailor without reward, the bailee will be chargeable if guilty of "some gross neglect," clearly means "wilful" negligence, which would be near to fraud. [Lord CHELMSFORD.—It is difficult of definition; but gross negligence seems to mean "utter carelessness."] For he bases this part of his judgment on Justinian's Institutes, Book III., tit. 15, where the

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liability of a depositary is thus defined: "Ex eo solo tenetur, si quid dolo commiserit; culpæ autem nomine, id est, desidiæ ac negligentiæ, non tenetur." And this rule was acted on in an American case, very like the present, *Foster* v. *Essex Bank*, 17 Mass. 478, where a cask of doubloons was deposited by the plaintiff with the defendants, and the cashier or clerk of the bank stole a great portion and afterwards absconded. The bank was held not to be liable on the grounds expressed in the following passage from the judgment of Parker, C. J. (p. 497), "It will not be disputed that if (this contract) amounts only to a naked bailment, without reward, and without any special undertaking, which in the civil and common law is called *depositum*, the bailee will be answerable only for gross negligence, which is considered equivalent to breach of faith; as everyone who receives the goods of another in deposit, impliedly stipulates that he will take some degree of care of them. The degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the depositary uses towards his own property of a similar kind. For although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favour of his particular interest, and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns. . . . The dictum of Lord Coke that the bare acceptance of goods to keep implies a promise to keep them safely so that the depository will be liable for loss by stealth or accident (*Southcote's case*, 4 Co. 83), is entirely exploded . . . having been fully and explicitly overruled by all the judges in *Coggs* v. *Bernard* . . . 'Now the law seems to be settled that such a general bailment will not charge the bailee with any loss, unless it happen by gross neglect, which is construed to be an evidence of fraud. But if he undertakes specially to keep the goods safely and securely, he is bound to answer all perils and damages that may befall them for want of the same care with which a prudent man would keep his own:' (2 Bl. Comm. 453.) And this certainly is the more reasonable doctrine, for the common understanding of a promise to keep safely would be that the party would use due diligence and care to prevent loss or accident; and there is no breach of faith or trust if, notwithstanding such care, the goods should be spoiled or purloined. Anything more than this would amount to an insurance of the goods, which cannot be presumed to be intended, unless there be an express agreement and an adequate consideration therefor. The doctrine, as thus settled by reason and authority, is applicable to the case of a single deposit in which there is an accommodation to the bailor, and the advantage is to him alone. He shall be the loser, unless the person in whom he confided has shown bad faith in exposing the goods to hazards to which he would not expose his own. This would be *crassa negligentia*, and for this alone is such a depositary liable." The court then went into the facts, and proceeded (p. 504): "Upon this state of facts, we think it most manifest that, as far as the bank was concerned, this was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank, which can tend to increase its liability beyond the effect of such a contract. No control whatever of the chest or the gold contained in it was left with the bank or its officers. It would have been a breach of trust to have opened the chest or to inspect its contents. The owner could at any time have withdrawn it, there being no lien for any price of its custody, and it was not right that the bank had authority to remove it to a place of greater safety without the orders of the owner. If it be possible to constitute a gratuitous bailment, or simple deposit, this was one. . . . Such deposits are in deed simply gratuitous on the part of the bank, and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures, more secure from fire and thieves than their dwelling-house or stores. . . . . (P. 507): The contract being, then, only a general bailment, the third question to be discussed is whether the contract has been cancelled by the bank. . . . The rule to be applied to this species of bailment is that the depositary is answerable in case of loss for gross negligence only or fraud which will make a bailee of any character answerable. Gross negligence certainly cannot be inferred here, for the same care was taken of this as of other deposits, and of the property belonging to the bank itself. . . . We have thus prepared the way for the discussion of the great question in the case, and we believe the only one on which doubts could be entertained. The loss was occasioned by the fraud or felony of two officers of the bank, the cashier and chief clerk. We shall not consider whether the act of taking the money was felonious or only fraudulent, as the distinction is not important in this case, the question being whether there was gross negligence, and that fact may appear by suffering goods to be stolen, as well as if they were taken away by fraud. . . . No fraud is directly imputed to the bank, it being found that the directors who represent the company were wholly ignorant of the transactions of the cashier and chief clerk in this respect. The point, then, is narrowed to the consideration, whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers. (Authorities were reviewed by the court.) . . . I think it may be inferred from all this, as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. The cases of innholders, common carriers, and perhaps ship masters or seamen, when goods are embezzled, are exceptions to the general rule, founded on public policy. We are then to inquire whether, in this case, when the gold was taken from the cask by the cashier and clerk, they were in the course of their official employment. Their master, the bank, had no right to meddle with the cask or open it, and so could not lawfully communicate any such authority, and that they did not in fact give any, is found by the verdict. . . . The cask was never opened but by order of the owner, until it was opened by the officers for a fraudulent or felonious purpose. It was no more within the duty of the cashier than of any other officer or person to know the contents or to take any account of them. If the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault when banking hours were over, that this together with other property should be secure from theft. He cannot, therefore, in any view be considered as acting within the scope of his employment when he committed this villainy, and the bank is no more answerable for this act of his than they would be if he had stolen the pocket book of any person who might have laid it upon the desk while he was transacting some business at the bank. . . . The undertaking of banking corporations, with respect to their officers, is that they shall be skilful and faithful in their employments; they do not warrant their general honesty and uprightness." The principles above stated are all applicable to the present case; though the latter is weaker against the bank than

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the American case, for in that it appears that an exact account of the gold deposited was left with the cashier, who gave a receipt for it, while here the bank knew nothing about the contents of the plaintiff's box. There are doubtless observations in *Doorman* v. *Jenkins*, 2 A. & E. 256, tending to show that the question of negligence is for the jury. But there was some evidence of gross negligence in the opinion of the court. And many modern cases establish the proposition that, unless there is some evidence upon which the jury can reasonably find that negligence existed, the question should be withdrawn from them. Thus in *Toomey* v. *London, Brighton, and South Coast Railway Company*, where the plaintiff while waiting at the defendants' station mistook the lamp room for the urinal, fell down some steps and was injured, Williams, J. says, "It is not enough to say there was some evidence; for every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." And this rule was adopted and approved in *Cornman* v. *Eastern Counties Railway Company*, 4 H. & N. 781, and in *Cotton* v. *Wood*, 8 C. B., N. S., 568. In the latter case Erle, J. observes (p. 573), "The very vague use of the term 'negligence' has led to many cases being left to the jury in which I have been utterly unable to find the existence of any legal duty or any evidence of a breach of it." And Williams, J. adds, "There is a rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz., that, where the evidence is equally consistent with either view, with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury." A still stronger case is that of *Crafter* v. *Metropolitan Railway Company*, 1 L. Rep. C. P. 300, where the plaintiff was injured by falling, in consequence of the slippery brass nosings on the stairs. Two witnesses of the plaintiffs, one of whom was a builder, stated that in their opinion the staircase was a dangerous one, and the defendants called no witnesses to contradict. Yet it was held that there was no evidence to go to a jury. M. Smith, J. remarks, "The court is, in an especial manner, bound to see that the evidence submitted to the jury in order to establish negligence is sufficient and proper to go to them." [Lord CHELMSFORD referred to *Ryder* v. *Wombwell*, L. Rep. 4 Ex. 32; 19 L. T. Rep. N. S. 491.]

Jos. Brown, Q.C. (*Murray*, and *J. D. Wood* with him), on the same side.—It is admitted that plaintiff's box had the same care as other customers' property, and as the property of the bank. The appellants are in fact urging that we ought to have taken special care of plaintiff's property. Even in the case of a bailment of goods to be kept for hire, it was held by Lord Kenyon in *Finucane* v. *Small*, 1 Esp. 314, that positive negligence must be proved, and that if "the goods were lodged in a place of security, where things of much greater value were kept, this is all that it was incumbent on the defendant to do; and if such goods are stolen by the defendant's own servant, that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own:" (See too Story on Bailments, ss. 63, 65, 66, 67, 71–3, 75–9.) *Doorman* v. *Jenkins* (*ubi. sup.*), differs from the present case, for there the plaintiff did not get the care he expected, which here he did. And it would not fix the bank with liability to show that there were some additional precautions which they might have adopted, for as said by Montague Smith, J., in *Crafter* v. *The Metropolitan Railway Company*, 1 L. Rep. C. P. 304, "the line must be drawn in these cases between suggestions of possible precautions and evidence of actual negligence, such as ought reasonably and properly to be left to a jury."

Watkin Williams replied.

Judgment was delivered by Lord CHELMSFORD:—This is an appeal from a judgment of nonsuit of the Supreme Court of the colony of Victoria in an action by the appellant's testator against the respondent. The action was brought against the defendant as inspector of the Union Bank of Australia, to recover damages for the negligent keeping of certain railway debentures delivered to the bank to be safely kept and taken care of. The plaintiff, who resided at Hobart Town, in Tasmania, had an account with the Union Bank of Australia from the year 1857. From the earliest period of his becoming a customer of the bank, he had placed in their care a box, of which he kept the key, containing securities, deeds, and debentures. The bank received no consideration for taking care of the deposits of their customers. In the month of Jan. 1862, the plaintiff purchased the railway debentures in question and put them in his box. The box appears always to have been kept in a strong room underground, in which the boxes of other customers of the bank were placed. There were also in this strong room the manager's box, containing bills for discount and collection, worth from 1,500,000*l.* to 2,500,000*l.*, teller's boxes, worth 50,000*l.*, and securities of the Royal, Central, and Agra Banks, in which the Union Bank was interested. The access to this room could only be obtained by passing through a compartment of the office which was separated from the part where the clerks were employed by a partition about 5ft. high. In this compartment Fletcher, the cashier, always sat during bank hours, and a messenger slept there during the night. There was a wooden door in this compartment which opened upon a flight of steps leading to the room where the plaintiff's box was deposited. This room had two iron doors, which were opened by separate keys. Fletcher always kept the key of the wooden door, and also, during the day, the keys of the two iron doors, but at the time the debentures in question were placed in the box one of the keys of the iron doors only was kept by him at night, the other being taken care of by another officer of the bank. Beyond the room where the box was there were two other rooms; in the outer of the two uncoined gold was kept, in the inner, bullion, and unsigned notes of the bank. The manager kept the key of the outer of these two rooms, and one of the directors of the bank that of the inner one. The plaintiff had frequent opportunities of seeing how and where his box with the debentures was kept. The customers were permitted to have access to their boxes during the bank hours, but always in the presence of a bank clerk. The plaintiff occasionally went down to the strong room to take the coupons from his debentures for collection, but generally the box was brought up to him. The coupons when taken from the debentures were always given by the plaintiff to Fletcher to collect for him. On the 19th April 1864, the plaintiff went to the bank and asked for his box. Fletcher brought it to him. The plaintiff opened the box, took out his debentures, and carried them away. He then cut off the coupons, took back the debentures, replaced them in box, locked it, and gave the coupons to Fletcher to collect for him as usual. Before the plaintiff's next visit to the bank,

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Fletcher had abstracted the debentures. The exact time at which this act of dishonesty was committed cannot be ascertained, but it must have been before the month of July 1864, as Fletcher then left the bank on leave of absence and never returned. Up to the time of his leaving he had always maintained a good character. The plaintiff did not come again to the bank till the 3rd July 1865. He then went into the strong room and took out of his box some gas shares. On the following day he returned to the bank and had his box brought up to him, when he discovered that the debentures were gone. All the material facts above stated were proved in the course of the plaintiff's case; that the bank were gratuitous bailees; that the plaintiff had known for years the manner in which the bank kept the property of their customers deposited with them, and the means which they employed for its protection, and that the debentures were dishonestly taken away by Fletcher. At the close of the plaintiff's case, the counsel for the defendant applied for a nonsuit on the ground that the bank being gratuitous bailees no evidence had been given of such negligence as would render them liable for the loss of the debentures. The judge refused to stop the case, but reserved leave to the defendant to move to enter a nonsuit. The defendant thereupon went into his case and called witnesses. The only material additions which he made to the facts proved by the plaintiff's witnesses were the keeping in the strong room in which the plaintiff's box with the debentures placed, not only of the boxes of other customers, but also of the before-mentioned valuable property belonging to the bank; the good character of Fletcher, and his leaving the bank in the end of the month of July 1864; and that after Fletcher left, but before the loss of the plaintiff's debentures was discovered, a rule was made in the bank that two clerks instead of one (as formerly) should go with a customer wishing to examine his box in the strong room. The jury found a verdict for the plaintiff upon an issue as to the delivery of the debentures to be kept by the bank without reward, and also upon the plea of not guilty (which raised the question of negligence), and they assessed the damages at 10,450*l.* The defendant, upon the leave reserved at the trial, moved for, and obtained a rule from the Supreme Court to set aside the verdict and to enter a verdict for the defendant or a judgment of nonsuit. That rule was afterwards made absolute, the Chief Justice stating that "in the opinion of the court the defendant was entitled to a verdict, but that as at the trial, when leave to enter a verdict was reserved, there was an understanding that the rule, if absolute, should be for a nonsuit, and not to enter a verdict, the rule would be absolute accordingly." In the argument of the appeal the counsel for the appellant, admitting that the bank were gratuitous bailees, and therefore not responsible except for the highest degree of negligence usually styled "gross negligence," insisted that it was a question of fact for the jury whether the bank had been guilty of this species of negligence, and that the judge would not have been justified at the close of the plaintiff's case in withdrawing the question from the jury and directing a nonsuit, and that after the defendant's case had been gone into, and the jury had pronounced a verdict upon all the evidence on both sides, it was not competent to the court to give a judgment of nonsuit or to do more than to direct a new trial upon the question of negligence. The learned counsel contended that the bank had been guilty of negligence, because there being two iron doors with protecting locks to the strong room where the plaintiff's debentures were, the cashier was permitted to keep both keys. And they urged that the bank by their own act admitted that they had not been sufficiently careful, as after Fletcher left, they made a rule that two clerks should always accompany the customers to the strong room instead of only one, as had previously been the practice. The first question to be considered is, whether the Supreme Court was right in directing a nonsuit to be entered. It was the duty of the court to do what the judge ought to have done at the trial; and if, at the close of the plaintiff's case, there was not evidence upon which the jury could reasonably and properly find a verdict for him, the judge ought to have directed a nonsuit. Formerly it used to be held, that if there were what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury. But a course of recent decisions (most of which are referred to in the case of *Ryder* v. *Wombwell*, L. Rep. 4 Ex. 32; 19 L. T. Rep. N. S. 491), has established a more reasonable rule—viz., that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. If, therefore, the plaintiff's evidence in this case was such that the judge ought to have considered that it fell short of proving the bank to have been guilty of that species of negligence which would render them liable to an action, he ought to have withdrawn the case from the jury, and directed a nonsuit. But the appellant's counsel insisted that, as the defendant at the trial did not rest upon his objection to the sufficiency of the plaintiff's case, but went into evidence of his own, he did it at his peril; and that if he proved any facts which were favourable to the plaintiff, they might be used in answer to the application to the court for a nonsuit, upon the leave reserved at the close of the plaintiff's case. It is unnecessary to determine whether this position is correct or not, because the counsel for the respondent agreed that the appellant's counsel might be at liberty to use in argument any facts which they could extract from the defendant's evidence in support of their case. But it may be convenient to see how the plaintiff's case stood upon his own evidence, before considering whether it was at all improved by any facts obtained from the defendant's witnesses. Did the plaintiff, then, give any evidence of the bank having been guilty of that degree of negligence which renders a gratuitous bailee liable for the loss of property deposited with him? From the time of Lord Holt's celebrated judgment in *Coggs* v. *Bernard*, 1 Sm. L. Ca. 177, 5th edit, in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called "gross negligence" This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a bailee of this class. At last, Lord Cranworth (then Baron Rolfe), in the case of *Wilson* v. *Brett*, 11 M. & W. 113, objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." And this critical observation has been since approved of by other eminent judges. Of course, if intended as a definition, the expression "gross negligence" wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord Holt and Sir William Jones in his Essay on the

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Law of Bailments. In the case of *Grill* v. *General Iron Screw Collier Company*, L. Rep. 1 C. P. 612; 14 L. T. Rep. N. S. 715, Willes, J., after agreeing with the dictum of Lord Cranworth, and stating that the same view of the term "gross negligence" was held by the Exchequer Chamber in *Beal* v. *The South Devon Railway Company*, 3 H. & C. 337; 11 L. T. Rep. N. S. 184, said: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." It is hardly correct to say that the Court of Exchequer Chamber in the case referred to adopted the view of Lord Cranworth as to the impropriety of the term "gross negligence." Crompton, J., in delivering the opinion of the court, said: "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the court below, where he says 'There is a certain degree of negligence to which everyone attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and he added, "for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence, is gross negligence. M. Smith, J., in the case in which the above-mentioned observations of Willes, J. were made, said: "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." The epithet "gross," is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise, corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject, and, though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the judge to distinguish, as well as they can, degrees of things which run more or less into each other. It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs. The case resembles very closely one that was mentioned by the counsel for the respondent, which was decided in the Supreme Judicial Court of Massachusetts, the case of *Foster, et al* (Executors), v. *The Essex Bank*, 17 Mass. Rep. 478. The plaintiff in that case deposited with the bank for safe custody, a cask containing a quantity of gold doubloons. This was placed with other deposits in a vault in the bank, and the agent of the plaintiff was in the habit of coming to the bank to see that his deposit was safe. There was no evidence how the vault was secured. Whenever the plaintiff gave orders to the bank (which he frequently did) to deliver some of the gold doubloons deposited, the cask was opened by the cashier or chief clerk, who delivered the doubloons pursuant to the orders. The cashier and chief clerk, both of whom had previously sustained a fair reputation, fraudulently took from the cask doubloons to the amount of 32,000 dollars, with which they absconded. The action was tried upon the general issue, and the jury found a special verdict. The court, after argument, gave judgment for the defendants. The Chief Justice, who delivered the opinion of the court, entered fully into the law of bailments applicable to the case holding that, "as far as the bank was concerned, the deposit of the gold was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank which could tend to increase its liability beyond the effect of such a contract." "That the bank was answerable only for gross negligence or for fraud, which will make a bailee of any character answerable, and that gross negligence certainly could not be inferred from anything found by the verdict, as the same care was taken of the plaintiff's property as of other deposits, and of the property belonging to the bank itself." And the court held that the bank was not responsible for the fraud or felony of the cashier and clerk, as when they abstracted the plaintiff's gold from the cask they were not acting within the scope of their employment; "and the bank was no more answerable for their act than it would have been if they had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank." Their Lordships entertain no doubt that it was the duty of the judge at the close of the plaintiff's case, upon the application of the counsel for the defendant, to have ordered a nonsuit, or if the plaintiff refused to be nonsuited, to have directed the jury to find a verdict for the defendant, as there was an entire failure of evidence of the want of that ordinary care which the bank was bound to bestow upon the plaintiff's deposit. But the judge having refused to nonsuit, the defendant thereupon went into his case and called witnesses, and having done so the counsel for the appellants contend that there being evidence on both sides the question could not be withdrawn from the jury, and that as the judge could not have nonsuited at that stage of the trial it was not competent to the Supreme Court to give a judgment of nonsuit. It is not, however, correct to say that the judge could not have nonsuited the plaintiff after the defendant had entered upon his case, as it was decided in the case of *Davis* v. *Hardy* (6 B. & C. 225), that the evidence given by a defendant may be used for the purpose of a nonsuit. The defendant's evidence added to the plaintiff's case the important fact that in the strong room in which the plaintiff's debentures were kept there were, besides the boxes of other customers, bills, securities, and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. This was, in effect the question left to the jury in *Doorman* v. *Jenkins* (2 A. & E. 256), where Lord Denman told them that "it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own, and that the fact relied upon was no answer to the

action if they believed that the loss occurred from gross negligence." No one can fairly say that the means employed for the protection of the property of the bank and of the plaintiff were not such as any reasonable man might properly have considered amply sufficient. But the appellant's counsel insisted that the fact appearing for the first time in the defendant's case, that the bank, after Fletcher had abused the confidence reposed in him, had introduced additional precautions to prevent the recurrence of a similar act of dishonesty, amounted to an admission that their former safeguards were not such as prudent men ought to have been satisfied with. This argument goes the length of contending that if a gratuitous depository does not multiply his precautions, so as not to omit anything which can make the loss of property entrusted to him next to impossible, he is guilty of gross negligence. Their Lordships are clearly of opinion that the plaintiff failed upon his own evidence to prove a case of negligence against the bank, and that the evidence produced by the defendant showed more strongly the absence of any such negligence for which they would have been liable. They will, therefore, recommend to Her Majesty that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Davidson, Carr,* and *Banister.*

Solicitors for the respondent, *Murray* and *Hutchins.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

June 1 *and* 3.

(Before the LORDS JUSTICES.)

Re THE SOUTH-EASTERN OF PORTUGAL RAILWAY COMPANY (LIMITED).

Company—Winding-up—Companies Act 1862, *ss.* 95, 96, 159, 160—*Powers of official liquidator—Where exercisable without sanction of court.*

The 95*th section of the Companies Act* 1862 *defines the powers of the official liquidator to be exercised with the sanction of the court; the* 96*th enacts that the court may authorise the exercise of those powers without its sanction or intervention; the* 160*th provides for compromises by the official liquidator with the sanction of the court:*

Held, that to support an order conferring these powers upon the official liquidator exclusively, there must be a constat justifying the exercise of a judicial discretion on the part of the judge; and where the evidence failed to satisfy the Court of Appeal, an order of Malins, V.C. to that effect was discharged.

This was an appeal by Mr. Brandeis and Mr. Rodocanachi, who were creditors of the company, against an order of Malins, V.C., made on the 8th May, confirming an order which his Honour had made in chambers on the 30th April, ordering that the official liquidator of the company, Mr. John Ball, should be at liberty to exercise all the powers of the 95th section of the Companies Act 1862 without the sanction or intervention of the court, except that of distributing the assets of the company.

The case is reported in 20 L. T. Rep. N. S. 800, where all necessary facts are stated.

Cotton, Q. C. and *Rowcliffe* for Mr. Brandeis; and *Glasse,* Q. C. and *Higgins,* for Mr. Rodocanachi supported the appeal.

Pearson, Q. C. and *Charles Hall,* for the official liquidator, opposed it.

The authorities referred to were:

Re The Northumberland and Durham District Banking Company, 1 Dr. & Sm. 273;
Turquand v. *Kirby,* L. Rep. 4 Eq. 123; 16 L. T. Rep. N. S. 260;
The Companies Act 1862, ss. 95, 96, 159, and 160;
General Order, 11th Nov. 1862, rule 49.

Cotton, Q. C. having been heard in reply,

Lord Justice SELWYN said:—The 95th section of the Act of Parliament confers a great variety of powers on the official liquidators, but it does not, amongst those powers, distinctly enumerate the power of entering into compromises. That is the subject of the 160th section. Then the 96th section says, "that the court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the court, and, where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him." That is giving to the court a very wide and extensive jurisdiction, and this court has been careful, and I hope always will be extremely careful, not in any degree to interfere with the discretion of the judges who are authorised to wind-up the affairs of these companies, feeling, as this court must necessarily do, that the judge, who has all the parties before him in chambers, and who has an intimate acquaintance with the affairs of the company, such as the appellate court cannot by possibility have, is in a better position to exercise discretion on matters of this sort than the Court of Appeal. At the same time the powers given by the 95th section are so wide and extensive, that it requires a *constat* in order to justify the exercise of the judge's discretion in granting them. It is a judicial discretion. In the present case the court has made an order by which, with the single exception of distributing the assets of the company, the official liquidator is authorised to perform all the duties comprised in the 95th section, and it is also intended that he should exercise the powers given by the 160th section. It is admitted that the principal, if not the only ground on which this order can be sustained, is the idea that a compromise of all the claims of this company on the Portuguese Government, that is to say, all the questions arising in the winding-up of this company, is to be made by Mr. Ball, the liquidator. Accordingly the order is in these terms, that he is to be at liberty to exercise all the powers of the 95th section of the Companies Act 1862, without the sanction or intervention of the court, except that of distributing the assets of the said company. It is intended to comprise in that, not merely those things which are nominally and expressly referred to in the 95th section, but, also the power to compromise which is conferred by the 160th section.

Now it appears to me to be unnecessary to decide many of the questions which have been argued before us, or at least several of them, because the evidence in this case appears wholly insufficient to justify an order framed as the order now before us is framed. I think, therefore, that that order must be discharged, on the simple ground that the evidence which is before us does not justify the judicial exercise of such a power as is given by the section to which I have referred. That being so, I think we are not in any degree preventing the accomplishment of the object which the Vice-Chancellor appears to have had in view, because

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it seems to me that, if the parties would have the good sense to meet together and discuss this matter, without reference to their extreme rights on either side, and, if, upon that discussion taking place, it is deemed desirable to enter into a compromise, that compromise can be effected in the manner I suggested during the argument; that is, that some person should be nominated to represent the interests of the creditors. Some other person would represent, if the official liquidator does not sufficiently represent, the interests of the shareholders, and therefore by means of two or three persons so selected the matter might be discussed in a manner which would not render it public at all, and then, in the presence of the judge, and with the sanction of the judge, certain limits might be defined within which one particular person might be authorised to enter into a compromise. It seems to be a simple mode of accomplishing the object which the parties have in view; but I think we should be going beyond the powers conferred on us by this Act of Parliament if, upon such evidence as is now before the court, we were to say that this order can be supported. I think that the result is, that the order of the 8th May, which is the order ordering the applicant to pay certain costs, should be discharged, and so much of the order of the 30th April should be discharged as orders that "the said John Ball be at liberty to exercise all the powers of the 95th section of the Companies Act 1862 without the sanction or intervention of the court, except that of distributing the assets of the said company." I think, with reference to the question of costs, the official liquidator should have his costs both here and below, and that the other parties should bear their costs, both here and below.

GIFFARD, L. J. said.—I am of opinion that this order cannot stand, and on the simple ground that there is not sufficient *constat* on which to found it. Whether the order is made under the 96th or the 160th section, I am of opinion that there must be, in order to support an order of this description, a *constat* showing that there has been that on which the court could exercise judicial discretion, and it is obvious that there is no evidence here to support the order, which has, I think, been erroneously made.

Then with respect to the course that can be adopted, this is no doubt both a difficult and a delicate matter, and a matter which may be so conducted as to be very injurious to the interests of the parties if they are determined to stand out for their extreme rights; and I cannot see why a representative of the creditors should not be appointed, and when that has been done I can see no reason why, in the presence of the judge and of the official liquidator, some proposition should not be made authorising the official liquidator to compromise within certain limits. That being so, I think that the proper order here is that suggested by my learned brother, and the reason why I think the parties below ought not to have any costs is this, that they have been standing out for their extreme rights, and asking for nothing but that. If they had come forward with some reasonable proposition I might, for one, have acted differently as regards the costs. I am certain that standing out for extreme rights in a case of this sort will only lead to the injury of all parties concerned, and will very materially affect, and prejudicially affect, their interests.

Solicitors for the official liquidator, *Mackenzie* and *Trinder*;

Solicitors for the parties appealing, *Brandon* and *Co.; Gregory, Rowcliffe*, and *Rawle*.

Saturday, July 24.

(Before Lord Justice GIFFARD.)

Re THE MASONS' HALL TAVERN COMPANY (LIMITED).

ORGILL'S CASE.

Company—Winding-up—The Companies Act 1862, *s.* 165—*Money received by a director from a promoter of the company out of a profit made by him from the company—Whether the director can be ordered to repay it as being money of the company.*

O., being asked by K., a promoter of a company, to become a director of the company, the qualification for which was the holding of fifty shares of 10*l. each, declined to do so, and then K. offered to provide the qualification for him. O., under these circumstances, consented, and N., another of the promoters, out of the profit which he made by the sale of certain property to the company, paid up fifty shares in full for O. There was no completed agreement for sale of the property by N. to the company before O. became a director. The company having been ordered to be wound-up, an application was made by the official liquidator, under sect.* 165 *of the Companies Act* 1862, *for an order that O. should repay the* 500*l. paid-up for him by N. as being money of the company retained by O.:*

Held (affirming the M. R.), that the sale by N. to the company not being repudiated, no such order could be made.

This was an appeal from the Master of the Rolls. The company was incorporated on the 12th Oct. 1865 for the purpose of purchasing the Masons' Hall Tavern, situate in Masons' Avenue, in the City of London, and some adjoining houses, Nos. 13 and 14, Basinghall-street. The company was to carry on the business of the tavern, and to erect on the premises in Basinghall-street an auction mart for the accommodation of auctioneers connected with the licensed victuallers' trade, and also for general sales and public meetings. Some arrangement was entered into for the purchase of the property in fee simple for 42,000*l.* of Mr. W. F. Nokes, who held a lease of the ground from the Masons' Company, it being intended that he should arrange with the Masons' Company for the purchase of the reversion.

The memorandum of association was signed by seven persons, one of whom was Mr. John James Orgill, an auctioneer, who signed for fifty shares. The articles of association provided that the first directors of the company should be appointed by the subscribers of the memorandum of association, and that until such appointment should be made the subscribers of the memorandum should be the directors of the company. The future qualification of a director was fixed at fifty shares. The articles did not refer to any contract for the purchase of any property as having been actually entered into, but they gave the directors power to purchase, take on lease, or otherwise acquire, any lands, buildings, hereditaments, and premises. The first meeting of directors which Mr. Orgill attended was held on the 17th Oct. 1865, and he attended many other meetings subsequently. The shares were allotted on the 19th Jan. 1866, and 100 shares were allotted to Mr. Orgill, who had applied for that number.

It appeared that Mr. Orgill was induced to become a director of the company in this way. Early in Oct. 1865 Mr. Arthur Kelday, another of the persons who subscribed the memorandum, called on Mr. Orgill, and urged him to join the then intended company. Mr. Orgill was at first unwilling to do so, but Mr. Kelday promised that his

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qualification as a director, viz., fifty shares of 10*l.* each, should be paid for by the promoters, and told him that the promoters expected to make some profit from the company, out of which profit they would pay his qualification as a director, and he thereupon consented to be a director. The whole of the 500*l.* due upon fifty of the shares allotted to Orgill was in fact afterwards paid to the company by Nokes. The other fifty shares Orgill paid for himself.

It appeared that after the company was incorporated, Nokes entered into a contract with the Masons' Company for the purchase of the reversion of the tavern for 9000*l.* The tavern was afterwards sold by the company to a Mr. Marsden for 19,000*l.*, out of which sum the 9000*l.* was paid to the Masons' Company, and the balance of 10,000*l.* was paid to Nokes for his leasehold interest, which he had previously purchased for 7500*l.*

Under the circumstances, the company having been ordered to be wound-up, a summons was taken out before the Master of the Rolls by the official liquidator, with the view of compelling Mr. Orgill to repay the 500*l.* so paid for him by Nokes, on the ground that it was money belonging to the company, which Orgill as a director could not retain.

The Master of the Rolls refused the application. His Lordship gave the following judgment: "I am of opinion that no case whatever has been made out for the court to compel Mr. Orgill to repay or to pay the 500*l.* This application is made under the 165th section of the Winding-up Act, which says, 'where in the course of the winding-up of any company it appears that any director has misapplied or retained in his own hands, or become liable or accountable for moneys of the company.' In this case Mr. Orgill has had no moneys of the company; they are moneys of a purchaser, who has paid money for the property which has been sold by the company, to be paid to the persons who sell, nor has he 'been guilty of any misfeasance or breach of trust in relation to the company,' so that the court may examine into his conduct, and so on. I think Mr. Orgill has not been guilty of any misfeasance or breach of his trust. The case is a very simple one. Either the contract which was entered into between the company and Mr. Nokes for the purpose of allowing the property to be sold to Mr. Marsden the purchaser for 19,000*l.* was at a preposterously large value, or it was not. If it was sold at a preposterously large value the application should be made against Nokes, because there is no suggestion that Mr. Orgill was instrumental in carrying the contract into effect, or that Mr Nokes got more than a reasonable price for the property sold. He was the owner of the leasehold of the Masons' Hall Tavern, and he entered into a contract to buy the reversion for 9000*l.* The company sold it to Mr. Marsden for 19,000*l.*, and they divided the 19,000*l.* in this way; 9000*l.* was paid to the Masons' Company, and 10,000*l.* to Mr. Nokes as the price of the leasehold. If that was the fair value of the leasehold, no person has a right to complain. If they gave him more than he ought to have received for it, and that was done by means of bribing one of the directors, unquestionably a very bad case would be made. But there is no evidence of the sort even suggested, and far less is it suggested that Mr. Orgill was liable in respect of it. If it was the act of all the directors, they would be just as liable as Mr. Orgill. Mr. Nokes could do what he pleased with the money he obtained, and he was at perfect liberty to pay for paid up shares for a person whom he wished to become a director of the company, if he thought it beneficial for the company to do so. Accordingly he induces Mr. Orgill, who it appears is an auctioneer, and therefore would be useful to the company, to become a director, on the promise of paying for the fifty paid up shares, which would be the qualification. If that had not been done the only effect would be that Mr. Orgill would have taken fifty shares only instead of one hundred, because he has paid upon fifty shares out of his own money, and has had fifty shares paid up with Mr. Nokes's money, but he would have been qualified as a director just as much if he had only had fifty. The whole transaction appears perfectly *bonâ fide* and regular. If there had been an express contract, "If you enable me to get a profit, I will give you something out of it," that would be a separate and distinct matter, and then you would be entitled to take the shares if you could not take the money. But all that is done is that the money is laid out in paid up shares, and 500*l.* is paid to the company, so that the company have got the money which they are now seeking to get over again on this occasion. I am of opinion that they cannot do that. I think Mr. Orgill's conduct has been perfectly straightforward, and also the conduct of Mr. Nokes. I do not perceive that there has been any concealment or anything of that kind in the matter. That Mr. Nokes made a very large profit out of the transaction is very probable; but that is a matter to be tried in a suit against him if it can be shown that he was a trustee for the company in the sense of being the agent of the company. But that would not apply to Mr. Orgill. I am of opinion therefore, that the summons must be dismissed, and that the costs of all parties should come out of the estate.

From this decision the official liquidator appealed.

Jessel, Q. C. and *Eddis*, Q. C., in support of the appeal, contended that even though the company affirmed the sale as far as Nokes was concerned, still Orgill, who was a trustee for the company, could not be allowed to retain any part of the profit made on the transaction. He became a trustee for the company with a view to the carrying out of a certain purchase, and then he received a douceur out of the purchase money. The money so received he could not be allowed to retain. The duty of Orgill as a director was to make the best bargain he could for the company, and therefore he ought to have insisted on the company paying to Nokes the 10,000*l.* less the 500*l.*, which he was to receive out of it. They referred to the following authorities:

The Madrid Bank v. *Pelly*, L. Rep. 7 Eq. 442;
Re The London and Provincial Starch Company, W. N. 1869, 98; 20 L. T. Rep. N. S. 390;
Tyrrell v. *The Bank of London*, 6 L. T. Rep. N. S. 1.

Without calling upon

Southgate, Q. C. and *Begg*, who appeared for Mr. Orgill,

Lord Justice GIFFARD said.—This is an application made under the 165th section of the Winding-up Act. It is an application against Mr. Orgill alone. Mr. Nokes is not here. The arguments that have been addressed to me, particularly by Mr. Eddis, would undoubtedly be very cogent arguments indeed if we were now considering what would be the result of a suit instituted by the company against Mr. Orgill and against Mr. Nokes for the purpose of setting aside this sale. That is not the matter now before me at all. It has been admitted very properly that in this proceeding I must take it that the company affirmed the sale. That being so, it seems to me to follow that Mr. Orgill cannot be called upon to refund this money. I can well understand that, if there was a transaction of a character which was a mere cloak for the purpose of getting a douceur, then, under the 165th section, the court would order that to be returned. That is really not the trans-

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action. The transaction is this. Mr. Orgill was an auctioneer. The promoters of the company were desirous that he should be a director, and they agreed with him that he should become a director, he declining to become a director unless they qualified him. That was the substantial agreement in respect of which he became a director, and, becoming a director, he could have maintained an action or proceeding for an indemnity against the parties so agreeing with him. That was the antecedent obligation on the part of those persons, and among others on the part of Mr. Nokes. True it is he says he understood that he was to be paid out of the profits which the promoters might make, and that would be a most sufficient reason for setting aside the contract; but, when you get the contract affirmed, of course, the contract being affirmed, I must assume it was a fair contract, and for a fair price, and I think it would be going far beyond any decided case if I held otherwise. I am not at all inclined to restrict the case of *Tyrrell* v. *Bank of London*, or any cases of that class. On the contrary, I think they lay down a most wholesome doctrine, that a trustee or agent shall not make profit at the expense of the *cestui que trust*. But where the transaction on the part of Nokes is an antecedent obligation to Orgill, Nokes selling to the company, and the company affirming that sale, it must be taken that that is a sale which cannot now be disputed. Then Nokes out of that money, not giving a douceur to Orgill, but paying to Orgill a sum of money which he (Nokes) is bound in law to pay him, I do not think under those circumstances Mr. Orgill can be called upon to refund this money. I agree therefore in opinion with the Master of the Rolls, and this application must be refused with costs.

I wish it to be distinctly understood that I by no means say that it may not be a proper case for the company to institute a suit to set aside the whole transaction. In a suit of that description the considerations would be wholly different from what they are now. As to the costs, the rule we now adopt is this. We make a direct order on the official liquidator for payment of costs, and leave him to apply to the judge of the court below to give him such an indemnity as the judge thinks fit.

Solicitors for the official liquidator, *Mercer* and *Mercer*.

Solicitors for Mr. Orgill, *Mackeson* and *Goldring*.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Friday, June 4.

Re KEMPTNER'S MORTGAGE.

Partner—Bills drawn for share in partnership—Subsequent failure—Insolvency at date of bills—General and separate creditors.

K., a member of a Japan firm of merchants, being about to go to England, drew bills in three sets, as representing his share, took one set to New York, and died there. The bills so taken by K. were lost, and another set were indorsed to abide the decision of the court on a question raised in consequence of the subsequent failure of the firm, as between the general and separate creditors of K.:

Held, that it being clear on the evidence that the firm was insolvent at the date of the bills, they belonged to the estate of the firm.

This was a petition for payment out of court of a sum of 4000*l.*, represented by certain bills of exchange, endorsed for the purpose of abiding the decision of the court, and paid in under the provisions of the Trustee Relief Act.

In this case, L. Kemptner being a member of a mercantile firm carrying on business in Japan, being about to come to England, in Feb. 1867, and there being at that time a sum of 4000*l.* standing to his account in the partnership books, procured bills from the firm, in three sets, to that amount. The first set being duly indorsed, were taken possession of by Kemptner himself; he took them to New York with him, and there died, and they were not forthcoming, and the second set were not indorsed until the May following. The firm failed in the end of 1867, and the question arose as between private creditors of Kemptner and his executors, whether his estate could be credited with the amount of the bills. Evidence was adduced to show that a firm of Smith and Co., connected with Kemptner's firm in business, was, at the time the bills were given, liable to half the amount of a loss of 30,000*l.* accrued upon certain silk shipments, and that, therefore, the Japan firm were then sufficiently solvent to meet the bills on Kemptner's account. On the other hand it was also alleged that Smith and Co. were unable to meet the 15,000*l.* to which they were liable, and that, therefore, the loss falling on Kemptner's firm, that firm was, in fact, at the time the bills were given, unable to meet the amount. The firm failed at the end of 1867 for 100,000*l.* and upwards. A petition was presented by creditors of Kemptner's firm, claiming payment of the bills to them.

C. Locock Webb appeared in support of the petition, and insisted that the firm of which Kemptner was a member being in fact insolvent at the time the bills were given, they belonged to the general creditors, and not to Kemptner's estate.

Lindley, for the representatives of Kemptner, contended that if at the date of the bills the assets of the firm were sufficient to meet them, it mattered nothing what subsequently took place. It appeared in evidence that 15,000*l.* was the only liability, and that on the balance of account there was sufficient to meet the bills.

Ex parte Kleck, 1 Mad. 346.

Stirling for the trustees.

The VICE-CHANCELLOR (without hearing a reply).—These bills were drawn on the assumption that Kemptner was entitled to sufficient to meet them. No doubt the first set were not forthcoming, and the second set not indorsed; but it was ascertained in the latter end of 1867 that in 1866 Kemptner's firm was insolvent, and Kemptner being no longer a free agent, the giving the bills, if that was so, was a fraud on the firm of which he was a member. The bills were subsequently endorsed by arrangement, in order that the money might be brought into account to abide the decision of the court, and I have to decide whether Kemptner by this transaction became entitled to the 4000*l.*, because his executors, of course, have no greater right than he himself had. It is admitted by Mr. Lindley that if the transaction was fraudulent, the right to receive the money by the representatives of Kemptner cannot exist. Now was it a fraud or not? I should be slow to come to the conclusion that Kemptner intended to commit a fraud, but I must look at the transaction, and the position of the parties when it took place. Now, at that time, the firm was insolvent, because, although there was 50,000dols. available capital, it is admitted that three or four months after there was a loss of 30,000*l.*, although under an arrangement with Messrs. Smith and Co., they were to bear half the loss, but in case they could not

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meet it, the whole would fall on Kemptner's firm. Now Smith and Co. were unable to meet it, and the whole loss, therefore, fell on the Japan firm. That took place in Aug. 1866, and it was well known in Feb. 1867, when the bills were drawn, that there was a great improbability of there being assets to meet them, and whether that was intended as a fraud or not made no difference. But besides that there is the clear breach of trust on this transaction, because, as it could only proceed upon the supposition of the solvency of the firm, at the end of the same year, it was insolvent for 101,100*l.*, the only assets being 7000*l.*, and that on no new undertaking or unforeseen contingency, for it is admitted that the transaction on which the loss occurred was entered into before the bills were given. Upon what principle, then, a partner who was joined with the others in a mercantile dealing, which may end in a ruinous loss, can be held entitled as against the general creditors under such circumstances as these, I cannot imagine. In order to defeat the right of Kemptner's representatives, the money not having been received, there must be a stoppage *in transitu*, the non-receipt being merely an accident. Under these circumstances, the court will be bound to prevent such a grossly improper thing being done. Whether knowledge can be imputed to Kemptner and his partners or not, it is an attempt to take money which belongs to the creditors, when the representatives of Kemptner can only resort to what remains after satisfying them. The bills not having been paid, the creditors had a right to follow them. It frequently happens that the court has possession of such securities; and whenever it has, it is its duty to say that the proceeds shall go, not to a separate creditor like Kemptner, but to remain part of the assets of the firm of which he was a member.

July 20 and 21.

COUTTS *v.* ACKWORTH.

Voluntary appointment—Power of revocation.

M. H. having a general power of appointment by deed or will under her father's will over 3000l. to be raised out of real estate, and being separated from her husband, and lodging with her brother-in-law A., and being threatened with a suit by her son-in-law B., whose wife (her only child) was dead, wished to put the 3000l. out of B.'s power. A. employed his cousin, a solicitor, who prepared, and M. H. executed, a deed which was an absolute appointment of the 3000l. (subject to her life interest) to A. M. H.'s husband died, and she married again, and, as it appeared by evidence, considering that she had appointed the 3000l. by will, A. was applied to for such will, but he said that his wife had it, and it was never produced until after M. H.'s death, which took place little more than a year after, she having by will under a power of revocation contained in the settlement, revoked part of the trusts, and given the bulk of the 3000l. to C., and the rest to her second husband. A. applied for and kept the settlement for some weeks, and it appeared in a bill of costs of his solicitor that he was advised to keep quiet about the appointment. On bill filed to set aside the appointment in favour of A., decree with costs.

This bill was filed to set aside a deed of appointment dated the 1st Aug. 1853, and for the delivery up of the same to be cancelled. The facts were these:—William Edmunds, by his will, dated the 18th June 1842, gave to Joseph Ackworth (deceased), the defendant, John Thurstain, and the Rev. William Pope (deceased) certain leaseholds, whereof Joseph Ackworth was tenant from year to year, and all his real and personal estates upon trust to pay his debts, funeral and testamentary expenses, and interest on a certain mortgage on the property in the occupation of Joseph Ackworth, and an annuity of 400*l.* a year to his wife. And after her decease upon trust to raise 3000*l.*, and stand possessed of the same upon trust to allow it to remain, on the security of the leaseholds, at 4*l.* per cent., or invest it in the public funds, or upon Government or real securities, with power to vary securities. And to stand possessed thereof upon trust to pay or permit his (the testator's) daughter, Mercy Harvey, to receive the dividends for her life, for her separate use, upon trust as to such sum of 3000*l.*, or the stocks, funds, and securities, in or upon which the same should be invested, and the interest, dividends, and annual proceeds thereof, for such persons upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisions, and declarations as the said Mercy Harvey, whether covert or sole, should by any deed or deeds, with or without power of revocation and new appointment, to be sealed and delivered by her in the presence of two or more credible witnesses, or by her last will and testament or by codicil thereto, from time to time, appoint. And in default of appointment upon trust for all such children of his said daughter, as, being sons, should attain twenty-one, or, being daughters, should attain that age, or marry before such age, with power to his said daughter Mercy Harvey, at any time after his decease, to appoint any part of the income of the said 3000*l.* unto any after-taken husband, for his life. And in case his said daughter had no child who should live to attain a vested interest in the said sum of 3000*l.*, then to his (the testator's) next of kin, according to the statute. The testator died on the 23rd Oct. 1852, and his widow was also dead, but the 3000*l.* had never been raised. Mercy Harvey had a daughter who attained twenty-one and married John Benstead, with whom she lived on very bad terms, and died in 1853 without children, and Mercy Harvey never had any other child. Mercy Harvey lived separate from her husband, and with her daughter till her death, when she lodged with Joseph Ackworth, her brother-in-law, a tallow chandler, at Chatham; but disputes arising, she left after a short time, but still lived at Chatham. During the time that Mercy Harvey lived at Joseph Ackworth's, John Benstead (her son-in-law), threatened a suit for the administration of the trust-fund, and she expressed her determination that he should never have anything that she could dispose of. The bill then alleged that Joseph Ackworth advised her to make a will, and she expressed her intention to do so, either in his favour, or that of his children, Joseph William Ackworth, John Ackworth, and Sarah Elizabeth Plummer, and remained under the impression that she had executed a will. That Joseph Ackworth undertook to get a will prepared, and applied to his cousin, George Ackworth, a solicitor at Rochester, who prepared a deed absolutely and irrevocably appointing the 3000*l.* after her decease to Joseph Ackworth, and the deed now sought to be set aside was executed on the 1st Aug. 1853, it being prepared by George Ackworth, and he and his son witnessed it. The bill alleged that this instrument was never explained to Mercy Harvey, and she never knew that it was an irrevocable appointment, but thought it was a will, and never had any other professional advice. All she knew was that she was preventing her son-in-law from getting any of the money.

This deed recited the will of Wiliam Edmunds, and his death, and it was witnessed that in execution of the power and all other powers enabling her in that behalf, she did, by that writing, in the presence of the two credible persons whose names appeared as witnesses to the execution thereof,

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absolutely and irrevocably direct and appoint that Joseph Ackworth, John Thurstain, and William Pope, or the survivors or survivor of them, his or their executors, administrators, and assigns, or other the trustees or trustee for the time being of the will of the said William Edmunds, should from time to time, and at all times thereafter, stand possessed of and be interested in the said sum of 3000*l.*, directed to be raised by the said will after the decease of his said wife, and the stock, funds, and securities upon which the same should be invested, and the dividends, interest, and annual produce thereof, subject to the life interest of the said Mercy Harvey therein, in trust for the said Joseph Ackworth, his executors, administrators, and assigns and for no other trust, interest, or purpose whatsoever.

This deed was taken possession of by Joseph Ackworth, and he kept it until after Mercy Harvey's death, and she never afterwards saw or had a copy of it, the costs of preparing it being paid by Joseph Ackworth. In 1858 William Harvey died and William Pope in 1861, no new trustee being appointed. In the latter part of 1860 Mercy Harvey became engaged to the defendant James Russell Brenchley, and on the 8th April 1861 a deed-poll was prepared, reciting the will, intended marriage, &c., and that Mercy Harvey was desirous of exercising her power over the 3000*l.*, and without referring to the deed of 1st Aug. 1853; it was witnessed that, in execution of the power and of every other power enabling her in that behalf, she, the said Mercy Harvey, absolutely revoked all deeds executed by her with respect to the 3000*l.*, and by virtue of the said power she, the said Mercy Harvey, did (in the usual form of words) absolutely and irrevocably appoint that in case the said marriage took effect, the trustees of the said will should, after the decease of the said Mercy Harvey, stand possessed of the income of the 3000*l.* upon trust to pay such income to James Russell Brenchley for life, and after the decease of the survivor to pay and divide the said sum of 3000*l.* equally between Joseph William Ackworth and John Ackworth and Sarah Elizabeth Plummer, their executors, administrators, and assigns, as tenants in common. Then followed a general power of revocation.

The marriage took place in April 1861, and before the deed was prepared James Ward, the solicitor employed, asked whether she had executed any other deed, and she said she had made a will in favour of Joseph Ackworth's three children, and she asked if it was necessary to get it, to which he replied no, because the deed overrode it. Joseph Ackworth was then applied to, and without stating that it was not a will, he replied that his wife had it, and she refused to give it up; and Mercy Brenchley having told her husband no further steps were taken, and Joseph Ackworth and John Thurstain were served with notice of the deed poll or settlement, and Joseph Ackworth asking to see it, it was sent to him, and he kept it for three or four weeks, and did not return it until applied to several times, but never mentioned the irrevocable nature of the deed. In Feb. 1862, Mercy Brenchley made a will, and, reciting the power, revoked the trusts of the deed poll, and appointed 1000*l.* to her husband, and 2000*l.* to the plaintiff, and in the event of his predeceasing her, to his executors and administrators. Mercy Brenchley died on the 22nd July 1862, and the plaintiff proved her will, of which Joseph Ackworth complained, but never produced the irrevocable deed, although he procured Thurstain to concur in the surrender of the lease, and a new one was granted to him alone.

On the death of Mary Brenchley, the plaintiff's solicitors applied to Messrs. Ackworth, and for the first time heard of the deed of Aug. 1851, and the *plaintiff* becoming bankrupt in 1863, that was superseded in 1867; Joseph Ackworth having died in Dec. 1866, made his will and appointed Charles Buyat executor, and gave all his property to his children equally. A correspondence took place, resulting in this bill being filed in Feb. 1868, praying that the deed of Aug. 1853 might be set aside, and a declaration that the trust fund was well appointed by the deed poll of 1861, and that James Russell Brenchley was put to his election between the life estate under the deed, and the 1000*l.* under the will; and that the executors of Joseph Ackworth might make good the trust fund out of his assets, with interest from the decease of Mercy Brehchley, or for the administration of his estate, and if necessary for the administration of the estate of William Edmunds. Answers were put in, and there was a great deal of evidence, and amongst the documents a bill of costs of Messrs. Ackworth, in which was an item, advising Joseph Ackworth to keep quiet about the deed of Aug. 1853.

Glasse, Q. C., and *Bagshawe*, for the plaintiff, contended that the conduct of Joseph Ackworth in concealing the deed, not disclosing its existence or true nature, under advice, as appeared by the bill of costs, although he had notice of the settlement, was alone sufficient to render it void. Moreover, Mrs Harvey was deceived as to its effect, it was never explained to her, she thought it a will, and that the settlement overrode it; and she had no professional assistance, but from a relative of the appointee paid by him. The transaction was not fair or understood properly by the appointor:

Cooke v. *Lamotte*, 15 Beav. 240;
Toker v. *Toker*, 31 Ibid. 629;
Phillipson v. *Kerry*, 32 Ibid. 628;
Huguenin v. *Baseley*, 14 Ves. 273.

Fooks, Q. C., and *Bevir*, for Mr. Brenchley, in the same interest as the plaintiff, took the same line of argument.

Cotton, Q. C. and *A. E. Miller*, for the defendant, Joseph Ackworth, insisted that the object of the appointor being plain, viz., to divest herself of all power over the fund, for the purpose of disappointing her husband and son-in-law, and being a person of full age, it would take very strong proof of being imposed upon to entitle the plaintiff to relief. She had the amplest opportunity of knowing what she was doing. She must have known the nature of the deed, being a middle-aged woman and deliberately doing the act. Joseph Ackworth was not bound to disclose what she had done; for she made the settlement knowing that she had before put the property out of her power, and there was no proof of unfair advantage. The mere fact of no power of revocation being reserved was quite insufficient to make the deed void; no case went to that:

Hunter v. *Atkins*, 3 M. & K. 113.

Cole, Q. C. and *Dixon*, for the trustee, took no part.

The VICE-CHANCELLOR (after stating the facts).—I assume that Joseph Ackworth was a man of irreproachable character, and the evident object of this deed was to put the 3000*l.* out of the lady's own control, that she might not be subject to the importunities of her husband and son-in-law. She does not appear even to have employed a solicitor; and being a resident in Joseph Ackworth's house for six weeks, no doubt she was under some degree of influence; but the case does not depend upon that, although that circumstance is not entirely to be disregarded. However, George Ackworth, a cousin of Joseph Ackworth, and practising at Rochester, took instructions for this deed, and on the evidence I come to the conclusion that those instructions were given substantially by Joseph

Ackworth; at all events, if they were given by her, she had only an imperfect apprehension of her rights and position. I consider that, under such circumstances, George Ackworth was bound to regard himself as acting for her, although no doubt he acted for Joseph Ackworth, who paid his bill; and it was his imperative duty to see that she was duly protected, and retained a proper control over the capital of that which was all the property she had, and of which she was the absolute mistress, being tenant for life, with power of appointment over the capital, having only to call on the trustees to hand it over to her bodily, whenever she thought fit. It produced her 120*l.* a year. She had an infirm husband, who was probably troublesome to her; and events might arise with respect to herself and other relations in life might render it necessary to use some portion of the capital to meet the exigency; and it did arise when she was afflicted by that most dreadful disease cancer. It is obvious that she ought to have been left in possession of the capital to dispose of for her own purposes; she was only fifty-three, not living with her husband, whether from her own fault is not material. In all probability if she survived the husband, as her first marriage was unfortunate, she would try a second, and for that reason alone she should have been allowed to retain the control over this property. It was said that a gift to Joseph Ackworth was in fact a gift to his wife and children, I cannot accede to that proposition, for he had the absolute control, and could sell the reversion, and cut down Mrs. Harvey to a life estate, and if he became bankrupt it would pass to his assignees, and all this was in favour of a man who I must consider as a stranger in blood. It was the duty of George Ackworth to put before her the fact that in case of illness or other exigency she could not deal with this money without applying to Joseph Ackworth, and there is not an iota of evidence to show that any such thing was said. There is, indeed, evidence of Mrs. Plommel that she was told that the instrument was irrevocable, and that the property would be Joseph Ackworth's afterwards; but I do not believe that she understood what that meant, and I think she ought to have been informed. I bring this within that class of cases with respect to which Lord Eldon observed that a person ought not to be allowed to execute such a deed. In *Toker* v. *Toker* (*sup.*), the solicitor asked whether there ought not to be a power of revocation reserved, when the lady refused to have it inserted. In that case she was seventy-four years old, here fifty-three; there there was a deliberate intention, and moreover the person employed was the family solicitor, and yet the deed was set aside. This poor woman had only the solicitor of the man who was to benefit by the deed to advise, and her position was none the better for his advice, for applying the principle of the authorities, he should have left the capital under her own control, her only object being to be protected against her husband and son-in-law. I consider that I am bound to come to the conclusion that the insertion of a power of revocation was deliberately abstained from, because it was the object of the solicitor and appointee, finally and for ever to secure possession of the 3000*l.* to Joseph Ackworth after her death, whereas she ought never to have been permitted to execute such a deed which was short sighted and improvident. What happened? Her husband died, which entirely altered her position, and she was open to contract a new relation, and three years after she married again and said she believed she had made a will. It is difficult now to say whether she knew that a will could not be upon parchment, but she was convinced that whether a will or not, she had the control during her life. Mr. Ward's evidence was that she considered she had made a will, and that she wished to provide for Joseph Ackworth's children; and that Ward told her it was unnecessary to consider what she had done by the will, because the deed overrode it. Then came the settlement on her second marriage; and during all this time Joseph Ackworth was alive, and died in 1866. He was in possession of a deed which it is obvious she did not know the effect of, but he did; and that on her second marriage she would make some provision for her husband; and was it decent or proper for him to stand by and allow her to make a settlement which, under the circumstances, was not worth the parchment it was written on. There is all but proof that he had got a deed which he dare not produce, and which was not in conformity with the intention of the appointor; she was deprived of the dominion and that was the reason why it never was produced till after her death. There was an attempt to show that her habits were intemperate, but it entirely failed, and there is evidence that she lived in domestic happiness till her death; and then this deed was brought forward, and the entries in the bills of costs of the firm who advised Joseph Ackworth show that he was advised to keep quiet in possession of a deed which gave him absolute dominion, and he did keep quiet until October; and I am satisfied that he knew he had taken improper advantage of this lady by getting all the property she had in the world. The plaintiff was her spiritual pastor, and claims under a will admitted to probate, and under a solemn disposition, the probate being conclusive on this court. The settlement contained a power of revocation, and Mr. Ward properly discharging his duty, and by the will she revoked the appointment in favour of her nephews and nieces. The second husband was abominably treated, and, I suppose, had not the means of asserting his rights, nor was the plaintiff of a class of men abounding in wealth, and Joseph Ackworth having lent him 100*l.* sued him for it; he was made bankrupt, but that was superseded on payment of the only creditor, and must be regarded as if it never existed, and he as the lady's legal personal representative, asks that this deed may be set aside and delivered up. I am clearly of opinion that he is entitled to what he asks. As to the concise statement, it contains matter proved to be untrue, of the most gross and unwarrantable description, and moreover has been fully answered, and could not advance the defendant's case in the least; and as clearly appears by the counsel's note at the foot, was only for the purpose of intimidation, and to force the plaintiff to abandon the suit. Those filing it must pay all the costs occasioned by it. With regard to the authorities, they all proceed on the principle laid down in *Huguenin* v. *Bazeley* (*sup.*), which is this, that where there is a voluntary provision made of a fund in favour of a donee, whether by appointment, settlement, or in any other form, the burden is thrown on such donee to show that the transaction was fair, proper, and well understood by the donor. Here it was unfair, it deprived her of the control of all her property; it never was explained, for if it had been the donee would have been discharged; and upon that it is hardly necessary to refer to the authorities. *Huguenin* v. *Bazeley* (*sup.*) laid down the rule, and *Cook* v. *Lamotte*, *Andrews* v. *Emsworth*, and *Forshaw* v. *Welsby*, carried it much further, because they show that when on the execution of a voluntary deed the circumstances are such that the donor ought to have been advised to retain a power of revocation, and it was not done, that is fatal to the deed. Lord Eldon considered that, although there might be particular circumstances rendering it invalid, he did not rest his decision on that ground alone: (See White and Tudor's Leading Cas. 425, referring to 14 Ves. 296.) All these obser-

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vations are applicable here where a woman in middle life was surprised into the execution of a deed whereby she was deprived of her property, which would have been obviated by simply inserting a power of revocation. If I had the power I would lay it down that wherever there is a voluntary gift of a material part of a person's property, unless as in *Toker* v. *Toker* the donor refuses to have a power of revocation inserted, it is the duty of the solicitor to insert it, and to refuse to prepare such an instrument unless a reasonable protection is afforded to the donor by a power of altering what he has done. An omission of such a power is almost conclusive for setting it aside. I consider that I need not go further than the cases warrant me; but, if it were necessary, I should have no hesitation in doing so in this case, because it is impossible for any case more clearly to illustrate the principle that, unless it is distinctly proved that there was a decided intention not to allow the insertion of such a clause, it was the duty of the solicitor to insist either that there should be a general power of appointment or a power of revocation. This deed, therefore, is open to all the objections that ought to have been provided against; it is therefore invalid, and must be set aside, as an unfair attempt to gain absolute possession of this property, and delivered up to be cancelled. I see no ground on which I can relieve those who are in the wrong and attempted to sustain the claim, from the consequences, for, instead of coming to some reasonable terms, they insisted on their extreme rights, and resisted a very proper demand, and must pay the costs of the suit. There must be a declaration of charge on the property for 3000*l.*, with interest at 4*l.* per cent. from the death of Mrs. Brenchley, within six months.

Solicitors for the plaintiffs, *Learoyd* and *Bleby*.

Solicitor for the husband, *Scott Lawson*.

Solicitor for the defendants, *Steinberg*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

Tuesday, June 29.

BARNES v. WOOD.

Vendor and purchaser—Acknowledgment by married woman—Specific performance.

B. contracted to purchase from S. a freehold property for which an agreement was entered into between them, and a deposit paid. It turned out that S. was not entitled in fee, but only to an estate pur auter vie, with remainder to the use of him and his wife. The wife's acknowledgment to the conveyance being necessary, this formality could not be completed, the sale was therefore considered as abandoned, and the deposit returned.

The property was subsequently sold to W., and the conveyance duly acknowledged by the wife.

On bill filed by S. for a specific performance of this agreement, and a declaration that W. was a trustee for B.

Held that he was so, and decree for specific performance made as to such interest as S. had in the property, and reference as to the amount of compensation to plaintiff for the interest not conveyed to him.

This was a bill filed by Benjamin Barnes against John Wood and John Stringer for the specific performance of an agreement of the 6th Feb. 1868, whereby Barnes agreed to purchase, and Stringer to sell, a freehold piece of land for 700*l.*, and a deposit of 50*l.* was paid by Barnes to Stringer in part payment of the purchase money. It was assumed that the vendor was the owner in fee. It turned out, however, that he was only entitled to an estate *pur auter vie* with remainder to the use of himself and Betty his wife in her right in fee simple. It was necessary therefore that Mrs. Stringer should be a party to the conveyance by acknowledging it as a *feme covert*. For some reason which did not sufficiently appear this could not be obtained, and on the 20th April the deposit money was left at the plaintiff's house. The property was subsequently sold to the defendant. The conveyance to him was duly executed and acknowledged in due form by Mrs. Stringer.

The bill stated these circumstances, and it prayed a declaration that the land was purchased by and conveyed to the defendant subject in equity to the plaintiff's contract of Feb. 1868 for the purchase of it, and that the defendant Wood held the same bound by that contract to the extent of the fee simple, or if not, then to the extent of such estate and interest therein as Stringer was able to sell, and for an adequate compensation to be made to the plaintiff for such estate and interest therein as Stringer could not convey.

Amphlett, Q.C. and *W. H. G. Bagshawe*, for the plaintiff, urged that it was proved that the defendant Wood had knowledge of the contemplated sale to the plaintiff, and the agreement to that effect. That he therefore had obtained the land collusively and with notice, and held it in equity as a trustee for the plaintiff. That he was clearly entitled to such interest in the property as Stringer was enabled to convey.

E. E. Kay, Q.C. and *G. Williamson*, for the defendant Wood, contended that there was no binding agreement between the plaintiff and Stringer, and that specific performance of such an agreement as had been entered into could not have been enforced against Stringer and wife. That he (Wood) was therefore entitled under his conveyance to the property in question.

The VICE-CHANCELLOR said that although Mrs. Stringer was not bound as to her remainder in fee. John Stringer was bound to convey to the plaintiff all the interest he possessed in the premises in question, and there would therefore be a decree against the defendant Wood for a conveyance of that interest with costs. There must also be a reference to chambers to ascertain the amount of compensation to be paid to plaintiff for the interest not conveyed to him.

Solicitors: *Few* and *Co.*; *Williamson* and *Co.*

Common Law Courts.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Saturday, May 29.

HARVEY AND OTHERS v. THE MAYOR AND CORPORATION OF LYME REGIS.

Harbour dues—Local Harbour Act (1 & 2 *Geo.* 4, *c.* 99)—*Construction of—Goods "landed within harbour"—What amounts to a "landing"—Tolls payable thereon.*

By their local Harbour Act (1 & 2 *Geo.* 4, *c.* 99) *the defendants are entitled to levy tolls on goods, &c., "landed," or "shipped within the cobb or harbour" of Lyme Regis. Cargoes of limestone, which were dug at the plaintiffs' quarries, situate on the shore to the westward of the harbour, were brought thence coastwise in boats into the harbour, and, by leave of the*

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defendants, were shot out from the boats into the water at a spot within the harbour between high and low water mark, there to remain until they should be re-shipped for exportation; and it was

Held (dissentiente Channell, B.) by the majority of the Court of Exchequer (Kelly, C.B. and Bramwell and Cleasby, BB.) that the depositing the limestone at the spot in question, in the manner above-mentioned was not a "landing" of the same, within the meaning of the Local Harbour Act, so as to entitle the defendants to levy a toll thereupon as upon goods "landed" within the cobb or harbour.

Leak and another (*qui tam*) *v.* Howel and another, *Cro. Eliz.* 533, *cited and distinguished.*

This was an action of replevin brought to recover damages for an alleged distress for nonpayment of harbour dues, alleged to be due to the defendants. And the declaration charged that the defendants, in or near a certain harbour or cobb called the harbour or cobb of Lyme Regis, took the goods of the plaintiffs; that is to say, a boat containing three tons of stone or thereabouts, and unjustly detained the same against sureties and pledger until, &c., with an allegation of damage thereby to the plaintiffs.

The defendants pleaded: 1. Not guilty. 2. To so much of the declaration as charged the taking and detaining the boat of the plaintiffs, and the causes of action in respect thereof, they said that by a certain Act of Parliament (1 & 2 Geo. 4, c. 99) for improving and maintaining the harbour, pier, or cobb, at the port or borough of Lyme Regis, after reciting (amongst other things) that certain ancient cobb duties therein referred to were insufficient for maintaining the said pier or cobb in good repair, and that it was expedient that more effectual provision should be made for maintaining the same, it was enacted that from and after the passing of the said Act it should and might be lawful to and for the mayor and burgesses of the said borough of Lyme Regis, and their successors for the time being, or such person or persons as he should appoint; and they were thereby authorised, from time to time and at all times, to ask and demand, take, receive, collect, recover and levy upon all and every of the ships, vessels, and boats, of whatsoever description, which should come into the said cobb or harbour, and for all goods, wares, or merchandise, and other things *landed or shipped within the said cobb or harbour* as aforesaid, the several rates and duties set forth in the schedules to the said Act, marked A. and B. respectively. And it was further enacted by the 5th section of the said Act, that it should and might be lawful for the said mayor and burgesses, at the times and in manner provided by the said section to appoint two sufficient persons, inhabitants of the said borough, collectors or receivers of the duties aforesaid, and such other officers as might be required for carrying into effect the purposes and provisions of the said Act. And it was further enacted, by sect. 9 of the said Act, that it should and might be lawful for the said mayor and burgesses and their successors, for the time being, by any one of themselves, or for the said collector or collectors, or any other of their officers for the time being, *to go on board any ship, hoy, barque, or other vessel that should come into the said cobb or harbour, to demand, collect, and receive the said duties which by the aforesaid Act should be due and payable, and upon non-payment thereof to take and distrain every such ship or vessel and all her tackle, apparel, or furniture thereunto belonging, or any part thereof, and also all or any part of the goods, wares, and merchandise chargeable with the said duties, and the same to detain and keep until he or they should be satisfied and paid the said duties, sum and sums of money, and every one of them.* And the defendants avow the taking of the said boat in the said place, for that at the time of the taking of the said boat of the plaintiffs, *the same was within the said cobb or harbour*, and the plaintiffs had just before the taking of the said boat unloaded *and landed therefrom, being within the cobb or harbour*, and from and off of the said barque certain goods, &c., to wit, three tons of limestone, whereby the plaintiffs became and were chargeable with the rates and duties in respect of the same provided by the said Act and specified in the schedule (B) thereto annexed —to wit, certain duties at the rate of 6*d.* per ton in respect of the said limestone, and thereupon the defendants, by their officers, duly and in pursuance of the said Act appointed in that behalf, in pursuance of the aforesaid powers in that behalf, demanded payment of the said duties from the plaintiffs, and upon non-payment thereof took and detained the said boat, as they lawfully might, &c., as a distress for and in respect of the said rates and duties, &c.

The plaintiffs pleaded in bar: 1. Joining issue on the defendants' plea. 2. As to the defendants' avowing that at the time of the taking of the boat, *the same was not within the cobb or harbour as alleged.* 3. For a second plea to the said avowry, denying the unloading and landing from the said boat within the said cobb or harbour goods, wares, and merchandise as alleged. 4. For a third plea to the said avowry, denying the plaintiffs' chargeability with the rates and duties provided by the said Act of Parliament. 5. And for a fourth plea to the said avowry, denial of any demand by the defendants of payment of the said duties from the plaintiffs before the taking and detaining of the said boat.

The defendants replied taking and joining issue on each of the plaintiffs' pleas respectively.

At the trial before Byles, J. and a special jury, at the last Spring Assizes at Dorchester, the following appeared to be the facts of the case.

The plaintiffs are cement merchants residing at Weymouth, and are tenants of certain quarries or beds of blue lias or limestone, situate on the foreshore, and in the adjoining cliffs, about half a mile westward of the Lyme Cobb or harbour. It appeared that the plaintiffs, as well as prior tenants of these quarries, had permission from the corporation to deposit the limestone, when dug out of the quarries, at a certain spot within the harbour, the stone being conveyed from the quarries by boats belonging to the plaintiffs into the harbour, and there shot from the boats into the water at the spot appointed as the depôt for it. The spot in question is between high and low water mark, so that at certain times of the day the heaps of stone were covered by the tide, and at other times they were left quite dry, or partially so; and the spot in question was found by the jury to be within the Cobb or harbour. The stone was deposited there in order and preparatory to its being reshipped on board vessels and exported to different parts of the Kingdom, on which exportation an export duty, as provided by the Cobb Act mentioned in the declaration, would be payable and paid.

Some disputes having arisen last year between the plaintiffs and defendants as to the payment of certain harbour dues with respect to limestone shipped direct from the quarries, to which it is not necessary now further to refer, the defendants gave notice to the plaintiffs of their intention to claim payment of a duty at the rate of 6*d.* a ton on every ton of limestone brought by boats from the plaintiffs quarries, and deposited at the depot within the cobb, as upon goods "landed" at the said cobb or harbour. Accordingly the defendants demanded payment of the said duties upon the occasion in question, and upon the refusal of the plaintiffs to pay the same, they distrained the boat of the plain-

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tiffs in the declaration mentioned; and thence arose the present action; the question now in issue being (the jury having found that the depôt where the stone was placed was within the cobb or harbour), whether or not the placing of the stones at such depôt in the way and for the purpose abovementioned is or not a "landing" of the same within the Harbour Act (1 & 2 Geo. 4, c. 99), so as to render the plaintiffs liable to pay the duties imposed by such Act upon goods "landed." At the trial, upon the above finding of the jury, a verdict was entered for the defendants upon all the issues, leave being reserved to the plaintiffs to move to set the same aside, and to enter it for themselves on points of law.

A rule *nisi* was accordingly afterwards moved for and obtained by *Kingdon*, Q. C. for the plaintiffs in Easter Term last to set aside the defendants' verdict, and to enter the verdict for the plaintiffs for 4*l.* 4*s.*, pursuant to leave reserved, on the ground that the goods, in respect of which the seizure mentioned in the section was made, were not landed within the meaning of the Act of Parliament (1 & 2 Geo. 4, c. 99), so as to render them liable to the duties imposed by the said Act.

H. T. Cole, Q. C., *Archibald*, and *Bullen*, for the defendants, now showed cause.—The question, and the only question in the case is, whether the depôts at which the limestones, in respect of which the seizure and replevin took place, were landed, was "within the cobb or harbour," and that question the jury have found in favour of the defendants. It is contended *contra*, that it was not a "landing" within the meaning of the Act, because the stones were brought to the "depôts" for a temporary purpose only, namely, to await reshipment to some place outside the port. But the defendants do not and are not bound to know anything of such purpose; it being enough in order to make the tolls payable, that the goods were landed. [KELLY, C. B.—If the stones had been brought in the boat at high water and transferred to a vessel, without either the boat or the stones touching the ground, would that have been a "landing" within the Act?] It is contended that it clearly would have been. Here the stone was brought and thrown out at this spot within the harbour, between high and low water-mark, by leave of the corporation. In the case of *Leak and another* (*qui tam*) *v. Howel and another*, Cro. Eliz. 533, which was an action for penalties under the statute of 1 Eliz. c. 11, s. 2, forbidding, for the protection of the revenue, persons to take up, discharge, and lay on land goods, except between seven a.m. and four p.m. under the penalty of forfeiture, it was held that the forfeiture was not incurred where goods were discharged into lighters at noon, brought to the seashore, "*aquâ ab inde refluxâ*" (and so below high water mark), at two p.m., and the greater part put on land before four p.m., showing that all the goods were "laid on land" before four, although partly unladen after that hour. And in Hale, De Portibus Maris, "concerning customs" Hargreave's Tracts, 224—228, that case is considered by Sir M. Hale to have so decided. [KELLY, C. B.—Is that case in Cro. Eliz. in the defendants' favour when it comes to be looked at?] To this extent, that there is no difference between "laying on land" and "landed." The term "landed" in the Act must be construed according to the nature of the particular goods or cargo. It has not one absolutely unbending meaning; for example, if grain, or other perishable goods were left on the shore, or thrown into the sea, that might not be a "landing" of them within the Act; but those stones were as much "landed" for all practical purposes, as if they had been placed on the wall of the cobb or pier, and neither the spot nor the manner of discharging them was unusual or improper. If goods are placed so that the owner is enabled to get at them and dispose of them, then they are "landed." [BRAMWELL, B.—Is this a landing at a wharf or pier? Have the stones got to land? May not the corporation prevent their being brought to land, and say "You may throw them overboard if you like, but you shall not land them?"] Here they are placed within the power of the owner, to use them as he pleases, either to take them inland or to export them. These stones at once came into contact with the land, and were placed to remain there, and were within the very words of the Act, and indeed it may be reasonably argued that if transshipped from the boat within the harbour, without touching the ground at all, they would have been "landed" within the meaning of the Act; but it is unnecessary to go so far here, where the words of the Act are satisfied, and its intention complied with.

Kingdon, Q. C. and *Lopes*, for the plaintiffs, *contra*, in support of their rule.—The Act points to two classes of dues, one to be levied on vessels bringing or importing goods from without, and unlading them within the harbour, the other on goods exported or shipped from the port. It is impossible to say, according to the ordinary construction and use of language, that these stones were "landed" by being placed in the water, at a spot inaccessible from the shore and where at high water they were entirely submerged, and were liable to be washed away by the ebbing tide. The Act never contemplated the payment of tolls under such circumstances. These depôts were mere places for the temporary deposit of goods in transit on board vessels, to be exported, on which exportation an export toll would be paid, and if the defendants are right in their present demand both import and export tolls would have to be paid on these stones, which would be manifestly unjust. Fish are said to be "landed" when fairly within the grasp of the fisherman, and the goods of a merchant are landed when they are placed so that he can take them to his warehouse or otherwise deal with them at his will and pleasure. These stones were by no means in that position. The Act contemplates a landing for importing or exporting purposes, and not this temporary deposit. Goods "landed" are in the Act opposed to goods "shipped," which shows the intention and meaning. The case from Cro. Eliz. was a decision against a penalty in which the intention of the Act substantially had been complied with. The words of the two Acts are different, and the case does not apply in the present instance.

KELLY, C. B.—I am of opinion that we must make this rule absolute. What we have to determine is, whether the defendants are, under the circumstances which appear in this case, entitled to levy tolls on these stones, as on a "landing" of them within their harbour, within the meaning of their Act of Parliament. By that Act the defendants are entitled to levy tolls on all ships, &c. which shall come into or use the said cobb or harbour, or shall be at anchor within the same cobb or harbour, and for all goods, &c. "*landed* or shipped within the said cobb or harbour, as aforesaid." The defendants, then are entitled to take these tolls virtually and substantially for the use of the harbour. The tolls are by the Act to be levied and taken in three instances, or under three heads, namely, first for vessels of the burden of ten tons and upwards entering the harbour, as a toll for the use of the harbour, without any reference to the purpose for which they enter it, or the length of time they may remain there; secondly, on goods "*landed*" or *imported into the harbour*; and, thirdly, on goods

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shipped or exported from the harbour. Now, the question is, were these stones, under the circumstances above mentioned, "landed," so as to bring them under the second head of toll above mentioned? Unless we can see that it was a landing, not only within the bare letter, but also within the spirit and meaning of the Act, I think we ought not to hold the plaintiffs liable to the toll. Reading the Act according to the ordinary meaning and purport of the language used, it would seem clear that tolls are imposed by it on all goods which are substantially and really—I do not say technically—brought or introduced into the harbour or port, for the use and purposes of the inhabitants of Lyme and the neighbouring district. The stones in question were brought into the harbour (no matter whence they came, or how they were brought), from the quarries where they were dug, and were deposited at these depôts not for the purpose of importation, but for that of being presently reshipped, and exported, and to say that they are liable not only to an import toll for the "*landing*" of them, but also to an export toll on the shipment of them, where the shipment toll can only be due, where there is no landing at all, would be contrary to the plain meaning of the Legislature, and placing a construction upon the word "landed" never intended by them, simply because these stones had just touched and lain upon the ground within the harbour for any purpose whatever. Again, let us take the case, which I put during the argument, of a lighter bringing stone into the harbour, and not taking the ground at all, but transferring the stones direct from itself on board a vessel in the harbour for exportation. Is it possible to say that the stones in such a case would be "landed" within the meaning of the Act of Parliament, and that toll was payable on stone which had never in any sense come in contact with the land at all? Surely not. It would, indeed, be straining the language of a taxing Act beyond the contemplation of the Legislature. If of the requisite tonnage, the lighter would pay for the use of the harbour on entering it, and that would be all the toll to which, under the circumstances, the defendants would be entitled. Then comes the question, can this user of the soil of the harbour by permission of the corporation for a small remuneration or acknowledgment from the owners of the stones, make this to be a "landing" within the Act? The intention of the Legislature is obvious from the Act itself, and even if the case came within the words it would, I think, be contrary to the spirit and meaning of the Act to impose a toll in the present case. Reference has been made to the case of *Leak and another* v. *Howel and another*, in Cro. Eliz., but in truth that has no application to the present case. There the Crown was being defrauded of its dues by the clandestine landing of goods at unreasonable hours, and the Act of Eliz. (1 Eliz. c. 11), on which the case turned, was passed to put a stop to such frauds. In fact, the question there was not one of toll at all, but whether, under the circumstances of that case, the particular goods there had been "laid on land" within the meaning of that statute. There was there found to be a landing not only literally and substantially, but also within the meaning of the Act. The Acts differ not only in their nature and purpose, but also in their words. In the present case the stones, in my opinion, were never landed with a view to be taken on land at all, and were not, therefore, liable to toll under the defendants' local Act.

BRAMWELL, B.—I am of the same opinion. The question is really, were these stones "landed" within the meaning of the Act, so that the defendants are entitled to claim toll upon them? I think the reason of the thing is against our so holding. The statute imposes tolls on vessels coming into the harbour as an acknowledgment or payment for its protection, and the convenience experienced by them in coming in there. It also imposes a toll on goods landed; that is to say, on the owners of the goods in respect of the convenience and benefit experienced and received by them by the landing of their goods, supposing them, that is, to be landed on a quay, or on some part of the shore whence they can be conveniently taken inland. But here the facts of the case show the contrary of all this, for here these stones were not taken on the land at all, nor were they put in a place whence they could, at the will and pleasure of the owner, be taken ashore without his committing an act of trespass in so taking them. It seems to me, therefore, that the reason of the thing is against our holding a toll to be payable on "a landing." But after all it is a matter of words,—were the stones *landed?* Now what is the meaning of "landing?" Why, it is a putting on the land. Where does the land begin? Why, where the sea ends; and where is that? Why, at high water mark, which is above the spot where these stones were deposited. Where then were these stones placed? Why, in the sea. Could passengers from a steamboat be said to be "landed" if they were made to get out of the vessel into 3ft. or 4ft. of water? I do not say that these stones might not have been said to be landed within the meaning of the Act if they had been placed where the owner would have had the means and the right of getting at them to remove them on land, though even that I think may be doubtful. Take, for example, the case of coal vessels coming into a port and running up as high aground as they are able to do, and then carts and horses coming alongside in 2ft. or 3ft. of water, and the coal being shovelled over the sides of the vessels into the carts. When in such a case would the coal be landed? I should say not until it actually reached the land. Again, take the case of timber thrown overboard from a vessel within the harbour, but below low water mark, and left floating there, but fastened by an anchor or to a buoy, would that be landing? I should say it would not be. Possibly, although goods might not be landed, in the ordinary acceptation of the term, until they had reached the land, yet it might be said to be a landing when they had arrived at the end of their transit. Here, had the stones been so placed that they might be taken thence by the owner inland at any moment at his free will and pleasure, it might have been a "*landing*" within the spirit of the Act; but, in my judgment, these stones have not been "landed" within either the words or the spirit of the Act, the intention of the Act clearly being to subject goods to toll only when a freight had been derived from the landing of them. With regard to the case which has been cited, it is difficult to make it an authority in the present case for the wording of the Acts differs. In that case, too, it was needful that there should have been a failure in two things, the discharge, and the laying on land, in order to constitute the offence against which the Act of Eliz. was directed. It is, however, I think, very questionable whether the question arises here. As a matter of fact, the corporation have for a long series of years permitted the stones to be placed and to lie at these depôts without the payment of toll, and have so far furnished evidence against themselves. It is no doubt, competent to them to revoke their licence, but we find no evidence of their having done so, and it is competent to the plaintiffs to say, "You have authorised us to lay the stones there, and have practically given us to understand that we might do so without payment of any toll."

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CLEASBY, B.—I also am of the same opinion, and think that this rule should be made absolute. We need not determine now whether, if liable to a "landing" toll, these stones would be liable again to a toll on exportation; but the defendants must, in order to make good their claim, show us that there was a "landing" within the Act. I think that these stones here were not "landed" within the meaning of the Act, but were merely shot by permission of the corporation into the water to lie there instead of remaining in the boat which brought them during the interval that should elapse between such deposit and their subsequent reshipment and exportation by sea, when an export toll would arise. In order to save all that waste of power the corporation gave leave for their being shot into the water. Had they been taken on land, as they might have been, an import toll would have accrued; but it was not intended that they should be so taken, but that they should be put on board vessels and carried to sea. They were not landed in the ordinary meaning of the word; but were put under water, and on the receding of the tide the consequence was that they were seen on the shore. The schedule levies tolls on goods, "shipped or landed." These stones were not "landed" in a sense corresponding with that in which goods are "shipped" when put on board ship, for they were placed here temporarily only in the course of their transit on board ship. The case cited is not applicable.

CHANNELL, B.—I do not propose formally and distinctly to dissent from the judgments of my Lord and my brothers Bramwell and Cleasby in this case; but I own that I have very great doubts in the matter; and but that the defendant will have a right of appeal without the expression of my dissent, I should have desired time to consider. I am not influenced by the case which has been cited from Cro. Eliz., for I agree with the rest of the court in thinking that it is not applicable to the present case, the words of the Act on which it was decided being neither the same nor equivalent to those of the Act in question here. It is clear, if Mr. Cole be correct in his argument, that he must contend for a right to take tolls in both cases, namely, one in "landing," and the other in "shipping" these stones, and as I understand him he does not shrink from that contention. I agree that we are to determine the meaning of the term "landing," and whether these stones were or not "landed" within the Act. In one sense at least they were "landed." It is not disputed that they were taken out of the boat in which they were brought from the plaintiffs' quarries into the harbour, and were thrown into the water and came in contact with the land, at a spot which was found by the jury to be "within the cobb or harbour." They were no longer on board the barque; they had been unshipped or unladen, and were in contact with the land. Why then were they not "landed" within the Act? I cannot find that the Act requires anything more than that the goods should be "landed within the cobb or harbour." The Act says nothing about wharves, or quays, or stores, or storehouses, or going into the country. They were on land within the harbour, and I think the letter, and also the spirit, of the Act, was then fulfilled, notwithstanding that this Act is one imposing a toll, and should therefore receive a strict construction. The jury have found that the place was within the cobb or harbour, and I see nothing to lead me to any conclusion one way or the other, as to the purpose for which the stones were placed there, or how long they were to remain there. I think they were "landed" within the meaning of the Act. I do not find anything in the Act calling for the construction that this was not a "landing" within the Act, because the stones had not touched the inland country, or some spot whence they could be taken away by the owner, and I do not wish to be wise above what is written.

Rule absolute.

Attorneys for the plaintiffs, *Dangerfield* and *Fraser*, 26, Craven-street, Strand, W.C., agents for *G. Symonds*, Dorchester.

Attorneys for the defendants, *Hopwood* and *Sons*, 47, Chancery-lane, W.C., agents for *R. Hillman*, Town Clerk, Lyme Regis.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

June 11 *and* 29.

(Before Lord PENZANCE, J. O.)

BUCKMASTER *v.* BUCKMASTER.

Dissolution—Desertion—Covenant by wife not to insist on cohabitation—Subsequent petition for restitution of conjugal rights.

Where a wife had agreed, on condition of the payment of a sum of money, not to insist on cohabitation, though she had afterwards presented a petition for restitution of conjugal rights which she did not prosecute:

The court held, that as the wife had agreed to live separate from her husband, and cohabitation had never been actually resumed, the husband had not been guilty of desertion.

This was a wife's petition for dissolution of marriage, on the ground of adultery and desertion. The husband appeared, but did not answer. The case was heard before the Judge Ordinary, and the adultery was fully proved, but on the question of desertion the court took time to consider.

The parties were married clandestinely in June 1861, and separated on the day of the marriage, the husband returning to his father's house, near Barnstaple, and the wife to her own home, which was with her sister at Houghton Regis. The husband promised that he would endeavour to prevail on his parents to provide them with a home, and a few days after the marriage the wife went to his father's house, but his parents would not allow them to cohabit. After some negotiation the wife signed an agreement, by which, in consideration of the payment of a sum of 100*l.*, she covenanted not to molest her husband. In the following March, however, she applied for further assistance, and that being refused, she filed a petition for restitution of conjugal rights. The husband having sailed to Australia, she was unable to serve the petition upon him, and she did not proceed with it. On his return in 1866, she again applied to him to provide her with a home, and on his continued refusal, she filed this petition.

June 29.—Lord PENZANCE, J. O.—In this case the court took time to consider whether the petitioner was entitled to a dissolution of marriage on the ground of adultery and desertion. The adultery was proved, and the question was as to the desertion. It appears that the parties were married unknown to the family of the husband, and that after the marriage they returned to their homes—he to his father's, she to her sister's house. Her account of the matter is this. She says: "We returned the same day to our own homes. He was to endeavour to get his parents to consent to find a home for me. Receiving his letter, I went to the 'Mill' (his father's place), and he still said he would find a house in a day or two. I had to sleep

away from him because his parents would not allow me to sleep in the house—he was much under the influence of his parents. I saw Mr. Chambers and asked his advice. He saw my husband's parents, and the result was that I should take 100*l.* not to molest him any more." The receipt on the undertaking is not forthcoming, but the solicitor was called, and he says it was an agreement that, in consideration of 100*l.*, the petitioner should abstain from molesting her husband by insisting upon her right to live with him. The upshot of the matter then is this, that the wife consented shortly after the marriage not to insist upon her rights—that, in short, she resigned them for the sum of 100*l.*, and that they have never lived together since. According to the principle that I have endeavoured to lay down in one or two previous cases that, I think does not constitute desertion on the husband's part. The wife chose to bargain with him that they should not live together, and unless cohabitation was afterwards resumed it seems to me that there could be no desertion. All that the wife is entitled to is a decree of judicial separation on the ground of adultery.

Attorneys for petitioner, *Tathams, Curling,* and *Walls.*

COURT OF ADMIRALTY (IRELAND).

Reported by OLIVER J. BURKE, Esq., Barrister-at-Law.

May 18, 19, *and* 20.

THE BURNS.

Salvage—Derelict—Written acknowledgment of abandonment of vessel by her captain—Question of sufficiency of remuneration for services rendered.

A large value of a derelict saved may authorise a large reward, even in the absence of any great amount of damage incurred by the salvors. Where, therefore, a derelict vessel of value 13,000*l. was rescued from being wrecked, a tender of* 500*l. by the defendant was held insufficient, and a sum of* 1100*l. and costs were awarded to the salvors.*

The petition stated that this was a cause of salvage instituted on behalf of Isaac Notter, of Crookhaven, in the county of Cork, owner of the pilot schooner *Meteor*, and the master and crew thereof, against the barque called the *Burns* (H. Harris, master), her cargo, &c., that the *Meteor*, a pilot schooner of about 60 tons register, value 700*l.*, belonging to Crookhaven, about eight o'clock in the morning of the 1st Feb. 1869 fell in with a boat with six men in her S.S.E. off Crookhaven, who proved to be the master and part of the crew of the *Burns*, about 385 tons registered tonnage, on a voyage from Bristol to the Coast of Africa, with a general cargo; the men, who were exhausted and in need of assistance, were taken on board the *Meteor*, when the master stated that he and his crew had abandoned their vessel at midnight on the preceding night, and that the remainder of the crew had left the *Burns* in another boat, and he requested the pilot master John Mahony, to go in search of the other boat. The *Meteor* did go, and after an hour's sailing discovered it about three miles to the S.S.E. of where the first boat was picked up, when the chief mate and eight hands were rescued then in an exhausted condition.

The petition then stated that the wind was blowing fresh from about N.W., and a very heavy sea rolling, and considerable danger to the lives of the men in the said boats, who were heading towards the N.E., and would in all probability have been lost if not rescued, that four of the most exhausted the barque's crew, together with the effects of said crew, were sent ashore with one of the *Meteor's* crew, but the said Harris, the master of the *Burns* and the remnant of her crew, at the request of Mr. John Mahony, proceeded in the said pilot schooner in search of the said barque, the said Harris stating that he believed his vessel had gone down; that at about one p.m. on the same day, the said barque was discovered between Mizen Head and Three Castle Head, and about a mile from the shore, and near the place where the said Harris had stated he abandoned her, that she then had both her anchors down with thirty-five fathoms of chain to each, heading about S.E., her head canvas all clewed up but not furled, her head sails gone, jib-boom carried away, bulwarks injured and partly carried away, and drifting rapidly towards the shore on which she would have been driven within half an hour or thereabouts. That the said pilot-master Mahony, informed the said Harris that he and some of his crew would attempt to board the said barque, but that if Harris went with them, Mahony should have charge of the barque, and Harris's presence should not prejudice the right to derelict salvage; that after boarding said barque, the said Mahony took charge of her and gave orders to slip her said anchors, which was done, and sail set on said barque, when she was barely able to weather the Mizen Head, and was taken to the eastward of Mizen Head into smooth water, during all which time the *Meteor* and the rest of the crew remained alongside. That on arriving off Crookhaven harbour, it was found impossible for said barque to be brought in there, not having sufficient anchors and chains, and said barque set sail for Queenstown by the direction of Mr. Isaac Notter, who came off in a whale-boat, and at the Bell Buoy she was taken in tow by a tug sent out to her by the said I. Notter, and moored in safety alongside Wheeler's Jetty, about nine o'clock on the 2nd Feb.; that during the voyage from Crookhaven to Queenstown the said Mahony was in command and charge of the said barque, and he and most of the crew of the *Meteor* worked the said vessel the entire way; that the master of the said barque while the *Meteor* was in search of her made an acknowledgment in writing of the abandonment of said barque, and of the nature of the services of said salvors, that during the aforesaid services, there was great risk and danger to the lives of all concerned, and that the *Meteor* was prevented from following her usual business as a pilot cutter for eleven days, and plaintiffs submitted that a tender of 500*l.* lodged in court to the credit of this cause was far too small remuneration.

The defendants' answer alleged that the two boats belonging to the *Burns* were proceeding to Crookhaven in search of assistance; that when the *Meteor* arrived at the *Burns* the latter was farther off the land than when she had been left the night before; that the master of the *Burns* took command of her, and slipped the cables of the barque, and that when boarded she was tight, staunch, and in perfect order, and in no distress; that I. Notter having come off to the *Burns* off Crookhaven, and having consulted with her master, the master determined to proceed to Queenstown; and that previous to Notter's arrival the rest of her crew, who were on board the *Meteor*, came on board the *Burns*, and there were then ten hands belonging to the said barque on board of said barque; that while the *Meteor* was proceeding to the *Burns*, the master of the *Burns* was required by those on board the *Meteor* to sign a document, and it was intimated to the master that if he did not, those on board the *Meteor* had it in their power not to take the said master back to his vessel.

The answer denied that the master of the *Burns* requested Mahony to go in search of the second boat in order to rescue the men, or that the men

were rescued, or that any lives were saved by the *Meteor*, or that there was any danger to the lives of the men in either of the boats, or that any of them were in an exhausted or fatigued condition, or that the said barque was discovered in a different place from where his master said she had been left, or that the said barque was drifting rapidly towards the shore, or that the race of the Mizen was causing a strong set towards the shore, or that the head sails of the barque were gone, or that the master agreed that his presence should not prejudice the right of the *Meteor's* crew to derelict salvage, or that the barque was in contemplation of law a derelict, or that said Mahony was in command of the said barque any of the way to Queenstown, or that the *Meteor* was prevented from following her ordinary avocations for more than two days, or that the allegations as to heavy sea, strength of wind, danger to life and property, had foundation in fact.

The "conclusion" by the plaintiffs denied the averments in the defendants' answer.

Dr. *Battersly*, Q. C., Dr. *Elrington*, Q. C., and Dr. *Boyd* for the plaintiffs.

Kernan, Q. C., *Exham*, Q. C., and Dr. *Correyne* for the defendants.

The following cases were cited:
The Lisbon, Ir. Rep. 1 Eq. 144;
The United Kingdom v. *The Syrian*, 14 L. T. Rep. N. S. 833;
The True Blue, L. Rep. 1 P. C. 206;
Taylor on Ev., s. 163;
The Barefoot, 14 Jur. 141;
The Coromandel, Swab. 205;
The Cleopatra, Swab. 135.

The facts of the case and the evidence are fully gone into by the learned judge in the following judgment:

TOWNSEND, J.—This is a cause of salvage promoted by Mr. Isaac Notter, as owner, and the master and crew of the pilot schooner *Meteor*, of Crookhaven, against the barque *Burns* and her cargo. The defendants have made a tender of 500*l.*, which the petitioners have refused. The question therefore is, is the tender sufficient? I shall not pause to consider whether the tender has been made by the respondents as fairly sufficient in their opinion to remunerate the services of the petitioners, or whether, as was suggested by the respondents' counsel, the amount was calculated on a very liberal scale to avoid litigation, I have to consider the case on its merits irrespectively of the tender. Capt. Harris and his second mate were examined *de bene esse*. From their evidence it appeared that the *Burns*, manned with a crew of fifteen hands and two Kroomen left Bristol for the West Coast of Africa with a general cargo. When off the coast of Ireland she encountered very severe weather with strong gales of wind, lost her jib-boom and a portion of her bulwarks. It was on the 31st Jan. she was off the Irish coast, and at eight o'clock on the evening of that day the wind had fallen to a calm; the sea continued very heavy, and as the vessel was drifting it became a question whether she could be kept off the land. About midnight her anchors were let go in thirty-five fathoms somewhere between Three Cable Head and the Mizen off a wild and dangerous coast, and near the well-known race of the Mizen. The anchors did not hold, and the master and crew left their vessel in two boats soon after midnight. It is said by the respondents that the boats were just going to Crookhaven for assistance, and that the barque was not derelict in law. If the master and crew left for a temporary purpose such as getting assistance and with the intention of returning, this is not such an abandonment as amounts to a dereliction, but if they quitted the vessel to save their lives, no vague general intention of getting assistance or of returning would take away the character of derelict of the vessel so abandoned. The question of dereliction must be considered, although the old rule of a proportion in such cases has become obsolete. I think the master and crew did not intend to return to that vessel again. Nothing was said about returning according to the second mate's evidence, and after they had left the vessel many hours, and saw the Crookhaven light. The master says he did not know the coast, although it has been easy for him to learn the names of the coast lands since he landed, and the not unnatural mistake of taking the Fastness light for the funnel of a steamer shows that he did not know his position. There was some discrepancy in the evidence as to when the *Meteor* picked up the boats of the *Burns*. I think, however, that the pilot's version is correct, and that they first suggested that they should go in search of the barque. It is difficult to suppose that the mate suggested a return at once to the vessel which he had left, as this would have been nothing less than an admission that he left her unnecessarily. The petitioners allege that there was danger to the crew of the boats; that they were exhausted and helpless. This is not borne out. They were not in immediate danger. They were not unable to work, and though they had been exposed to the weather and a very rough sea there was nothing in their condition to involve them in immediate peril of life. The conduct of Mahony has been much commented upon by the respondents, and it certainly requires the closest investigation. There is no doubt that Mahony was under the impression that he as salvor was entitled to ignore the master's authority on board his own vessel, and that if he as salvor got on board the vessel he was master of her. It appears also that he obtained the master's signature to a document in which the master acknowledged that he had abandoned the vessel, and that he had been picked up by the *Meteor*, and that its owner and its crew were entitled to salvage reward. It has been suggested that this document has been obtained under duress, but the evidence shows that the master signed the document willingly, that there was no resistance to his authority, that he made no complaint of the conduct of any of the salvors, and never objected to the document which he signed. I do not think that anything which Mahony has done could take away or diminish the amount of salvage to be awarded. Some danger there undoubtedly was in boarding the vessel, the boat was stove in when alongside, and there is no ground for the suggestion on the part of the respondents that the boat was brought alongside for any sinister purpose of enabling any particular member of the crew to get on board first, or in any manner other than good seamanship would suggest. It is stated that the salvors were to blame for refusing the assistance of a whaleboat which came alongside when they were slipping the anchors, and that they might have saved the anchors and chains; but to this it is answered that there was no objection to the slipping of the anchors, and the master himself assisted at the operation. Much ingenious argument has been addressed to the court as to the position of the vessel and her drift. This does not appear to me to be a question of much importance. The evidence of the coastguard is of great weight, they are skilled and disinterested witnesses, and they put the vessel three quarters of a mile off shore, and say that if she were drifting she would drift ashore. There was no difficulty or danger in getting the vessel under weigh, nor in taking her to Cork, but Mr. Notter is entitled to be paid for sending the hands round to Cork, but not for the loss of time of the *Meteor* in taking them, as they need not have

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been sent in so expensive a manner. There is then an admitted value of 13,000*l.* rescued from a position of great danger, arising from her being helpless and abandoned, subject to all the incidents of the change of weather, and on a dangerous coast. On the other hand there was no risk of life or limb to the salvors, and no unusual skill or labour in their services. I have no wish to discourage tenders; but each case of salvage must rest on its own merits, and a very large value may authorise a large reward in the absence of any large amount of danger, labour or skill, in the service, which danger, labour, or skill may also receive a large reward, when the value is not large. Looking to the principles which guide Courts of Admiralty in rewarding salvage services with a liberal hand, I overrule the tender of 500*l.*, and award the salvors 1100*l.* and their costs.

Attorneys for plaintiffs, *Doran* and *O'Brien.*

Attorney for defendants, *The Queen's Proctor.*

Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

THE BOROUGH OF HASTINGS.

April 14, 15, 16, *and* 17.

(Before BLACKBURN, J.)

Barrister's court money—Agency of registration association—When payment corrupt—Question of fact—Lavish expenditure by candidate to acquire influence—Municipal and Parliamentary elections—Evidence to connect—Treating—Agency—Employment of voters.

It is not illegal to assist persons in getting their names on the electoral register.

But where under colour of so assisting persons, payments are made with the intention of influencing the votes of such persons, it is bribery; and for the purpose of discovering the intention, the important elements for consideration are, first, whether the payments were made contemporaneously with the registration; and, secondly, whether they were remuneration for payments out of pocket so that the voter should not be a loser, or whether it was intended to give him a profit.

An association, admittedly the agents of the respondents, made certain payments to voters for attending the barrister's court. These payments were made contemporaneously with the registration, and amounted to no more than loss out of pocket. No evidence, however, of particular precaution being taken to ascertain the bonâ fide nature of the claims to payments, was given beyond the statement of the members of the association making the payments that they were intended for payment of loss out of pocket to persons who had actually attended the court:

Held, that these payments did not amount to bribery.

Such payments, when the registration occurs close before a Parliamentary election, must be suspicious, and with a very little added, must justify the conclusion that they were intended to influence the election.

At the time when the revising barrister was sitting many persons who attended his court were treated to meat and drink by the association, but there was no evidence that the treating continued beyond the day of registration:

Held, that although foolish and unwise, the treating was not corrupt; but that had the object been to procure popularity or votes at the Parliamentary election, it would have been corrupt.

The municipal contest occurred a fortnight before the Parliamentary. At the former the customary amount of treating at public-houses went on, in a great measure under the superintendence of the agents of the association, who were also active partizans of the respondent at the Parliamentary election:

Held, that although this treating might have influenced the Parliamentary election, yet, inasmuch as it was not in excess of treating at other municipal elections, and there was no evidence to show a corrupt intention, it did not affect the Parliamentary election.

Lavish personal expenditure in a neighbourhood for the purpose of gaining influence is not illegal. To render it corrupt it must be made with a view of influencing particular votes.

Where a small isolated act of treating is proved to have been done, more evidence of agency is necessary to fix the member than where the treating is more extensive.

It is not necessarily bribery to give a job to a voter of opposite politics just before an election. Where this was done, and the intention to influence the vote was denied, the act was held to be innocent.

These were two petitions against the return of Mr. North and Mr. Brassey, the Liberal members, but they were heard together, and all the evidence bore upon both.

Giffard, Q. C. appeared for the petitioners.

Ballantine, Serjt., *Powell*, Q. C. and *Holland*, for the respondents.

It was admitted by the respondent's agent for election expenses that at the municipal election, early in November, refreshment was provided gratuitously at the Jolly Fisherman, the Dolphin, the George, and the Fortune of War public-houses. The orders for the supply of refreshments were given by the candidates and other persons conducting the election. The municipal election was on the 2nd Nov.; the Parliamentary election was on the 17th of the same month. For twenty years past it had been the practice of candidates at the municipal election to treat people.

Evidence was also given of the payment of barrister's court money by the Liberal Registration Association, and it was not shown that any particular precautions were taken that none but those *bonâ fide* entitled were paid.

Ballantine, Serjt. contended that there was nothing illegal in the payment of the barrister's court money; and that the treating at the municipal election was not intended to influence, and could not void, the Parliamentary election.

Giffard, Q. C. in reply.

BLACKBURN, J.—Each of the members against whom these petitions are presented has been returned by a majority of the electors, and in this particular case a large majority having voted for him. But, nevertheless, if that return was shown to have been obtained by corrupt practices of any kind, either by the members themselves or by their agents, that return would be void, and there would require to be a fresh election. [His Lordship acquitted the respondents of personal corruption, and disposed of the alleged bribery on the part of Mrs. Brassey, and proceeded:] One thing further was glanced at, which Mr. Giffard did not rely upon in his reply, namely, that it was shown that Mrs. and Mr. Brassey had bills with the tradesmen, and spent a very considerable sum of money in the town; and it was said, as part of the petitioners' case, that that expenditure had been increased, and was the more lavish, because the election was coming on; in short, that there was lavish household expenditure, with a view of influencing the election, with the same intention and in the same way as would, if it had been an expenditure of meat and drink to

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influence the election, have come within the definition of treating. But there is no law yet which says that any lavish expenditure in a neighbourhood, with a view of gaining influence in the neighbourhood and influencing an election, is illegal at all. In order to constitute anything which would be a corrupt practice in respect of expenditure of that sort, it must be made with a view of influencing a particular vote. If such an expenditure is made at a place with a tacit understanding of this kind, "I will incur bills, and spend my money with you if you will vote for me, that being not the side on which you intended to vote," if it is intended to produce that effect upon the vote, it amounts to bribery. In the present case there is nothing to show that in either of the cases there was such an understanding, or such an arrangement made. In fact, the first tradesman who was called, whose bill was one of the largest, refused to vote at all, on what was very probably a very judicious opinion of his that he had better keep friends with both sides. The expenditure there, certainly had no influence upon him. I think in none of the other cases was there any attempt made to show that there was such an arrangement, or such a holding forth, that the custom was given for the purpose of procuring the vote of the man as would make it a case of bribery. Whether or not the expenditure was more lavish than it would otherwise have been is no matter for me to inquire into, because that would not affect the election if it was made out. I now must pass from these, which I have mentioned first, and which really do not in any way, as the evidence has turned out, occasion any difficulty in deciding the case, and come to what are much more difficult questions to determine, to which Mr. Giffard has almost entirely confined his very able reply. Mr. Giffard himself has gone, and therefore I may speak more freely in saying that he urged upon me the points which had previously occurred to my own mind, and occasioned me most doubt. I must say that he produced some effect upon my mind by what he was saying, and made me hesitate a little with regard to the views which I took upon some of the points as to whether he had not shown that there was more force in the view that he took on his side than I had otherwise thought. But still I must state the conclusion I have come to, and the best opinion I can form upon what I find the facts to be. I think, as far as regards the law, every one would agree with all that Mr. Giffard stated as being the law. The inference of fact is that which occasions the difficulty. Now, first of all, I must take the cases of treating. What are the cases of treating? I will consider, first, the cases of treating and the registration taken together. There is no doubt, as the law now stands, the Corrupt Practices Act has made it perfectly clear that wherever any money or valuable consideration is given to influence a vote, that is bribery; and that if it be done by the candidate, or the candidate's agent, it would, when shown, avoid the election. It appears here (I do not think the facts are now in dispute at all in this matter) that there was a registration association or committee who had subscriptions given to them for attending to the registration. There is no doubt whatever that the intention was to get upon the register such persons as should vote for their party. The very object of what the registration association was to do, was to get upon the register people who would vote for the Liberals afterwards; and, no doubt, what they did was with the motive of increasing the strength of the Liberal party, and of course with the expectation that those Liberal voters whom they got upon the register would vote at the forthcoming election upon the Liberal side. That was, no doubt their view. Immediately after this the candidate came into the field, and the first resolution was that the Liberal Registration Association committee should be their committee. It would not have mattered even without that when it appeared that the same individuals who formed the registration committee were acting as their agents. Even without that resolution it would follow that they were their agents, and inasmuch as the Parliamentary law has long established that where an agent is guilty of corruption it is not necessary to show that it was with the knowledge and consent of the candidate, nor to show that the money was produced by the candidate, but that corruption by an agent, though done with his own money, or with anybody else's money, would avoid the election, it follows at once, as it seems to me, and I wish to state that clearly, that their calling themselves the registration committee, and applying the money that was subscribed by people for the registration to a corrupt act, would not prevent that corrupt act unseating the member, if it were proved. The question, therefore, I take it, as regards what the registration committee did, is this: is what they did a corrupt practice within the Act? If so, it would unseat the members, for they were agents for the members. Now, there is not much dispute as to the fact of what was done at the time of the registration by the registration committee. The persons who attended at the revising barrister's court, not necessarily as witnesses, but either to support their votes or to support their claims, would probably lose their day's work by attending at the court. Those who had work very close to where the revising barrister held his court might perhaps be able to attend there without leaving their work, but a great number of persons who made claims would lose a day's work by attending at the court, and if they had to attend more than one day they would lose more than one day's work. What the registration committee say they did was this; part of the expense of the registration committee was caused by their paying those who so lost their work upon an estimate of what they would otherwise have made; so that they should be no losers by coming to put themselves upon the register. They assert that they did only that, and that they did not give anything which would enable a man to make a gain. Now, I wish to point out distinctly how in my mind that question comes to be a question of fact. I take it that the law has never yet said that to pay a person any money, or to assist him in any way in being put on the register, should be an offence at all. To give any money or any valuable consideration for the purpose of inducing a person to vote is a corrupt practice, and is made an offence; consequently, wherever it appears that under colour of paying people to get put upon the register, or assisting them to get put upon the register, a payment is made which is fully intended to influence a vote at the ensuing election, that would be a corrupt practice, and the question in each case for those who have to determine the question must be, whether or not those payments that were made, were made with the intention to influence the vote at the election or not, because, if they were they were bribes. It is clear that, as the law is framed, and as the statute is worded, to pay a person for coming to vote, giving him his day's wages, or making up to him his loss of time, for the purpose of voting at the time of the election, would be a bribe. The words of the Act are clear, beyond all question, upon that point. But no such enactment says that paying a man for coming to the registration for the purpose of supporting his claim to vote is to be in itself considered as a bribe. Consequently one must see whether it is in effect a payment for the sake of the vote. That must be always, more or less, a question of evidence, upon which the person who has to decide it must draw his inference, and what,

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it seemed to me, are the important elements for consideration in drawing the inference, are, first, whether the payments were really and truly made contemporaneously with the registration; that is one great thing. Another great thing is, whether they were really intended to be merely a remuneration for what the man who was paid was out of pocket, so that he should be no loser; or, whether the intention was to give him a profit. I had occasion, in the election inquiry at Taunton, to consider a matter of this kind, the evidence being that some time after the registration, when the election was coming very near, a general notice was given that everybody who had been at the registration court might have a payment of 5*s.* for the day's loss of time, and that was carried out by giving 5*s.* to all who came to ask for it without any further inquiry than whether he was upon that side. I came to the conclusion that that payment was intended to influence the election, and was therefore bribery, and accordingly unseated the member. But where the case turns out to be, as it is at present, upon the evidence that the money was paid contemporaneously with the registration; that no more was paid than the voters were out of pocket; and that precautions were taken to see that no more than that was paid, I do not think that that inference would be proper to be drawn. Now, in the present case, Mr. Giffard urged in his reply that it was not proved that precautions were taken to see that the payment was confined to what the voters were out of pocket. No doubt it was not proved in this sense; there was not a minute inquiry upon it, and there was no attempt made to show in each individual case where men were paid that they were persons who had attended the registration court. But each of the persons connected with the registration who were called who knew anything about it, Mr. Langridge and Mr. Poole; and I think there was another called whose name I forget; all swore positively, in general terms, that they did intend it to be confined to them, and that the desire of the people who supplied the money was that it should be confined to them, and they believed that it was confined to them. Certainly no evidence has been given to show the contrary. The consequence is that, as far as regards these payments for attending at the registration court, I cannot see that I am to draw the conclusion that they were bribes, and consequently I cannot see that this would upset the election. I wish to guard myself in case of other times from being misunderstood in any way to say that payments made in that way for a registration, especially when the registration is coming so closely before the election, are not in themselves very suspicious things, and that such payments, with very little added, a very little more than there is now, might not justify the conclusion that they were intended to influence the election. All I say is, that in the present case I do not think they were so intended; consequently, as regards those payments, I do not think the petitioners have made out a case of bribery. The next thing we have to consider is, that at the same time that these payments were made there were refreshments given. Meat and drink were given at Gallop's house. We have distinct evidence that at the same time that the men were paid refreshments were given to the voters. I think that the probability is, that there might be similar things in other places, though we have not distinct evidence of it. Now comes the question, Is that treating? The definition of treating given by the Corrupt Practices Act is this, that where a candidate (and where a candidate acts by agents, his agents are the same thing for this purpose as the candidate himself) gives meat or drink with the intention to influence the election or to influence a vote at the election, that is to be considered as corrupt treating. Here meat and drink undoubtedly were given at the time of the registration. As I have already said, I consider the registration committee who were the same individuals as formed the committee of the sitting members, as being the sitting members' committee. The question comes to be, was that meat and drink given with the intention to influence the election. There, again, in considering the question whether there was the intention which makes treating corrupt treating, which makes the giving of meat, drink, and refreshments gratis corrupt, if it be done with that intent, which would make it a corrupt practice, it always comes to be a matter of very great importance, though not conclusive, to see the time when it was done, the extent to which it was done, and the manner in which it was done. I think, as far as the evidence goes here, the giving of those refreshments, which were shown to have been paid for by the registration committee, is distinguished from any other case, as far as I can perceive, in that it was confined to the time when the revising barrister was actually sitting. In Gallop' case, where we had the most distinct evidence about it, it appears that they were entirely given at that time. I think it amounts to this; that on each occasion when the men who were to be paid (they were paid in two batches at Gallop's house, Langridge paying for some) came to be paid, there was some refreshment and beer given also at the same time, Mr. Langridge paying for his portion at the time, but Mr. Poole afterwards dividing Gallop's bill, as to which several remarks were made, and to which I will allude presently. It appears that those refreshments were given exclusively at that time. Taking that view of the matter, although I think it was a very foolish and unwise thing to do, it seems to me to come nearly in the same category as the payment of the men for coming to support their claims. If there was any reason to believe that it was done not merely for that purpose, but to procure popularity, or to influence a vote at the election, it would be treating. But if it was merely meant and intended to be part of their coming to support their claims, and not at all to influence the election itself, it would not be corrupt treating. I think being of no very great extent, for extent and quantity are very material elements in the consideration, and being confined, as far as I can perceive in the evidence, to the time of the registration, I should draw the inference that it was not intended to influence the votes. Now we come to one more head upon which the facts are scarcely in dispute at all. During the time when the contest was raging, it happened this year that the municipal elections fell but a very little while before the Parliamentary elections came on, and as might naturally be expected, there being a contest for the Parliamentary representation of the borough, those who stood in the municipal elections on the Liberal side, were active partisans of Mr. North and Mr. Brassey, and at least one of them, Mr. Poole, and probably others also, were agents for the sitting members in conducting the election. It is not disputed or denied at all, in point of fact, that when they stood as candidates for the municipal election, they had given refreshments to the municipal electors, who would be the same class, and indeed the same individuals, as the Parliamentary electors; but they say they did it with the intention of influencing the municipal election, and that only. Now, on the same reasoning as I used before with regard to the registration, if the object and intention in their minds, when they gave those refreshments was to influence the Parliamentary election also, that would be treating, although it might be done with the object at the same time of influencing the municipal election.

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Here again it comes to be a question of fact. In trying to draw a conclusion as to what the intention was, it becomes very important to see what was the quantity, and the scale upon which this was done, and what was the time when it was done, in order to see whether it really was intended for more than the wrong and improper practice which generally prevails at municipal elections; and whether or not it was intended to go further, and influence the Parliamentary election, which was just about to come on. There are cases undoubtedly. Beverley was mentioned as one, and I believe the facts proved it, in which large payments are made to voters at the municipal elections that they may become members of the Yellow or the Blue party, as it may be called, the intention being that the Yellow or the Blue party shall stick together at the Parliamentary election; they will be paid nothing there; but they are generally paid largely at the municipal elections, that they may be in the party and vote at the Parliamentary election. In such cases the real motive and intention of the persons who supply the money is to win the Parliamentary election. Wherever that is proved, of course there can be no doubt that it would be bribery, and perhaps it could scarcely ever be carried out in such a case without its being bribery, to such an extent as to make it a very proper question for Parliament to inquire whether the borough should be disfranchised or not. But without coming to that, it may very well happen that the municipal electors, being of the same class as the Parliamentary electors, advantage is taken of the opportunity of the municipal election, and under the colour of that, under the pretence of treating for the municipal election, there is money advanced for refreshments, in order to produce an effect upon the minds of the parties when they come to vote at the Parliamentary election. Now, in looking at that, and seeing whether or not there is that intention, it becomes a most important element to see when it was done. In the present case, the municipal elections having come so very nearly at the same time as the Parliamentary elections, of course anything that was done at the municipal elections must have been near enough to the Parliamentary elections to produce an effect upon it. But there is a great importance in the time and place at which it was done, as evidence tending to make one think that it was done with the intention to influence the Parliamentary election. I had a similar thing in a case which was before me, where an active agent having been elected an alderman at a contested municipal election, afterwards gave refreshments in gratitude, as he said, to his supporters, but unluckily chose, as the place to give them, a public-house where the candidates had held a meeting, and chose as the time to give them just the time when the candidates came out. It was not necessary to decide that point there, because there were other things which upset the election, and vacated the seat, and I had not to make up my mind upon this question; but I mention the case as an instance of what I mean when I say that the time and place are very important. The time and place there made me very much think that I should be obliged to come to the conclusion, if it should be really necessary to decide it, that there was an intention in that case to produce an effect upon the Parliamentary election. Here I have to see what were the time, the place, and the extent to which the treating, which has been proved at the municipal election, took place, in order to see whether it would really be intended to affect the Parliamentary election or not. As far as I make out, I think the principal evidence obtained of that was from Mr. Poole, who did not seem to me upon that point at all to wish to keep back anything. When he was asked about it he mentioned several things which had not been proved, and named several public-houses at which during the municipal election refreshments had been given (punch, I think he said), as it was customary to do upon the occasion of their being elected. Now all this took place exactly on the day of the municipal election. As far as the evidence went, none seems to have been given afterwards; and although there is no doubt of this refreshment being given to some persons who would ultimately be Parliamentary electors, and it would be likely enough that the popularity acquired might continue for a fortnight, so that a portion of it would influence the Parliamentary election afterwards, yet, looking to the question, nor whether or no it may have produced that effect, but whether or no it was the intention to do so, it seems to me that there was no intention at the time which would make it corrupt; but I cannot come to that conclusion in the present case. If I found that it was continued after the municipal elections were over, if I found that the quantity of refreshment given was in excess of what it seems to have been at other times, or if I found that the place where it was done was such as to show that it was intended to produce an influence upon the election of members of Parliament, all those things would be material to show me the intention. But in this present case I cannot find that there was anything done beyond what had been done in ordinary municipal elections, when no Parliamentary election was coming. It was done on the day of the municipal election, and only on that day; and therefore although it was certainly a matter to be inquired into and considered, I do not think that a corrupt intention has been made out. Then comes a matter in connection with this, on which Mr. Giffard made a very strong point in his reply; and I may fairly say that Mr. Giffard did make me feel that there was a great deal to be said there; he did make me pause and hesitate on this part of the case.

It was sworn by a man called Foster that when one Thomas Tutt was bringing him to the poll, Foster asked for allowances for drink, and Tutt made answer to him, "I could not do that; it would be bribery." But, at the same time, said to him, "You may drink, and afterwards, when it is all over, you shall be paid." This was not denied.

His Lordship said as to this: Then comes the question whether, that being so, upon that alone there is not made out a case of treating by Tutt, who was an agent of the sitting members, to such an extent, that although it was only 10*s.* that was paid, and although it was only in one instance, that is or is not a corrupt practice which ought to upset the election. There I have felt a great deal of force in what Mr. Giffard said, and I have paused and hesitated upon it a good deal. It is established by Parliamentary law that a member is responsible for his agents in these cases; and, although what constitutes an agent is very ill defined, yet still it is a question which it is important to consider, and one must see what an agent is. I have frequently had it in my mind that there is a great difficulty, in strict logic, in making the agency of a person dependant upon the extent of the corrupt practices committed by him. It does seem that, in strict logic, if a man would be an agent if he was shown to have corrupted 100 people by paying them 5*l.* apiece, then if he corrupts only a single man by giving him a single glass of beer, he ought to be regarded as an agent equally. There is no doubt that in strict logical language you will find a difficulty in making the distinction, yet I cannot but feel that in administering justice and in administering the law in such a way that it would be tolerable, one must make some distinction of that sort. There is the same thing that constitutes the man an agent

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in the one case present also in the other case; but I cannot but feel that where the case is a small, isolated, solitary case, it requires much more evidence to satisfy one of agency than would otherwise be necessary. If a small thing is done by a person who is the head agent; for instance, in this case, if a very trifling thing had been done by Mr. Poole, who is the agent for the election expenses, I think that would have upset the election; and if small things to a considerable extent were done by a subordinate person, comparatively slight evidence of agency would probably have induced one to find that he was an agent; but when you come to a case of this sort, where there is the single case of Thomas Tutt having told a man, when he was inducing him to go to the poll, that he would be paid afterwards for what he might spend in drink, to make that single case upset the election would require considerable evidence of agency; and I do not find that there would be strong enough evidence of agency here to make one act upon that one single case. Mr. Giffard argued, with great force, that if treating were proved in this particular case, it is a fair and reasonable inference that that would account for a great many others of a similar kind, and that, consequently, I ought to act upon it. I accede to that; and if I felt at all that there was any ground for believing, upon the whole of the evidence taken together, that there was a mode of procuring treating at the Pelham Arms and elsewhere by sending in a variety of people, each of whom was to treat upon a small scale, I should probably say that I thought that was an instance of it, and that this would be evidence to prove it; but if such a thing existed, I cannot but feel that there would be some more evidence of it. What Mr. Giffard said is very true, that there is this great difficulty in these cases, that the parties who are guilty of being bribed and those who are guilty of bribing, are together, and therefore there is great difficulty in getting evidence in cases of bribery; but that does not apply so much to cases of treating. Treating from its very nature must be done openly, and in such a way that a great number of people may see it. It is almost impossible to have treating so carried on that the opposite side may not see it, and there are generally a considerable number of neutral persons who attend where treating is going on from the mere love of drink and beer, without regard very much to what politics they are of, and who are willing to tell about it afterwards. Consequently if there had been any regular system, of which this case with regard to what Tutt said was a single instance that cropped out, I cannot but think that we should have had more evidence of it. Taking that view of it, I think I cannot act upon the evidence of the agency of Tutt, though it is evidence of agency which might have induced me to act if there had been anything tending to show a general system, rather than, as it is, an individual case.

On a question whether the giving a job to a voter was bribery, where the intention was denied by the persons giving it, his Lordship said: I have always considered it a very wrong thing on the part of anyone, on the ground of politics, to dismiss his men whom he had already in his employment because they were going to vote against him; that is made undue influence. It would also be very wrong to employ men in order to influence them to vote for you; and to lay down the rule that whenever a person really having a job in hand offers it to a man who is going to vote on the other side, although he says it was not intended to influence the man's vote, we are to draw the inference that it was, would be laying down the rule that during an election there must be exclusive dealing. I do not see how one possibly can act upon such a principle as that. I come to the conclusion that the case brought forward on the part of the petitioners has failed as against both the sitting members. As in this case the petitioners have failed, and I see no reason to deviate from the ordinary rule, I must order that the costs be borne by the petitioners.

Agents: *Durrant Cooper; Wyatt* and *Hoskins; Baxter, Rose,* and *Norton.*

House of Lords.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

July 3, 6, 1868; *July* 13, 1869.

THE HAMMERSMITH AND CITY RAILWAY COMPANY (plaintiffs in error) *v.* GEORGE HORATIO BRAND AND MARY CHRISTIANA LOUISA, his wife (defendants in error).

Damage from use of Railway—Vibration—Action—Compensation—Railway Clauses Act (8 & 9 *Vict.* c 20), *ss.* 6, 16—"*Construction*" *and* "*use*" *of Railway—Headings to groups of sections in statutes—Lands Clauses Act* (8 & 9 *Vict.* c. 18), *s.* 68.

An action was brought against a railway company to recover an amount assessed by a jury, as compensation "for vibration from the use of the railway after construction." The damage did not arise from negligence, but was the inevitable consequence of the proper and ordinary use of the railway:

Held (*reversing the judgment of the Exchequer Chamber*), *that, first, no action would lie for the damage sustained; for the Legislature having given power to the company to employ locomotive engines, if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses, upon the principle of law that "cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit," it must be taken that power is given to cause that vibration without liability to an action. The cases of* Rex. *v.* Pease (4 *B.* & *Ad.* 30), *and* Vaughan *v.* Taff Vale Railway Company (5 *H.* & *N.* 679), *approved. Secondly* (*Lord Cairns dissentients*), *that there was no title to compensation for the damage sustained; for the Railway Clauses Consolidation Act* 1845 (8 & 9 *Vict.* c. 20), *by ss.* 6 *and* 16, *provides compensation only for damage caused by the "construction" and not by the "use" of the railway.*

The headings to the groups of sections in the above Act indicate the general object of the provisions immediately following, and may be usefully referred to to determine the sense of any doubtful expression in a section ranged under a particular heading.

The Lands Clauses Consolidation Act 1845 (8 & 9 *Vict.*) c. 68, *has no direct bearing on the above question.*

This was a suggestion of error upon a judgment of the Court of Exchequer Chamber, by which that court reversed the judgment of the Court of Queen's Bench in favour of the plaintiffs in error. The action was brought by the defendants in error against the plaintiffs in error, to recover the sum of 272*l.* which had been assessed by a jury under the provisions of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), as compensation to the defendant in error, Mary Christiana Louisa, before her marriage with the other defendant in error, for injury occasioned to a house and land, to which she was entitled, by vibration from the use of the railway of the plaintiffs in error, together with interest on the said sum. The claim in respect of which this sum of 272*l.* was assessed, was one of three heads of claim made in respect of the injury mentioned. The plaintiffs in error admitted the

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other two heads of claim, and paid the amounts awarded in respect of them, but they contended that the damage in respect of which the said sum of 272*l.* was assessed could not be the subject of compensation, and that no claim was maintainable against them in respect thereof.

By consent of the parties the question was stated for the opinion of the Court of Queen's Bench in the form of a special case, which is sufficiently stated at 16 L. T. Rep. N. S. 101.

The Court of Queen's Bench on Nov. 27, 1865 (Mellor and Lush, JJ.), gave judgment for the plaintiffs in error. (see 13 L. T. Rep. N. S. 501; 35 L. J. 53, Q. B.; L. Rep. 1 Q. B. 130.) The defendants in error then brought error in the Court of Exchequer Chamber, which, on Feb. 1, 1867, gave judgment by a majority of three to one (Bramwell, B., Keating, and Smith, JJ.; Channell, B. *dissentiente*), reversing the judgment of the Queen's Bench (see 16 L. T. Rep. N. S. 101; 36 L. J. 139, Q. B.; L. Rep. 2 Q.B. 230). Against this judgment error was then brought in the House of Lords, and the case was there argued on July 3 and 6, 1868, in the presence of the following judges:—Willes, Blackburn, Keating, and Lush, JJ., Bramwell, and Pigott, BB.

Sir *J. B. Karslake*, Q. C. (Attorney-General), *Russell*, Q. C., and *Digby*, for the plaintiffs in error.—The plaintiffs in this action are not entitled to recover the damages claimed, either by action or as compensation under the statute. No action will lie, for the vibration complained of was the necessary and inevitable consequence of the use of the railway. No negligence or improper conduct has been imputed to the plaintiffs in any way. The Legislature authorised the use of the railway, and, though damage to private individuals occur from the ordinary running of the trains without negligence on the part of the company, no action can on that account be brought:

Vaughan v. *Taff Vale Railway Company*, 5 H. & N. 679;
Rex v. *Pease*, 4 B. & Ad. 30.

Nor can compensation be had, for the provisions of the Lands and Railways Clauses Acts, as to compensation, refer exclusively to cases where land has been taken by the company, or has been injuriously affected by the execution of works, or by the exercise of other powers for the construction of the railway. This is shown by the heading preceding sect. 6 of the latter Act, which must govern and limit the application of the sections that follow:

Bryan v. *Child*, 5 Ex. 368;
Eastern Counties Railway Company v. *Marriage*, 9 H. of L. Cas. 32.

Here no land of the plaintiffs was taken, compensation for damage from the construction of the railway has already been paid, and the present claim is on account of damage, not from the construction, but from the use of the railway: (*The Caledonian Railway Company* v. *Ogilvie*, 2 Macq. 229.) At any rate the defendants are not liable to compensation in the present case, where no structural injury has occurred or is alleged. The damage is, indeed, not to the land or property at all, but is in the nature of a mere personal inconvenience or discomfort to the occupier of the house and premises. For such damage no compensation can be had:

Mumford v. *The Oxford, &c., Railway Company*, 1 H. & N. 34.

Other cases cited were:

Broadbent v. *Imperial Gas Company*, 7 H. of L. Cas. 600;
Leigh v. *Stockport, &c., Railway Company*, 10 L. T. Rep. N. S. 426; 33 L. J. 251, Q. B.;
Jones v. *Festiniog Railway Company*, 18 L. T. Rep. N. S. 902; 37 L. J. 198, Q. B.; L. Rep. 3 Q. B. 567.

Sir *Roundell Palmer*, Q. C., *Mellish*, Q. C., and *Dixon* for the defendants in error.—The damage complained of would have constituted a nuisance, for which an action could have been brought had not the Legislature authorised the use of the railway from which the damage resulted:

Soltau v. *De Held*, 2 Sim. N. S. 133;
Walter v. *Selfe*, 15 Jur. 419;
Bainford v. *Furnley*, 6 L. T. Rep. N. S. 721; 3 B. & S. 62;
Elliotson v. *Teetham*, 2 Bing. N. C. 183.

The damage may be said to be caused by the construction of the railway, for it was the reasonable and probable consequence of the construction:

Rev. v. *Moore*, 3 B. & Ad. 184, 188;
Crowder v. *Tinkler*, 19 Ves. 622.

The land here was specially and injuriously affected (*Glover* v. *North Staffordshire Railway Company*, 16 Q. B. 913) by the construction of the railway, and compensation is therefore due. The fact that none of the plaintiffs' land was taken does not bar them from claiming compensation. As observed by Lord St. Leonards in the *Caledonian Railway Company* v. *Ogilvy*, 2 Macq. 247, "It is quite settled that there may be a damage and compensation may be required from a party from whom no land is taken." If an action would have lain for nuisance as regards the land, but for the powers conferred on the company by the Act of Parliament, there is a right to compensation:

Re Penny, 7 Ell. & Bl. 668;
Ricket v. *The Directors, &c., of the Metropolitan Railway Company*, L. Rep. 2 App. 175, 198, 203; 16 L. T. Rep. N. S. 542, 545, 547.

An actual damage has been actually suffered here, and it is just that compensation should be paid to the party sustaining it. The intention of the statutes was to give compensation in such a case, and "every fair intendment ought to be given to effectuate that intention": (per Lord Denman, in *Reg.* v. *The Eastern Counties Railway Company*, 2 Q. B. 359, 362.) An injury, which is the subject of compensation, when temporary, under sect. 16, must be also, when permanent, under sect. 6: (*Ricket* v. *Directors, &c., of Metropolitan Railway Company, ubi sup*, per Lord Cranworth.) The fact that the damage here is recurring and continuing is no argument against its being had:

Broadbent v. *The Imperial Gas Company*, 7 De G. M. & G., 448;
Lee v. *Milner*, 2 M. & W. 840;
Lawrence v. *The Great Northern Railway Company*, 16 Q. B. 643, 653.

There is no conclusive authority against a right to claim compensation for injury by vibration. *Re Penny* (*ubi sup.*) was decided chiefly on another point, though Lord Campbell and the other judges thought that vibration would be a subject for compensation, the qualification that "the damage arising from vibration after the construction and during the use of the railway is not a ground for compensation:" (7 Ell. & Bl. 672), being doubtingly added by his Lordship after his judgment had been given. The following cases and statutory provisions were also referred to:

Mumford v. *Oxford, &c., Railway Company*, 1 H. & N. 34;
Chamberlain v. *The West-End and Crystal Palace Railway Company*, 2 B. & S. 605; 6 L. T. Rep. N. S. 318;
The North Western Railway Company v. *Bradley*, 3 M. & G. 836;
The East and West India Docks, &c., Railway Company v. *Gattke*, Ib. 1555, 164;
Gardiner v. *London, Chatham, and Dover Railway Company*, L. Rep. 2 Ch. App. 201; 15 L. T. Rep. N. S. 552;
The Lands Clauses Act 1845 (8 & 9 Vict. c. 18), ss. 22, 48, 49, 68, 69, 73.

After the arguments of counsel the following

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question was referred to the judges:—Were the defendants in error entitled to have compensation made to them by the plaintiffs in error for the vibration in respect of which damages were assessed by the jury as mentioned in the special case?

There was a difference of opinion among the judges, who therefore gave their opinions *seriatim*, as follows:—

WILLES, J.—My Lords, I am of opinion that the defendants in error were entitled to have compensation made to them by the plaintiffs in error for the vibration in respect of which damages were assessed by the jury as mentioned in the special case. The admitted relevant facts are as follows:—The claimant, Mary, was seised in fee simple in possession of a house, called Cumberland House, and its outbuildings; the railway was made so near the house that although no part of the site was taken, and although it did not appear that any structural injury was or would be caused to Cumberland House or any of its outbuildings by the construction of the railway, "yet it appeared, and is admitted for the purposes of this case, that by reason of the working of the railway after it had been opened for traffic, the house and buildings were and would be subjected to vibration, noise, and smoke from passing trains, and were and always would be affected, and depreciated and lessened in value thereby." No compensation was assessed in respect of the noise and smoke. Compensation was assessed at 272*l.* "for vibration from the use of the railway after construction as beforementioned," which it must be assumed from the terms of the admission, and in the absence of objection as to the extent of the vibration, would have been actionable but for the statutory powers of the company. The result is, that the 272*l.* represents the price estimated by a jury of a perpetual right acquired by the company to shake the house and its outbuildings by traffic upon the railway, or, as it was well put in argument, the depreciation of the value of the property by a servitude of vibration imposed in respect of the railway constructed by the company. Such a servitude, if granted by an ordinary conveyance without being limited in respect of the use of a specified dominant property, would probably have amounted to a licence only, and not have affected the land in the hands of a purchaser; but as limited to vibration by traffic carried on upon a specified railway, it was properly the subject of grant by way of interest in the servient land: (*Rowbotham* v. *Wilson*, 8 H. of L. Cas. 848.) Therefore, as soon as the railway was completed and fit for use, there was, by the conjoint operation of the company's Act and the execution of the company's works thereunder, statutorily taken away from whoever had or should in future have Cumberland House, and transferred to the company as appurtenant to their railway, part of the use and value of the house, and the house was therefore injuriously affected by the construction of the railway or execution of the authorised works within the words or within the substantial intention of the compensation provided by sect. 68. No analogy to the use of a road dedicated by a private individual can assist. A private individual could dedicate a road to a limited use, but a private individual could not of his own power dedicate a highway with tolls, nor a railway with the statutory restrictions and privileges. The cases which furnish the test "no right of action, no compensation," are satisfied, because the right of action, which would have existed but for the statute, is taken away by the statute in respect of the works executed and railway constructed, and to which the law annexes the dominion. As against the company it must be presumed, and indeed it is involved in the admission, that the railway when made was sure to be used, and the probable extent of that use must have been a subject of proof and consideration in committee, and could in like manner be proved before and considered by the jury in assessing the amount. The uncertainty of the amount is what made most difficulty to my mind; but I think that it must be taken that the depreciation was capable of being calculated, without mere guessing, near enough for practical purposes, quite as near as surveyors calculate work to be paid for by measure and value either done or to be done, in fulfilment of a covenant to repair for instance, upon which there are often wide differences of opinion which a jury must reconcile. The case of the *Imperial Gas Company*, 7 H. of L. Cas. 700, involved peculiar elements of uncertainty defying calculation. In the result I adopt the reasoning of Bramwell, B. (with whom Keating and Smith, JJ. agreed) in the Exchequer Chamber, being satisfied that there must be either compensation or liability to repeated actions, which latter would defeat the general intention of the Legislature as well as contradict a series of authorities too convenient and reasonable to bear overruling. I therefore answer in the affirmative, and in this opinion my brothers Keating and Pigott, as also my brother Lush, concur.

LUSH, J.—My Lords, a careful consideration of the arguments of my learned brethren in the Exchequer Chamber, and of the able arguments addressed to your Lordships on the hearing of this appeal, has induced me to change the opinion which I expressed in the Court of Queen's Bench, and to come to the conclusion that the defendants in error were entitled to have compensation made to them by the plaintiffs in error for the vibration in respect of which damages were assessed by the jury, as mentioned in the special case. The complaint of the defendants in error was, that "by reason of the working of the railway after it had been opened for traffic, their house and buildings were and would be subjected to vibration from passing trains, and were, and always would be, affected and depreciated and lessened in value thereby." And I take the jury to have found by their verdict that the premises had, as a consequence of this working of the railway, become less comfortable for occupation, and their value substantially diminished. It is clear that if, without the sanction of Parliament, a private individual had caused this damage, by making the railway upon his own land, and running the trains upon it, he would have been liable to an action from time to time so long as the nuisance continued, at the suit of the party injured. This proposition was not disputed on the argument, but it was contended on behalf of the plaintiffs in error, that this being a public highway, the company are in the same position as if they had made the railway on their own land and dedicated it to the public, and in that case they would not have been liable for the nuisance caused by the public in using it. The answer to this is, that this is not a highway by dedication; if it were it would not be, as it is, the property of the company, nor could they receive the tolls or any other profit from the public for the use of it, as they now do. The case assumes that this damage results, not from any improper or extraordinary use that is made of the railway, or any negligence or misconduct in the management of the traffic, but from the ordinary use of the line as a passenger line, that being the purpose for which it was authorised to be made. It is therefore, to my mind, equally clear that the defendants in error cannot maintain an action for the damage they have sustained, because the plaintiffs in error have only done what their Act of Parliament authorised them to do. But

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that authority was given to them subject to certain conditions, and the question is, whether it is one of those conditions that they should pay to persons situated like the defendants in error compensation in gross for the damage to their property, which is the direct and necessary consequence of such use of the railway. This depends upon the construction to be put upon sects. 18, 22, 49, and 68, of the Lands Clauses Act, and of sects. 6 and 16 of the Railway Clauses Act. These sections were so fully commented on in the course of the argument, that I do not think it necessary to recite them. It is in your Lordships' recollection that their phraseology differs. In some of them the damage for which compensation is to be made is spoken of as damage sustained by reason of "the execution of the works," in another, "by reason of the execution of the undertaking," in others, "by the exercise of the powers of the Act;" and sect. 6 of the Railway Clauses Act contains both the latter expression and the phrase "by the construction of the railway." I cannot assent to the argument that the Legislature, in adopting in that section of the Railway Clauses Act the expression, "by the exercise of the powers of the Act," had any reference to sect. 86, which empowers the company to carry on the business of carriers upon their line, and for that purpose to use locomotives. The same phrase occurs in sect. 49 of the Lands Clauses Act, and is there evidently used as synonymous with "the execution of the works" in sect. 69 and other sections, and I cannot doubt that if a special Act were to incorporate all the provisions of the Railways Clauses Act, except those which enable the company to become carriers, the liability of the company in a case like the present would be the same. I think that the variances were undesigned, and that the same idea is meant to be conveyed by each form of expression. The question, then, is narrowed to this: Did the Legislature intend to compensate for damage occasioned by the "making and using" the railway, or the damage occasioned by the "making" only, apart from its use? As the intention to give the larger measure cannot be collected from the words themselves, we are in the first place to look to the contract, and see if we can collect from the general scope and object of the Act as expressed in its other provisions, what the intention of the Legislature upon this point was, and if we see that it was their intention to give the larger measure, then to determine whether the words in question are sufficient to give effect to that intention. The Lands Clauses Act is designed not for railways only, but for all undertakings for which compulsory powers of taking lands are given. And every special Act, which incorporates its provisions, designates and fixes the purposes for which the land is to be taken, and the use to which it is to be permanently appropriated; and the company who are empowered to take it are bound to apply it to that purpose, and to that purpose only. So much of the general Act as is incorporated becomes part of the special Act, and its language as part of that Act becomes pointed to the particular work or undertaking specified, whatever it may be, whether a railway, a dock, a canal, or any other undertaking. It there authorises the taking of the land for the purpose of, and its conversion into, the particular railway, dock, or canal in order that it may be used as such. The undertaking is regarded as a working concern, and the idea of its use as a railway, dock, or canal is in the mind of the Legislature inseparable from that of its construction. In professing to give compensation for all damage sustained by the owner of the adjacent land by the "execution of the works," or "the exercise of the powers of the Act as regards such lands," (s. 6 of Railway Clauses Act) the Legislature must, as it appears to me, have had in view the ultimate object arrived at; the works were complete and in operation, the dock, railway, or canal, not abstractedly as a mere excavation, embankment or reservoir, but in connection with its appropriate traffic, and with the ordinary incidents of a business undertaking. These considerations lead me to the opinion that the view I took of the Act in the court below is too narrow a view, and that it is apparent from the context that the Legislature intended to compensate for the use as well as for the making of the railway, and thus to make the new remedy which it gave co-extensive with that which it took away. Taking this to have been the intention of the Legislature in framing the compensation clauses, we are to see whether the words in question are capable, upon a fair and reasonable interpretation, of giving effect to such intention. It cannot be said, I think, that they are so clear as to exclude this meaning, but only that they are ambiguous. Taken in their literal and primary sense they would, no doubt, be read as denoting the mere work of construction; and if they occurred in a contract between the company and a person who thereby undertook to make the line, this would be their undoubted meaning. But as applied to the subject matter of the special Act, which regards the user of the railway as the end and object of all its provisions, and looks at the adjacent land as it will be affected by that user, I think they may, without undue straining, be read as embracing both the construction and the user, as if the expression had been "injuriously affected by the railway," instead of "by the execution of the works," *i.e.*, the making of the railway. It seems to me that no violence is done to the language, nor any forced or unnatural sense put upon the words, by holding the latter expressions to be equivalent to the former. For these reasons I answer your Lordships' question in the affirmative.

BRAMWELL B.—My Lords, in this case it must be taken that the jury have found that by the ordinary working of a railway line, by the passing of trains, without negligence or design, by what, in short is practically necessary (as we are told) for the using of the line by the defendants, and those who pay them for its use, a nuisance will be caused to the occupiers of the plaintiffs' premises by vibration to such an amount, that the occupiers, if without remedy, will pay the plaintiffs for the occupation from time to time a less sum than they otherwise would, the fee-simple or capitalised value of which is 272*l*. For this nuisance the occupiers would from time to time be entitled to maintain actions (*Jones* v. *Festiniog Railway Company*, L. Rep. 3 Q. B. 733; 18 L. T. Rep. N. S. 902), unless some statute has legalised the nuisance with or without compensation, by which I mean the statutory compensation they have claimed. If the nuisance is so legalised, no action is maintainable, whether or no there is a right to such compensation. On the other hand, if it is not legalised, an action is maintainable; and it is agreed on all hands, that if an action is maintainable, the defendants in error are not entitled to have compensation made to them by the plaintiffs in error for the vibration in respect of which damages were assessed by the jury, as mentioned in the special case. But for the cases I shall refer to, I should be of opinion that such nuisance was not legalised, that the occupiers would be entitled from time to time to maintain actions for the nuisance, that consequently the plaintiffs would not be entitled to compensation, and that your Lordships' question would be answered in the negative. It is for those who say that this nuisance is legalised, and the right of action taken away, to show it. For this purpose reliance is placed on the clauses of the Railway Clauses Act, and especially

on s. 86, authorising the use of locomotives and carriages, which will cause the vibration in question. It is said that these clauses show that locomotives and carriages may be used, and consequently that no action nor indictment lies for that use; and no doubt this has been so held in *Rex* v. *Pease*, 4 B. & Ad. 30, and in *Vaughan* v. *Taff Vale Railway Company*, 5 H. & N. 679. My Lords, with great respect, I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question. What that object and effect are I will proceed to point out. The private Act of a railway company, whereby it is constituted, is its deed of settlement, declaring what are the purposes and objects of the company. It always begins by creating a corporation for the purpose of making a certain railway. If it stopped there the company could not act as carriers, nor furnish locomotive power, nor do more than make their railway and receive tolls for its use. Anything else would be *ultra vires*, as would now be their keeping an hotel or having steamboats without special powers for that purpose. Moreover, the courts of common law have held that the powers of these statutory corporations are limited to the purposes for which they are created, and that an agreement for anything else entered into by them is not merely *ultra vires* and void, but illegal: (See *East Anglian* v. *The Eastern Counties Railway Company*, 11 C. B. 775; *Gage* v. *The Newmarket Railway Company*, 18 Q. B. 457, and many other cases.) Your Lordships are aware that, for the same reasons, canal companies could not act as carriers on their own canals till an Act of Parliament enabled them to do so. This would have been the situation of the railways but for the clauses in question. Those clauses have no other object or effect, as I submit, than to obviate the objection I have referred to. Your Lordships will find that they begin with a general heading, "With respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon." All that follows that heading is to be construed with reference to it: (*Marriage* v. *The Eastern Counties Railway Company*, 9 H. of L. Cas. 32.) There is not a word in this heading as to the legalising or allowing of nuisances. The first of the following clauses, sect. 86, allows the company to be carriers on their own line, and limits the charges they may make. The "company" wanted no law to enable them to use a locomotive, any more than it did to use "other moving power and carriages and waggons," except to avoid the objection of *ultra vires*. A man may use a locomotive on his soil and freehold, and so may a corporation. They do want—that is to say, unless given, they do not possess—the power to use it so as to be a nuisance to their neighbours. But if this were intended to be given, where are the words? The words are sufficient, if meant to give *vires ultra* those of a company to make a railway, but insufficient if meant to authorise the doing of damage. Besides, the use of other moving power, and of carriages and waggons is authorised. In what sense? That a nuisance may be committed by their use without remedy? Impossible, for it was never contemplated that they would be a nuisance. Sect. 87 clearly also gives power of contracting with other companies, and has no thought of authorising nuisances. So sects. 88, 89, 90, and 91. Sect. 92 gives other companies and persons a right to use the railway with engines and carriages "properly constructed as by this and the special Act directed." The object of this was to define the rights of the public over the line as against the company, and not to authorise nuisances. All these sections, down to and including sect. 113, have the same object, namely, regulating the use of the railway by the company and others. But it is said that sect. 114 shows that the interests of others were in view of the Legislature, and that they made thereby what they thought was sufficient provision for that object. The argument is, with all submission, bad. They provided for this matter certainly. They said, we will not let it be discussed whether this is a nuisance. Did they, therefore, say nothing shall be, or if it is it shall be, remediless? Certainly not. Further, the statutes, the Land and Railway Clauses Acts, themselves recite that such clauses, as are contained in them, usually appear in Acts of Parliament authorising the taking of land and the construction of railways, and that it is desirable to avoid the necessity of repeating them. They ought to have, therefore, no greater or other effect in the general and public Acts than they had in the particular and private. Now it is not supposable that in a private Act for a particular company an anomaly so great was to be introduced, as that an actionable suit be committed with no common law remedy, and for the benefit of the company, that their profits might be larger, if without compensation. If it is said that compensation is given, then it is most surprising that in such private Act there is no provision for it in express words. And the same remark may be made on those general Acts. Why, if the common law remedy was to be taken away, are there not express words to that effect? Why, if there is to be a remedy by compensation, are there not express words to that effect? Why, if there is to be no action and no compensation, is so gross and anomalous an injustice inflicted, when such pains are taken to give compensation for the slightest injury occasioned by the very fabric of the railway? It seems to me impossible that it can have been intended that this damage can be done without any compensation. One reason only for such a state of things is given. It is said that the railway and the working of it are for the public benefit, and therefore the damage must be done, and be uncompensated. Admitting that the damage must be done for the public benefit, that is no reason why it should be uncompensated. It is to be remembered that that compensation comes from the public which gets the benefit. It comes directly from those who do the damage, but ultimately from the public in the fares they pay. If the fares will not pay for this damage and a fair profit on the company's capital, the speculation is a losing one, as all the gain does not pay all the loss and a fair profit. Either, therefore, the railway ought not to be made, or the damage may well be paid for. But further, though if it were the law and practice to do individuals a damage for the benefit of the public without compensation, no one in particular could complain when it happened to him, as every one would know that he held his property subject to being deprived of it or having it injured, when it suited the public, still such a law and practice would be highly inconvenient and mischievous. It is, however, however, idle to discuss such a question, as the Legislature has acted under no such considerations. For if the public benefit is a good reason for damaging a man's property without compensation, so would it be for taking it without compensation. The Legislature has made the most careful and minute provisions for the payment of compensation for everything taken, and indeed for everything injuriously affected. And it is absurd to suppose that it was intended that if a house was damaged to the extent of 1*l.* a year by its light and air being diminished, compensation should be given, and that it should not be given when the damage was ten times as great, but was caused by the noise and vibration of passing trains. Surely when a reasonable meaning can be given to the clauses relied

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on, it should be adopted rather than one so unreasonable. It is said that a man might dedicate land as a highway, and no action would lie for the nuisance occasioned by its user. In addition to the other answers given to this, I may add that the ordinary use of a highway is not a nuisance, affecting either the building or its occupants to such an extent and in such a way, as to be actionable. But if anyone continually used the highway with a very heavy vehicle, so as to cause such a vibration as is experienced in this case, I apprehend an action would lie against him. If there is to be a remedy, and it is to be by compensation and not by action, how is the compensation to be calculated? The line may not be used; its traffic may double; branch lines may be made. Further, it is not contended by those who say that the common law remedy is gone, that there is an unlimited right to damage, but only a right to do reasonable mischief, or a reasonable right to do mischief. That is to say, if by going a little slower, or being at a little more expense, or some other inconvenience, mischief can be avoided, it must be. But on what principle is this to be settled? Ten trains a day at twenty miles an hour might be no nuisance. This might accommodate the public, and pay a dividend. But fifty trains a day at thirty miles an hour might be a grievous nuisance, though much better for the public and the company. Where is the line to be drawn? Take the case of the plaintiff in *Vaughan* v. *Taff Vale Railway Company*. There the defendants declared that they went as slowly as they could, and with every contrivance for safety. But they might have had one servant, or ten, or 1000 at the spot in question, to prevent the grass catching fire and burning the plaintiff's wood. This would have cost them money, and it was cheaper to burn the wood, or, at all events, on a calculation of chances, better to risk doing so, than to have a sufficient number of servants. But how is compensation to be calculated for such a matter? Moreover, if these plaintiffs are entitled to compensation, so is the owner of every piece of land near the railway. For though there may be no house on it now, it is possible there would have been; but that is now prevented by the railway, at least to the same advantage as before. Therefore such land is injuriously affected, if this is. In the result, then, the right of action is not taken away in terms, the right to compensation is not given in terms; the principle on which compensation should be given would be most difficult to settle. Though given, the companies would still be liable to actions of excess, which it would be difficult to define, leaving scope for continual litigation. It is impossible that all remedy and redress are taken away; and the only clauses supposed to indicate this are shewn to have another and different object and effect. For these reasons I think the right of action not taken away, and the remedy by compensation not given, and that the two cases I have referred to were erroneously decided. I may observe, however, as to *Rex* v. *Pease*, that it was not one of private wrong, but of public nuisance. In the latter case if what was done was for the public benefit, the public is at once the gainer and loser, and the one may in some sense be set against the other, and so it might have been that, without an Act of Parliament, the matter complained of there would have been no public nuisance. But the present is not the case of a public but of a private nuisance, when the loser and the gainer are not the same to the same extent. In that case also the point I present to your Lordships was not mooted. It was not noticed that the clause was necessary to avoid the objection of *ultra vires*. Nor was it used by the counsel for the plaintiffs in error before your Lordships, because, though it would relieve them from the present claim, it would do so at the expense of leaving them subject to actions from time to time. It is said that *Rex* v. *Pease* has been so long decided, and so many railways have been made on the supposition that it was law, that it must be set right, if wrong, by legislation only. That it gives rise to great difficulties I think I have shown. I believe it has not been acted on; compensation under the compensation clause has not been given as it ought to have been if *Rex* v. *Pease* is law. This is the first time the question comes before your Lordships, and it cannot be said that railway companies have allowed such compensation to be awarded against them without appeal. So, also, juries in actions have found negligence in railway companies as they ought not to have done, if that case is not law; and compensation ought not to be given. As to railway traffic being stopped by injunction, I apprehend injunctions would not be granted in such cases. I have deemed it my duty to bring these cases before your Lordships. If your Lordships hold them to have been rightly decided, or think they are so far settled law, they must be acted on; then it seems to me they show that the judgment below was right, and that your Lordships' question should be answered in the affirmative. Because, for the reasons I have given, I am sure the Legislature did not mean to leave persons whose property will be injured, as in this case, without remedy by action or by claim for compensation; and I think it right to hold that any words that are capable of it, to mean to give a remedy by implication. Of course we must not put a meaning on words which they cannot bear, merely in order to remedy an injustice, however gross. But I think the words "injuriously affected by the construction thereof," and "full damage sustained by reason of the exercise as regards such land, of the powers," &c., may, and, where it is established there is no right of action, must, have the effect of giving compensation for the damage. For according to the case of *Vaughan* v. *The Taff Vale Railway Company*, immediately on the construction of the railway, and "by the construction thereof" a right accrued to do this damage. How then can it be said that the lands are not injuriously affected "by the construction thereof," if they thereby became subject to this? They immediately come under a servitude, as Mr. Mellish put it in the court below. Suppose it had been enacted expressly that, on the construction of the railway, there should be a right to use it so as to create a nuisance actionable at common law, would not that have been matter for compensation as much as if it had been enacted that the owner should make a grant of such a servitude? But it makes no difference whether it is expressly or otherwise enacted, if it is enacted, as *Vaughan* v. *The Taff Vale Railway Company*, shows it is. As to the argument that the premises are none the worse, but only the occupiers, it is enough to say that the same thing might be said in a claim for compensation for diminished light. It is to be observed that the word is not "in" or "during," but "by" the construction of the railway. Besides, this is a damage sustained by occupiers, by an exercise, as regards these lands, of the powers of the Act. The opinions I have expressed here, I entertained and expressed in the court below. But feeling there that I was bound by the case of *Vaughan* v. *The Taff Vale Railway Company*, I thought the then plaintiffs entitled to judgment in their favour. Should your Lordships hold those cases to have been well decided, or too settled to be overruled, then, for the reasons I have given, I think the then plaintiffs entitled to judgment in their favour; otherwise not. I have necessarily repeated what I said there, because I am unable to offer anything better to your Lordships, and because I desired to save your Lordships the

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trouble of referring to what I then said, had your Lordships been minded so far to honour me.

BLACKBURN, J.—My Lords, I have come to the conclusion that the plaintiffs below have no right to compensation for the vibration mentioned in the special case. I need not say that finding that I stand alone amongst the judges consulted by your Lordships, I give this opinion with diffidence. My reasons are as follows: I think it is agreed on all hands that if a person, not authorised by Act of Parliament so to do, erected a railway or any other private road on his own land, and then worked it by running locomotives and trains, or any other species of carriages, upon it, so that the vibration and noise were to such an extent as really to be annoying to a neighbour, that injury would be a nuisance, and that neighbour would have a fresh cause of action against the maintainer of the way every time that the way was so worked as to give rise to the nuisance, and he might, I apprehend, obtain an injunction to prevent the continuance of the nuisance. But if, instead of making and maintaining a private way of his own, the owner of the land dedicated it as a public highway, and the public brought traffic on it to such an extent that the noise and vibration seriously affected the neighbours, I apprehend they would be without remedy. The common law would have them suffering a private hardship for the public benefit. This distinction may have some bearing on the construction of the statutes (8 Vict. cc. 18 and 20), on the true meaning of which I think the present case depends. And I think that it is agreed on all hands that if the Legislature authorises the doing of an act (which if unauthorised would be a wrong and a cause of action) no action can be maintained for that act, on the plain ground that no court can treat that as a wrong which the Legislature has authorised, and consequently the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the Legislature has thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noisy traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit. Now, the Legislature has thought fit to authorise the defendants to make a railway, and by 8 Vict. c. 20, s. 86, "to use and employ locomotive engines and other moving power, and carriages and waggons to be drawn or propelled thereby." And the question is, whether this is such a legislative authorisation of the use of such power as to render all such consequences, as inevitably attend it, no longer wrongful. If this were a new matter, I should think there was a great deal in what is thrown out by Bramwell, B. in his judgment in the Exchequer Chamber, in this case; but the contrary was held in *Rex* v. *Pease*, so long ago as 1832, and acted on in *Vaughan* v. *The Taff Vale Railway Company*. And if your Lordships were to reverse those decisions, the consequence would follow that any owner of a house or field so adjacent to a railway that the inevitable disturbance from the working of the line amounted to a nuisance, might (at least where the railway has not been opened for twenty years) stop the working of the line. So large an amount has been invested in the belief that the trains might be run, even though some mischief to others was inevitable, that I think your Lordships will hold that even if the principle of *Rex* v. *Pease* was originally an error, it has long become *communis error*, and ought to be held to have made the law. I come, therefore, to the conclusion that, but for the statutes, the plaintiffs would have had a right of action for the vibration arising from the working of the defendants' line, and that the statutes have taken away that right of action. The question then arises, whether the Legislature has given the plaintiffs any compensation? and that must be a question depending on the construction of the statutes. It has been argued, with great force, that it is so unjust to take away private rights without compensation that it should be supposed that the Legislature at least wished to give compensation in every case where there was a private injury. But I think it is clear that the Legislature has not adopted the principle. In such a case as that of the *London and North Western Railway Company* v. *Bradley*, where the beer in the vaults adjoining the railway turned sour in consequence of the vibration, the owner of the vaults may or may not have had a right to compensation for the injury to his vaults; but the owner of the beer, if a different person from the occupier of the vaults, could have none, for the right to compensation is strictly confined to interest in lands injuriously affected: *Caledonian Railway Company* v. *Ogilvy; Ricket* v. *The Metropolitan Railway Company*.) The reason why the Legislature so narrowed the claim to compensation is probably that stated by Lord Cranworth in *Ricket* v. *The Metropolitan Railway Company*, "That any other construction of the clause would open the door to claims of so wide and indefinite a nature." But whatever be the reason, I think it clear that no compensation is given to those whose personal interests are injuriously affected, except where it can in some way be annexed to compensation for an injury to land. No doubt it is often very difficult to say whether an interest in land is or is not injuriously affected. In the present case, however, I assent to the argument so neatly expressed in the reasons of the appellants' case, that the plaintiff's house has "become subject to a perpetual servitude," and so her interest in it is injuriously affected. In my mind, therefore, the question is narrowed to this:—Do the compensation clauses in the statutes extend to the consequences of working the railway, and using the statutable powers for that purpose? Or, are they confined to the making and maintaining of the railway and the works, and using the statutable powers for that purpose? I can see many plausible reasons why the Legislature might think fit to adopt the narrower construction. There is the analogy to the hardship which, for the public good, is imposed by the common law by the owner of a quiet villa, if his neighbour dedicates the land close under his windows to the public as a highway; it might be leading to Smithfield market. Or they might have thought, as Lord Cranworth expresses it, that claims in respect of such damage would be of "a very wide and indefinite character." But I must own that, on reading the statutes, I do not think that the Legislature deliberately excluded such claims. I think they were not in the contemplation of those who framed the statutes at all; and that if there are words used sufficiently large to embrace such a case it is by an unintended accident. My opinion is based on what may be called the narrow ground, that no right to compensation exists unless given by the Legislature, and that I can find no sufficient expression of an intention on the part of the Legislature to give compensation for the consequences of exercising the powers given by 8 Vict. c. 20, s. 86. I am relieved from the necessity of going through the different sections of the Acts, because Channell. B., in his judgment in the Court of Exchequer Chamber, has said everything I could wish to say on that head. I will only add, in reference to the argument used in the Exchequer Chamber by M. Smith, J., derived from the general words, "they may do all other acts necessary for making, maintaining, altering, or re-

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pairing, and using the railway," which occur in the middle of the 16th section of 8 Vict. c. 20, that in *Jones* v. *The Festiniog Railway*, the court of Queen's Bench (then consisting only of my brother Lush and myself) thought that similar general words in a Railway Act which did not contain any express authority to use locomotive powers left the company at liberty, no doubt, to use locomotives, but on the common law terms, that they must keep in the fire at their own peril. So far as it goes, this confirms the reasoning of Channell, B. on this part of the 16th section. I regret that I am obliged to come to such an unsatisfactory determination; but I think the whole depends on the construction of enactments not sufficiently considered when perused. Opinions will differ on such a point, and it is not capable of much illustration from argument. I can only repeat that, in my opinion, the onus lies on the plaintiff to show that the Legislature has given compensation, and I cannot find in the statutes any language which, in my mind, expresses an intention to give compensation for such an injury.

Judgment was given by their Lordships on July 13, as follows:—

Lord CHELMSFORD.—My Lords, this is a proceeding in error upon a judgment in the Court of Exchequer Chamber, reversing a judgment of the Court of Queen's Bench, in favour of the plaintiffs in error upon a special case. The question raised for the opinion of the court below was, whether the plaintiffs in the action, who are owners of the house adjacent to the Hammersmith and City Railway, were entitled to compensation from the railway company for injury to their house from the vibration caused by the passage of trains over the lines in the ordinary use of the railway without negligence, whereby the house was depreciated in value to the extent, as found by a jury, of 272*l.* It is necessary in the outset of the consideration of this case to point out that the question is confined to the injury arising from vibration; because Lush, J., in the Court of Queen's Bench stated that the question was whether the owners of the house were entitled to compensation "for vibration, noise, and smoke;" and Sir William Erle, who heard the whole of the argument in the Exchequer Chamber, but retired from the bench before the judgment was delivered in that court (whose opinion is added to the report of the case in L. Rep. 2 Q. B. 246), assumed that the compensation was given for noise and smoke, as well as for vibration, and stated that "there was nothing to indicate what was the degree of noise, smoke, or vibration, or what was the amount assessed for either of these causes separately; and there was no evidence of any damage to the realty, either in structure or otherwise, from these causes, so that the compensation must be taken to have been given for the supposed discomfort of the inmates of the house." The special case, however, expressly states, with reference to this head of claim, that the jury assessed the amount of compensation, "for vibration from the use of the railway after construction," at 272*l.* There has been great difference of opinion amongst the judges of the courts below upon this case and those whose assistance your Lordships had are not unanimous in their answers to the questions put to them. It must therefore be regarded as one of nicety and difficulty. It must be borne in mind that this is not a case in which it was possible to claim compensation before the construction of the railway, nor, indeed, till after its working had commenced, because till then it could not be known whether there would be any vibration injurious to the house occasioned by the passing of the trains. The simple question, therefore, is whether the Legislature has provided compensation for any damage to land or houses not arising from negligence, but the inevitable consequence of the proper and ordinary use of the railway. As an introduction to this question, I must repeat what I said in *Ricket* v. *Directors, &c., of the Metropolitan Railway Company*, L. Rep. 2 App. 187; 16 L. T. Rep. N. S. 543, "The criterion of a party's right to damages under the clauses of the Railway Companies Acts is correctly stated by Lord Campbell in *Penny* v. *South-Eastern Railway Company*, 7 E. & B. 660, that 'unless the particular injury would have been actionable before the company had acquired their statutory power, it is not an injury for which compensation can be claimed.'" To which I must add, as I added there, the observation of my late noble and learned friend Lord Cranworth, in the case of *The Caledonian Railway Company* v. *Ogilvy*, 2 Macq. 235, "that it does not follow that a party would have a right to compensation in some cases in which, if the Act of Parliament had not passed there might have been not only an indictment, but a right of action." Assuming that before the passing of their Act the company would have been liable to an action for the injury caused to the plaintiffs' house, it is necessary for the plaintiffs in the first place to establish that the Company's Act has taken away the remedy by action in order to open the way of their claim to compensation. If the cases of *Rex* v. *Pease*, 4 B. & Ad. 30, and *Vaughan* v. *Taff Vale Railway Company*, 5 H. & N. 679; 2 L. T. Rep. N. S. 394, were rightly decided, this question has been determined. It was established by those cases, "that when the Legislature has sanctioned the use of a locomotive engine there is no liability for any injury caused by using it so long as every precaution is taken consistent with its use." Bramwell, B., in his answer to the question put by your Lordships to the judges, adverting to the above cases, said, "With great respect, I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question." And he then reasoned from the Act of the company in this manner: "The 86th section, which gives the company the right to be carriers on their own line, is preceded by a heading, 'With respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon.' There is not a word," said the learned baron, "in this heading as to the legalising or allowing of nuisances. The company wanted no power to enable them to use a locomotive. A man may use a locomotive on his soil and freehold, and so may a corporation. They do not possess the power to use it so as to be a nuisance to their neighbours. If this were intended to be given where are the words? The words are sufficient if meant to give *vires ultra* those of a company to make a railway, but insufficient if meant to authorise the doing of damage." With great respect to the learned baron, we do not expect to find words in an Act of Parliament expressly authorising an individual or a company to commit a nuisance or to do damage to a neighbour. The 86th section gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses, upon the principle of law that *cuicunque aliquis quid concedit concedere videtur et id, sine quo res ipsa esse non potuit*, it must be taken that power is given to cause that vibration without liability to an action. The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighbourhood, actions might be brought by their owners which would soon put a stop to the use of the railway. I therefore think, notwithstanding the respect to which every opinion of Bramwell, B. is entitled, that the cases of *Rex* v.

Pease and *Vaughan* v. *Taff Vale Railway Company* (*ubi sup.*) were rightly decided. The plaintiffs' remedy by action being taken away, the question remains whether they are entitled to receive compensation from the company for the injury done to their houses, a question which must be decided entirely by the provisions of the Acts of Parliament relating to the subject. It must be taken as an established fact that by the use of the railway the plaintiff's house has been depreciated in value to the extent of 272*l.*, and as they cannot recover the damage they have sustained by action, one naturally feels a wish to find that the Legislature has not left them remediless, but has provided for them the means of redress in the shape of compensation to be paid by the company as the price of the right given to them to injure the plaintiffs' property. It is with this disposition that I entered upon an examination of the clauses of the Acts to which your Lordships' attention was called in the argument, and I may say that it was with regret I was unable to find anything in them upon which, in my opinion, the claim to compensation can be established. It is not that the Legislature has excluded compensation for injury arising as the necessary consequence of using the railway, but that it has not, as far as I can discover, given any right to claim compensation for this species of injury. The sections of the Railway Clauses Act, which appear to me to be alone necessary to be considered are the 6th and the 16th sections. I do not think that the sections of the Lands Clauses Act, which were referred to in the argument, are applicable. The sections of the Railway Clauses Act are, as your Lordships know, arranged in order under different headings, which indicate the general object of the provisions immediately following; and these may be usefully referred to to determine the sense of any doubtful expression in a section ranged under a particular heading. The heading to the 6th and all the subsequent sections down to the 30th, and including, of course, the 16th, is, "And with respect to the construction of the railway, and the works connected therewith, be it enacted as follows." Therefore all the sections, to which this heading applies, must be taken to have been intended by the Legislature to provide for matters relating to "the construction of the railway, and the works connected therewith." The 6th section seems more closely to confine its provisions to these objects, for it begins by enacting that, "In exercising the power given to the company to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act, and in the Lands Clauses Consolidation Act," and then it goes on, "and the company shall make to the owners and occupiers of, and all other persons interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special Act incorporated therewith vested in the company." It was argued by the plaintiffs that the injury occasioned to the house from the vibration caused by the use of the railway came within the words "injuriously affected by the construction thereof," or, at all events, that it was a damage sustained "by reason of the exercise of the powers vested in the company." Now as to the words "by the construction thereof," it seems to me that it would be doing violence to language (even without the limitation which is placed upon these words by the general heading to the 6th and following sections, and the context of the section itself), to extend them to any injury which is not the immediate consequence of the construction of the railway. An instance of damage of this sort occurs in this very case, for the jury gave the plaintiffs compensation to the amount of 836*l.* for obstruction of light, air, and doorway. To argue that, as the injury could not have occurred unless the railway had been previously constructed therefore it was caused "by the construction thereof," is certainly a strong example of the illogical reasoning of *post hoc ergo propter hoc*, and would extend to every accident or injury occurring upon the railway after its construction, which, of course, could not have happened if it had not been constructed. With respect to the subsequent words in the 6th section, "damage sustained by reason of the exercise of the powers vested in the company," it was argued that they embrace the claim of the plaintiffs, because the powers vested in the company are not merely for the construction of a railway, but also for the use of it after its construction, being the end and object for which it is made. But again we must refer to the heading of this, and the following sections, which limits the provisions they contain, to "the construction of the railway and the works connected therewith." And reading the words of the section with reference to these objects, we find that compensation is to be made to the owners, &c., of lands taken or used for the purposes the railways, or injuriously affected by the construction thereof for damage sustained (not as regards such lands, but) "by reason of the exercise, as regards such lands, of the powers vested in the company." Now the powers vested in the company "as regards such lands," are to take and use the lands for the purposes of the railway, and to say that the use of the railway after its construction is one of the powers vested in the company in regard to the lands conveys to my mind no intelligible meaning. The sixth section of the Railway Clauses Act being inapplicable to the plaintiff's claim, we must turn to the 16th section to see whether it affords any countenance to it. The 16th section, as already observed, is one of the sections ranged under the heading which immediately precedes the 6th section. As the words "using the railway" are found in it, great stress is laid upon it in favour of the plaintiffs' claim to compensation. Now, it must be observed that this section begins with the words "it shall be lawful for the company, for the purpose of constructing the railway, or accommodation works connected therewith, hereinafter mentioned, to execute any of the following works." And then follows a specification of different works in detail empowered to be done for the purposes mentioned, ending with a general power to do "all other acts necessary for making, maintaining, altering, or repairing, and using the railway." The section then provides that, in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction to all parties interested, "for all damage by them sustained by reason of the exercise of such powers." The counsel for the respondents argued that this proviso comprehended every description of damage sustained by reason of the exercise of the powers vested in the company. That power is given to them by the 86th section of the Act to use and employ locomotive engines upon the railway; and that the injury to the plaintiffs arose from the use of such locomotive engines, and therefore was sustained by reason of the exercise of the company's powers. It appears to me that this argument claims for the proviso in the 16th section a wider application than is warranted by the purview of the section. The powers specifically conferred by it are expressly referred and limited to the purpose of "constructing the railway." The general power to

do all other acts, &c., must be read with reference to this object. If this mode of construing the section by the context is adopted, there will be no difficulty in understanding the words, "all other Acts necessary for using the railway," to mean, that for the purpose of constructing the railway the company may do all acts necessary to enable them to use the railway. This construction appears to me to be aided by the words which are found in juxtaposition with the word "using," viz., "making, maintaining, altering, and repairing," and it seems to me rather a forced interpretation of language to say that the words the company may do all acts necessary for using the railway, mean they may do all necessary acts in using the railway. I think that the proviso must be limited to the powers conferred by the section, and that it is only if in the exercise of these powers damage is sustained, that satisfaction is to be made. The section itself having empowered the company to perform certain works for the purpose of constructing the railway, the proviso in the Act that "in the exercise of the powers, &c., they shall do as little damage as can be," clearly pointing to the execution of the works to which this section relates, and confining the satisfaction to be made for damage done in exercising those powers. It appears to me that in the reasonable construction of this section it is impossible to hold that it gives any remedy to the plaintiffs for damage occasioned to their house in the course of using the railway. And there being no other legislative provision upon which the plaintiffs claim to compensation can be founded, except the 6th and 16th sections of the Railways Clauses Act, which I have fully considered and shown not to apply to that species of injury of which they complain, I am compelled very reluctantly, in a case where real damage has been sustained though not to a very large amount, to come to the conclusion that the Legislature has not provided for their case, but has left them without remedy, and that the judgment of the Court of Exchequer Chamber ought therefore to be reversed.

Lord COLONSAY.—My Lords I have, I confess, found this case to be attended with much difficulty, and I think I need not refrain from stating that, when I find that there has been so much difference of opinion in regard to it among the judges who have decided it in the other courts, and that there is even a difference of opinion among your Lordships. The case arises out of a claim made by a party for injury to her property, resulting from vibration caused by the use of the railway belonging to the appellants. The claim is rested on the provisions contained in certain statutes, and depends on the construction to be put on those provisions. Two general Acts have been referred to, and the special Railway Act, but I do not understand that under the special Act there is any particular clause that can affect the judgment to be pronounced in this case. The two general Acts that have been referred to are the Lands Clauses Consolidation Act, and the Railway Clauses Consolidation Act both of which are held to be incorporated in the special railway Act. It is, I think, upon the provisions of the two general Acts that the question depends. One of those general Acts, to wit, the Lands Clauses Act has, I humbly venture to think, only an indirect bearing on the question. No land belonging to the respondent, or in which she was interested, was taken or touched by the railway. Her case is not directly within the provisions, as I read them, of that Act. I think it is very clear that, unless it is within the provisions of the 68th section of that Act, it is not within the provisions of the Act at all. Nevertheless, in reading the *Railway Clauses Act*, on which I think the claim *of the respondent* must be rested, it is not illegitimate to borrow such light as can be got from the language of the Lands Clauses Act, passed at the same time, and intended to be co-operative with the Railway Clauses Act, repeatedly referred to in, and intended to be incorporated with, the special Act for making the railway. Now when I have said that I do not think that the Lands Clauses Act bears on this claim otherwise than indirectly, I may explain that it appears to me that the object of the Lands Clauses Act is to give a power to parties engaged in this species of public undertakings to acquire lands. The preamble of the Act says that, "Whereas it is expedient to comprise in one general Act sundry provisions usually introduced into the Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for ensuring uniformity in the provisions themselves." Then it goes on to enact, with regard to the purchase of lands for such undertakings. The Act is classed under various such divisions, the first of which is, "with respect to the purchase of lands by agreement." That begins with the 6th section and ends with the 15th section. Then there is another heading: "And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." Then comes another heading, "With respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating or making title, be it enacted as follows." Then another heading, "And with respect to the conveyances of land, be it enacted as follows." Then another heading, "And with respect to the entry upon lands by the promoters of the undertaking, be it enacted as follows." And so on with regard to various matters as to lands. I am not speaking at present of the 68th section; but all the other clauses are clauses which are applicable to the promoters of the undertaking, and to the parties from whom lands are to be taken. There is no other class of persons contemplated in that statute. It is not a statute authorising the execution of any particular kind of works. It is a statute only as to the taking of land. It is intended to regulate the interests of the parties who take the lands, and of the parties to whom the lands belong, or who are interested in the lands to be taken. It provides on behalf of the parties whose lands are to be taken, not only that they are to receive the value of the lands so taken from them; but it provides also that they are to be compensated for the injury done to any lands held along with such lands, whether by severance or any other injury done to them, but it is all with reference to the parties, whose lands are to be taken, or who are interested in lands to be taken. The sections which were specially referred to in the argument were the 18th, 21st, 38th, 49th, 63rd, and 68th, and it will be seen that throughout the whole of them the matter to be dealt with is the interests of the parties from whom the lands are taken, or who are interested in those lands, and the interests of the railway company, or of the promoters of the undertaking, whatever it may be. Then I come to the 68th section, which is the only one of wider application. Now that section is one of that class of clauses which are placed under the heading, "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows." That heading covers the sections beginning with the 6th section and ending with the 68th, and then follow the sections, "With respect to the purchase-money or compensation coming to parties having limited interests." Sect. 68 says that, "If any party shall be entitled to any compensation in respect of any

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lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of their works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled by arbitration, or by the verdict of a jury as he shall think fit." The words here certainly are, "If any party shall be entitled to compensation in respect of any lands injuriously affected by the execution of their works." But these expressions, "injuriously affected by the execution of the works," which occur repeatedly throughout the statute are limited to the persons who are to get notice, and from whom lands are taken, or who have other lands which may be affected by such proceedings. And I think that this section of the statute must be read as a part of that class of section which has reference to the subject mentioned under the heading prefixed to that class of sections; and must be limited in its operation to the matters with which it is immediately connected. It should be observed that this is not a statute relative to any particular kind of works, it is a statute relative to the taking of lands. Even if it were to be read otherwise, it will be observed that there is a limitation in the expression here used, "affected by the execution of the works," to which I shall afterwards refer. But it appears to me that this section is one of those which have reference to the taking of lands otherwise than by agreement, it has reference to parties, who, under the other sections of the statute to which I have referred, would be entitled to compensation, but who would have not been omitted or overlooked in dealing with the matter. It may be that parties having certain interests in lands taken, or lands severed by reason of the taking, have not been found out at the time, and may come forward afterwards and make a claim. Notice is required to be given to owners and occupiers, and to all parties known to be interested, who have not had notice, and it is right that those parties, if found, should have an opportunity of coming forward and making a claim. And it seems clear that this was intended, seeing that it will not apply to claims that do not exceed 50*l.* in value. Why should the claims of smaller amount be excluded? There are modes here given of opening up other claims by arbitration; but where they are above 50*l.* they are to have the choice of arbitration or a jury. That also shows that this is connected with the previous sections under this head. But it appears to me that the Railway Clauses Act stands upon a different footing. That Act has reference to the particular species of undertaking. And I think that it is in that Act that we may expect to find the materials for dealing with claims in reference to such undertakings as this. It provides for compensation, not referring to the Lands Clauses Act as the rule for compensation, but referring to that Act as the machinery by which compensation is to be adjudged, without taking the Lands Clauses Act as giving the rule, or as regulating the parties to whom, or the matters for which, compensation is to be given. On the contrary, it contains its own provisions with regard to the matter that we are here dealing with. I think the Railway Clauses Act is of wider application than the Lands Clauses Act as regards the parties entitled to compensation, and also as regards the matter for which compensation may be given. The important sections are the 6th and the 16th. The 6th section appears to me to be, on the whole, the most important and the most general. It says that "in exercising the power given to the company by the special Act to construct the railway, and to take lands for the purpose, the company shall be subject to the provisions and restrictions contained in this Act and in the said Lands Clauses Consolidation (Scotland) Act; and the company shall make to the owner and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers of this or the special Act, or any Act incorporated therewith vested in the company." Under this clause the company are to make compensation to certain parties for certain things. They are to make compensation to the owners and occupiers, and other parties interested in any lands. What lands? "Lands taken or used for the purposes of the railway." So far it is clear, but it does not stop there. They are to make compensation to the owners and occupiers of lands "injuriously affected by the construction thereof." Now, I think, it is very clear that the occupiers and owners to whom compensation is to be made are to be the occupiers and owners of lands injuriously affected by the construction of the railway. The respondent in this case is the owner and occupier of land injuriously affected by the construction of the railway, and therefore she is a party who is comprehended in the class of persons who are entitled to claim compensation. Then what is the matter for which compensation is to be made? It is to be made for "the value of the lands so taken or used." That does not apply to the respondent's case. But the section goes on, "And for all damage sustained by such owners and occupiers" (of whom the respondent is one), "by reason of the exercise as regards such lands" (which includes the lands of the respondent), "of the powers by this or the special Act or any Act incorporated therewith vested in the company." Now, the claimant of compensation here is an owner and occupier of lands injuriously affected by reason of the exercise of the powers vested in the company. It is very clear that her property has been injuriously affected by the exercise of the powers vested in the company. It has been injuriously affected by the construction of the railway, the very words of the clause being "by the construction thereof." Therefore, she is a person who under this clause is entitled to come forward and make a claim. Her property was in the predicament which this clause contemplates, as property "injuriously affected," and therefore she is a person entitled to compensation. Then, the question arises, how far that compensation is to go? Is it to go beyond the measure in which she is injuriously affected by the construction of the railway? Is it to be extended to any injury which her property has sustained by the use of the railway? Compensation has been awarded to her for the injury done by the construction of the railway as affecting the access to her property, and the lights and so forth. The sum of 800*l.* odd has been assessed for that. But the question remains whether the statute by this enactment provides for compensation to be given for damage sustained not only by reason of the construction of the railway and the works connected therewith, but by reason of the subsequent use of the railway by the running thereon of locomotives causing vibration. Before expressing any opinion on that question, I should like to refer to other terms of the section of the statute, which has been founded upon in support of the claim. It is the 16th section, and it says that, "subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith herein-

after mentioned, to execute any of the following works." This is under the heading, "With respect to the construction of the railway and the works connected therewith." Now, the things that are allowed to be done are specially enumerated—to construct inclined planes, to alter course of rivers, &c., to make drains, to erect warehouses, &c., and to make alterations and repairs; and then there is this general clause, that "they may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway." Then there is a clause of compensation, "Provided always that, in the exercise of the powers by this or the special Act granted, the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special Act, and any Act incorporated therewith, to all parties interested, for all damage sustained by reason of the exercise of such powers." Now, it appears to me, that that clause for compensation has reference to the matters comprehended in the 16th section of the Act, and the question, therefore, comes to be whether the general expression, that they may do "all other acts necessary for making, maintaining, altering, repairing, or using the railway," comprehends the claim now made in respect of the use of the railway. I confess it does not appear to me to comprehend this. I think this section has reference altogether to the construction of the railway, and of certain things being done to enable the railway to be constructed and repaired, and made ready for use. I think it has reference to all these acts here mentioned, the making of drains, and inclined planes, altering and repairing the works, and all other acts necessary for making or maintaining, altering or repairing, and using the railway—all the acts necessary for placing the railway in a condition to be used. That is the construction I put on these words. Then when I go back to the 6th section, I think that section points in the same direction, that is, that the claim to compensation is limited to the injury done by the construction of the railway, and that it contains nothing whatever as to the use to be made of it. If compensation had been intended to be given for the using of the railway by locomotives or otherwise, I should have expected something to be said with reference to it. I should not expect to find in the Lands Clauses Act anything specific with reference to any kind of works, because that Act has nothing to do with any particular use that may be made of the works that are to be constructed. But in the other Act, in which we have statutory enactments, with regard to this particular class of public works, namely, railways. I should have expected to find something with regard to claims for compensation, not merely for injury done in the construction, but also for injury arising from the use of such locomotives, if such compensation had been intended to be given. I think there may be reasons seen why such a wide claim should not be given. But however that may be, I can look only at the statute itself, and I have only to state the construction, which I feel myself constrained to put upon the statute, without going beyond that. There is no connection between this question and the limits of deviation, as regards particular lands, under the statute. The claim now made could not have been confined to lands, within the limits of deviation under the statute, because injury by vibration or any other injury might be done to lands more remote, and the claim would be equally well founded. I think that when the Legislature gives special powers under any particular Act, the provision for compensation would be contained in that Act. The Legislature has not made Acts in regard to all kinds of public works. It has made an Act with regard to railways, and I do not find within that Act with regard to railways what I can consider as a right to claim compensation for vibration by reason of the subsequent use of the railway when made. I therefore feel myself under the necessity of concurring in the judgment that has been suggested by my noble and learned friend.

Lord CAIRNS.—My Lords, in a case which certainly is not without difficulties, and which has caused much difference of opinion in the courts below and among the learned judges who have assisted your Lordships, it is not, perhaps, surprising that the same difference of opinion should reach your Lordships' House; and I regret very much that I am unable to concur in the views of my noble and learned friends who have just spoken. My Lords, in one part of their view I do entirely concur. It appears to me that the effect of the legislation on this subject is to take away entirely any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken, I think, from the statements in this case, that the railway could not be used for the purpose for which it was intended without the consequences of this vibration. It is clear to demonstration that the intention of Parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily caused damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company for the damage which the landowner sustained, and, after some actions had been brought and had succeeded, the Court of Chancery would interfere by injunction, and would prevent the railway being worked. This, of course, is a *reductio ad absurdum*, and would defeat the intention of the Legislature. I have, therefore, no hesitation in arriving at the conclusion that no action would be maintainable against the railway company. My Lords, that alone would certainly predispose the mind to find in the enactments upon the subject compensation in some other form for the loss which, beyond all doubt, the landowner in such a case sustains. I do not mean to say that it would be safe to strain the words of an Act of Parliament on account of considerations of that kind; but if there be any doubt or ambiguity in the words, the consideration ought not to be overlooked that, beyond all doubt, the intention of legislation of this kind is that, in some shape or other, compensation should be made to those who sustain loss or harm by the operation of the Parliamentary powers. My Lords, it appears to me that it is not necessary in any way to strain the words of the Acts of Parliament in this case; but it is necessary in the first place to be perfectly clear as to what Acts of Parliament and what clauses apply. In my opinion there are two Acts of Parliament which must be looked at for this purpose, both the Lands Clauses Consolidation Act and the Railways Clauses Act. My Lords, with regard to the Lands Clauses Act, there is no doubt that it mainly relates to the taking and purchase of land, but it would be a great mistake to suppose, and it would be at variance with the well-settled practice upon the subject to hold, that the Act is confined to the taking of lands from landowners. And, in fact, the frame of the Lands Clauses Act shows that it is even dangerous to trust to the headings, which occur at the commencement of these *fasciculi* of clauses, for the purpose of restraining or confining the natural operation of the words which you find in the various clauses under those headings. I will illustrate what I mean by one *fasciculus* of clauses in the Lands Clauses Act. The 16th clause is prefaced by these words, "with respect to the purchase and taking of lands otherwise than by

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agreement, be it enacted as follows." The bundle of clauses which occurs under that heading runs on to the 68th section, and if you were to take the literal meaning of the words of the heading, you might expect to find nothing in the clauses that follow except with regard to the purchase and taking of land, and you might perhaps say that you must interpret every clause that follows as relating to the taking of land, and not to the affecting in any way of land which is not taken. But when we turn to the 22nd clause we find this enactment, "if no agreement is come to between the promoters of the undertaking, and the owners of or parties by this Act enabled to sell or convey or release, any lands taken or required for, or injuriously affected by, the execution of the undertaking, or any interest in such lands, as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50l., the same shall be settled by two justices." My Lords, it is evident that various classes of land are there spoken of, not merely land which is taken, or land which is required, but also land which is injuriously affected by the execution of the undertaking. And when we come to the 68th clause, the language is still more significant. The enactment is, "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for, or injuriously affected by the execution of, the works, and for which the promoters of the undertaking shall not have made satisfaction, under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l*," then it is to be settled by arbitration, or by a jury in the way pointed out. My Lords, I need not remind your Lordships that, under this Act of Parliament, passed as it was many years ago, many hundreds of thousands of pounds, I might perhaps say millions of pounds, have been paid to persons, not one yard or one inch of whose land has been taken by the railway company, but whose land has been (in the words of the section) injuriously affected by the execution of the works (whatever that may mean, that is another point), but "injuriously affected," as a matter entirely distinct from the taking of the land. That shows, I think, that the headings of these clauses are not to be relied upon, and many other instances of the same kind inside the clauses themselves, something showing just in the same way that an Act of Parliament often goes beyond the preamble, and that provisions have been introduced in the progress of the clauses going somewhat beyond the short and summary definition in the headings of the clauses; in fact, one of these Acts of Parliament shows that these short headings were introduced merely to earmark a set of clauses, and to afford a short and summary way by which they might be introduced as enactments into other Acts of Parliament. My Lords, I have gone through the sections in the Lands Clauses Act, which seem to me to be relevant to this matter, and all that I would say more with regard to them is this: As to the 68th section to which I have referred, I agree that that section does not define the conditions under which the person whose land has been injuriously affected is to be entitled to compensation. It rather assumes that the right to compensation has been given in some other enactment, and it contents itself with pointing out the *modus* in which that compensation shall be obtained. And I may observe that in the present case the whole of the proceedings have been taken under the Lands Clauses Act, and indeed it is only under the Lands Clauses Act that a jury can be summoned, or the aid of arbitration invoked. I therefore commence with the Lands Clauses Act as the mode in which compensation is to be obtained, if the landowner is entitled to compensation under any other provision. I now turn for the purpose of finding the kind of compensation to be given to the Railway Clauses Act. I will only ask your Lordships to bear in mind the words which I mention again, in the 68th section: "If any party shall be entitled to any compensation in respect of any lands which shall have been injuriously affected by the execution of the works." Now, turning to the Railway Clauses Act in the *fasiculus* of clauses, which I agree commences with these words, "and with respect to the construction of the railway and the works connected therewith be it enacted as follows." The 6th section is in these words: "In exercising the powers given to the company by the special Act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this Act, and in the said Lands Clauses Consolidation Act" (*i. e.*, in the 68th section among others), "and the company shall make to the owners and occupiers of, and all other parties interested in, any any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company. And then it proceeds to say that that compensation shall be ascertained under the Lands Clauses Act. My Lords, I desire in passing to point out to your Lordships that the words are evidently to be read *reddendo singula singulis.* If the land be taken or used, full compensation is to be made for the value of the land. If the land be not taken or used, but be injuriously affected by the construction of the railway, then compensation is to be made for the damage sustained by the owners and occupiers or other party interested by reason of the exercise as regards such lands of the powers by this or the special Act vested in the company. Then the 16th section I may also refer to, and that will complete the enumeration of the enactments with which we have to deal. It is as follows: "Subject to the provisions and restrictions in this and the special Act and any Act incorporated therewith" (that is to say, subject to the provisions and restrictions in the Lands Clauses Consolidation Act), "it shall be lawful for the company for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works." Then come a number of what I may term, structural works, such as turning the course of rivers, making railways across streets, and so on, and then comes the final power—"They may do all other acts necessary for making, maintaining, altering, or repairing and using the railway." Then comes what appears to me to be of great importance, the term and condition upon which alone they are authorised and empowered to make these structural works. The condition is, not that in the exercise of those structural powers they are to make certain compensation, but "that in the exercise of the powers" (that is, of all the powers by this or the special Act granted), "the company shall do as little damage as can be, and shall make full satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers" (*i.e.*, of all the powers vested in the company). My Lords, I venture to think that it would be too narrow a construction of these words to say that the powers here

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mentioned are simply those powers which are immediately before enumerated. If that had been the intention of the Legislature, nothing could be easier than to say, and it would have been much shorter to have said, "provided always that in the exercise of such powers they shall make full compensation to the persons interested." Then we should have known exactly that what was intended was that, if by reason of the exercise of those structural powers any damage was done, they should make compensation. But, on the contrary, the provision is in substance this, "we, the Legislature, will authorise you to make these structural works, but the term and condition upon which we authorise you to make them is that, if by reason of the exercise of any of the powers by this, or the present Act, given to you, you do any damage you shall make compensation for that damage. In other words we will authorise the railway to be made with certain powers appendant and annexed to the making of the railway, one of the main and special ones of which is, that the railway shall be used as a passage for locomotive engines, but if by reason of the exercise of any of the powers we give you, you do damage you shall make full compensation for that damage to the persons injured. Now having taken the liberty of pointing out to your Lordships the sections, with which we have to deal, I shall sum up what appears to me to be the true and proper construction, (even if we were dealing with the 6th section alone of the Railway Clauses Act) of those words which have been referred to already, "injuriously affected by the construction of the railway." Even if we were dealing with that section alone it would appear to me that those words, "by the construction of the railway," are just the same words, and intended to denote the same idea, as the words in the 68th section of the Lands Clauses Consolidation Act, "injuriously affected by the execution of the works," and that even dwelling upon those two sections, and not praying in aid at all the 16th section, the position of things would be this: Parliament authorises construction of the railway, but Parliament does not look upon those words, "the construction of the railway or the execution of the works authorised," as meaning the digging out so much land, the putting so much brick and mortar together, the making of a viaduct, or the making an embankment, or the mere structural aspect of the works, it looks upon the railway as an undertaking, as a going concern, if I may so call it, as a thing which is to be there for a certain purpose, and so fulfil a certain end, which the Legislature has had in its view. And, when it was the term "the execution of the works," and "the construction of the railway," it appears to me to point to a living and active thing which, placed in the spot where Parliament authorises it, may possibly have an injurious effect on some circumjacent land, and then pointing to that Parliamentary power, which is given to construct that railway or to execute that work, Parliament says, "If, by the construction of this railway with these incidents, if, by the execution of these works, there be a consequence in the shape of damage to those who are in the neighbourhood, that damage must be atoned for by compensation. My Lords, this case might be illustrated very easily by putting another case not the instance of a railway. The Lands Clauses Consolidation Act applies to works of all kinds, not merely to a railway; suppose that, under a special Act of Parliament, a company were authorised to take land for the purpose of making in a particular locality a gasworks, or were authorised to make on a particular spot copper-smelting works, either of which, we know, when they came to be worked would most probably produce injury to the circumjacent lands, although the lands around may taken by the company. Supposing Parli authorised the gasworks or the copper-sm works to be conducted, by words of enac which would make it impossible for the ow the adjacent land to maintain an action f injury sustained, and then Parliament said, " the execution of those works, the neighb owners sustain any damage, you shall pay fo damage," I should understand by an enactm that kind, not that the neighbouring owner is posed to be likely to sustain damage b construction of the building, by putting the and the mortar together, but to sustain dama those works as active, going works, which there for the purpose of manufacturing g smelting copper as the case may be, and that Parliament said, "If, by the execution of works, damage is done," Parliament meant t "If, by the execution of these works, *qua* gas or *qua* copper-smelting works, continuing to and actively proceeding, any damage is done damage shall be paid for." I may remind Lordships that this question was very near h to be decided once in your Lordships' Hous though, from circumstances, the decision becam necessary. In the case of *Broadbent* v. *The Im Gas Company*, 7 De G. M. & G. 436; 7 H. of L 600, the case which I have supposed was very happening, the company was authorised to mak works in a particular place and the Lands Clause was incorporated to a certain extent in the prov of the special Act, but there was a clause in th Clauses Act, also incorporated, which provide in carrying on their works and making gas n sance or injury should be occasioned to any c surrounding land. And it was held by this H as might be expected, that the consequence of section being introduced was that the right of was not taken away, and therefore it was not sary to consider the case I have suggested. I you had a case, where the right of action was away, and where Parliament had provided compensation should be made for injury do the execution of the works, then, in my opini least, it would mean and imply the execution works of the undertaking as an active and concern. That would be the opinion which I s entertain on the 6th section alone, even witho 16th section. As it appears to me that Lu has expressed with great felicity the same idea I have entertained, I cannot do better than re your Lordships of what Lush, J. says:— Lands Clauses Act is designed, not for rai only, but for all undertakings for which comp powers of taking lands are given, and every s Act which incorporates its provisions desig and fixes the purpose for which the land is taken, and the use to which it is to be perma appropriated, and the company, who are empo to take it, are bound to apply it to that pu and to that purpose only. So much of the ge Act as is incorporated becomes part of the s Act, and its language, as part of that Act, be pointed to the particular work or undert specified, whatever it may be, whether a rail dock, a canal, or any other undertaking. It authorises the taking of the land for the purp and its conversion into the particular railway, or canal in order that it may be used as such. undertaking is regarded as a working concer the idea of its use as a railway, dock, or canal the mind of the Legislature inseparable from of its construction. In professing to give co sation for all damages sustained by the own the adjacent land by the 'execution of the worl 'the exercise of the powers of the Act as re such lands,' the Legislature must, as it appears

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have had in view the ultimate object aimed at, the works when complete and in operation—the dock, railway, or canal, not abstractedly as a mere excavation, embankment or reservoir, but in connection with its appropriate traffic, and with the ordinary incidents of a business undertaking." It appears to me that if it is necessary to go beyond that and make the case still clearer, the case is made clearer by the 16th section, because as I interpret that section it seems to me to give a number of structural powers, I agree, but to make it the term and condition of exercising those structural powers —of interfering with rivers or with roads, and those other violent powers, as they may be termed, given by that Act, or by the special Act—that the company shall make full satisfaction to every person for all damage sustained by reason of the exercise of such powers, that is of all the powers given by the Act to the company. Now, my Lords, that being certainly the view which I should take of the construction of these Acts of Parliament, the only other matter which I have to refer to is what appears to have weighed in the minds of some of the learned judges, who were unable to adopt this view. I observe that some of those learned persons say that there would be very great difficulty in estimating the compensation because the damage could not be ascertained until the undertaking became, what I may call, a going concern, and until by experience you had ascertained exactly what the amount of damage or injury actually was. Now I do not think there is any difficulty at all on that head. In the first place, in the present case which we have here before us, no difficulty seems to have occurred. A sum has been found by the jury, not representing merely the past damage, but representing the whole damage which, in the opinion of the jury, both had been sustained and would be sustained by the exercise of the powers given to the company. In addition to that the problem which has to be solved appears to me not to be at all beyond the powers or the province of a jury. What you have to find is, what is the actual deterioration in value. You have a certain house, and near it a vibrating railway, I mean a railway in the use of which there cannot fail to be vibration. The house was of a certain value before the railway was put there. If the railway causes vibration evidence can be easily obtained to prove what the amount of deterioration in value is and the sum can be awarded accordingly. The subject may be illustrated further by supposing a house used for a particular trade, say that of a watch or clock maker, which requires particular steadiness. Serious injury might be done there, and the house might become useless for the particular purpose for which it was used before. But in addition to that it is said that you ought to know how many trains in a day there will be running, and the weight of them, and the speed at which they will pass. There is a well-known principle which applies to such cases, which is, that if the company against which the claim is made are not willing to bind themselves as to the maximum number of trains or the weight, or the speed, then the sum must be taken most strongly against the company upon the principle enunciated in the well-known old case of *Armory* v. *Delamirié*, 1 Strange, 504; 1 Sm. L. Ca. 301. And the largest amount of injury which can be sustained would probably be considered to be the amount to be awarded by the tribunal which has to award compensation. I might mention another case in which everyone would admit that compensation would have to be assessed at the commencement, and where the same difficulty might occur. Your Lordships will recollect cases which have come before this House arising upon questions of which the *Caledonian Railway Company* v. *Sprot*, 2 Mac. 449, may be taken as an instance. In those cases it was held that a landowner selling a strip of land to the railway company, is bound to give lateral support to resist the pressure which a heavy train passing over the land might occasion. Now in that case there cannot be compensation assessed and payable for the land taken in the first instance. Yet at the time when that compensation was so assessed, it might not be known what the number of trains passing along the railway, or the weight, or speed of them would be, and therefore it might not be possible to say with mathematical exactitude what would be the precise amount of support which would have to be given to the land on each side. In such a case the landowner would make his claim; he would show that the nature of the ground was such that lateral support would be particularly desirable; he would then show that he might have to support the land against the pressure that would be created by a great number of trains passing every day, and he would claim and probably would recover, compensation for the maximum amount of support which the land would require. I, therefore, cannot accept the suggested difficulty as to ascertaining the amount of compensation as any reason why the Act of Parliament should be taken as having a meaning other than what appears to me to be the plain meaning of the words. My Lords, I regret very much to say that I am afraid that the result will be that although a clear injury and damage has been sustained, and although a substantial sum has been awarded by a jury to the landowner, that sum will not be recovered. But I have been unable to do otherwise than to express to your Lordships the view which I entertain as to the construction of these statutes in a case which, as it appears to me, may be one of great importance.

Digby.—My Lords, I am with Sir *John Karslake*, and I am instructed to ask your Lordships to reverse the judgment, with costs, in the court below.

Lord CHELMSFORD.—The costs will follow.

Digby.—I understand not.

Lord CHELMSFORD.—In the case of a writ of error surely the reversal carries the costs. There can be no doubt about it.

Digby.—I understood there was some doubt.

Lord CHELMSFORD.—We shall take care that the costs will follow the ordinary course.

Digby.—I understand that the costs always follow when the appeal is affirmed; but in this case, when the judgment of the Exchequer Chamber is reversed, I understand the rule is somewhat different.

Lord CHELMSFORD.—Whatever the ordinary rule is, this case will follow it.

Judgment reversed.

Attorneys for the plaintiffs in error, *Elsdale* and *Byrne*.

Attorneys for the defendants in error, *Aldridge* and *Thorn*.

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Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

May 4, 5, 6, 7, *and* 29.

(Before the LORDS JUSTICES.)

THE EARL BEAUCHAMP v. WINN.

*Agreement—Alleged mutual mistake—Suit to rectify—"Warren" — "Warren of conies" — Grant of warren—What passes by—*38 *Geo.* 3, *c.* 60—*"Tenement."*

Although the court has undoubted jurisdiction to set aside an agreement, on the ground of mistake, yet, as a general rule, the mistake must be so plain and palpable as hardly to admit of a difference of opinion, and it must be possible to replace the parties in what was substantially their original position.

There is no ground in law for saying that a person having a right of free warren generally may not grant a limited right by a grant of a "warren of conies," but that phrase is not so extensive as "free warren."

A grant of a "warren of conies" is a grant of the conies, and a grant of a warren in a particular locality does not pass the soil.

A grant of land, or of a manor, according to the authorities, does not pass a right of free warren; for neither the words "warren of conies" nor the word "warren" necessarily or primarily mean an estate in the soil; but "warren" may be so used as to pass such an estate, provided that the context shows that to be the intention of the instrument.

A right of "warren" is a tenement.

The Act 38 *Geo.* 3, *c.* 60, *conferred on the Duchy of Cornwall the right to sell "land" and "tenements:"*

Held, that power to grant a right of warren was conferred by both the words "lands" and "tenements."

This was an appeal by the plaintiff, the present Earl Beauchamp, against the decree of the Master of the Rolls, whereby his Lordship dismissed with costs the bill filed by the last preceding Earl, as well as the supplemental bill of the appellant.

The judgment of the Court of Appeal fully states all necessary facts and documents, as well as the considerations and arguments upon which the decision depended.

Sir *Richard Baggallay*, Q. C., *Jessel*, Q. C., and *Walford*, supported the appeal.

Sir *Roundell Palmer*, Q. C., *Mellish*, Q. C. (of the Common Law Bar), *Speed*, and *Jeune* were for the defendants.

The authorities referred to were,

The Prince's case, Coke's Reports, vol. 4, part 8, 1 a;
Rice v. *Wiseman*, Rolls Reports, 259; 3 Bulst. 82;
Leigh v *Weald*, 1 B. & Ad. 622.
Marshall v. *The Ullswater Company*, 3 Best & Sm. 732; 8 L. T. Rep. N.S. 416;
Cooper v. *Phibbs*, L. Rep. 2 Eng. & Ir. App. 149; 16 L. T. Rep. N. S. 678;
Feathers v. *The Queen*, 6 Best & Sm. 257; 12 L. T. Rep. N. S. 114;
Alton Woods case, 1 Co. 46 b., 49 a.;
Davies' case, 3 Mod. 246;
Bingham v. *Bingham*, 1 Ves. Sen. 126;
Ramsden v. *Hylton*, 2 Ves. Sen. 304;
Rex v. *Piddletrenthide*, 3 T. Rep. 772;
Morris v. *Dimes*, 1 Ad. & Ell. 654;
Cocking v. *Pratt*, 1 Ves. Sen. 400.

At the conclusion of the reply, judgment was reserved until the 29th May, when

Lord Justice GIFFARD said:—The judgment I am about to deliver is the judgment of the court.

Earl Beauchamp, the present appellant, who is the sixth earl, claims through Henry, the fifth earl. He has appealed from a decree of the Master of the Rolls dismissing, first, the original bill in this suit which was filed by the fifth earl; and, secondly, the supplemental bill which he himself filed; both bills were dismissed with costs. The questions in the suit arise in this way.

In Oct. 1864, the fifth earl and the defendant agreed to exchange certain lands and hereditaments, with the rights and privileges belonging thereto, and these lands were severally specified in two schedules appended to the agreement. The agreement itself consisted of six articles, and the earl was to pay by way of equality of exchange 3400*l.* to the defendant. The provisions of the agreement are set forth in the fifth paragraph of the bill. The first schedule contained a description of the lands and hereditaments to be given in exchange by the earl, they were as follows:—First, 162½ acres in the parishes of Frodingham, Bottesford, and Ashby; secondly, freehold common rights on the East Common of Bromby; thirdly, all the right or stray of rabbits or right of warren in the said East Common with the appurtenances. The second schedule contained a description of the lands and hereditaments, rights and privileges, to be given in exchange by the defendant; they were 55a. 2r. and 29p. lying in Bromby; secondly, all the freehold common rights, or other rights, interests, or property, in or upon the West Common of Bromby; thirdly, all the freehold moorland in Bromby Moors, as set out by boundaries, containing 186 acres, or thereabouts; fourthly, a tithe rentcharge payable out of the estate of the earl to the defendant; fifthly, a fee farm rent of 7*l.* 2*s.* 6*d.* payable out of the estate of the earl to the defendant; sixthly, the right and privilege of the exclusive use for twelve years of the Warping Sluice to the defendant; seventhly; all the right and interest of the defendant as lord of the manor of Bromby, in all that portion of the East Common in Bromby, which lies to the west side of the public carriage road, amounting to 115 acres, or, if less, to be made up to that amount. The agreement was duly executed, and possession given accordingly, since which time acts of ownership have been exercised by the parties over the properties so exchanged. There have been no conveyances.

In 1865 the late earl and the defendant promoted the enclosures of the East and West Common of Bromby; in November of that year the late earl sent in his claim to the Inclosure Commissioners, and in Dec. 1865, with a view to substantiate that and another claim, search was made amongst the earl's deeds and muniments of title at Madresfield, the family seat, when, on considering a deed of grant from the Duchy of Cornwall, it appeared, as the plaintiff alleges and insists, that the East Common of Bromby, and the mines and minerals thereunder, and under certain lands in Frodingham and Scunthorpe, were by a grant of the Duchy of Cornwall, dated the 27th March 1799, conveyed to Thomas Pindar, his heirs and assigns, for ever. It is not disputed that all the property belonging to Thomas Pindar in this district passed from him to the Earls Beauchamp, and were possessed by the late earl, and that they are the property of the present earl. The defendant denies that the soil of the East Common of Bromby, and the mines and minerals thereunder, or under the lands of Frodingham and Scunthorpe, were conveyed by this grant of the 27th March 1799 to Thomas Pindar.

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On the contrary, he alleges that they were conveyed by a grant of the Manor of Kirton from the Duchy of Cornwall to Mr. Angerstein, on the 9th July 1799, and that Bromby, Frodingham, and Scunthorpe are part of the manor of Kirton. The defendant claims through Mr. Angerstein.

It is plain that all parties acted on the assumption that the soil in the East Common of Bromby, and the mines and minerals under it, and the mines and minerals under th lands in Frodingham and Scunthorpe, belonged to the defendant, and did not pass by the grant of March 1799; this the appellant alleges, as the fifth earl did before him, to have been a common mistake. He avers that the mines and minerals are of very great value; that in substance he gets by the exchange that which was really his without it, and therefore he asks the court either to rectify the agreement, or to nullify the transaction and set it aside.

It needs no argument to prove that the court has jurisdiction to set aside an agreement on the ground of mistake; but, as a general rule, the mistake must be plain and palpable—one as to the existence of which opinions can scarcely differ, and it must be possible to replace the parties in that which was substantially their original position.

In the present case the rights of the parties have been assumed to be such as formed the foundation of the exchange during a period of sixty years preceding the present dispute. In 1801 an Inclosure Act was passed (41 Geo. 3, c. 74), under which an allotment was made to Thomas Pindar for his right of warren, and to Mr. Angerstein for his right of soil, in certain commons of the manor of Kirton. Again, in 1831 another Inclosure Act was passed; no doubts were entertained as to the relative rights and positions of the defendant and the then Earl Beauchamp, the defendant being treated and considered as entitled to the soil, the earl to the right of warren as distinguished from the soil; the several transactions under both Acts are detailed in the 8th, 9th, 10th, 11th, 12th, and 13th paragraphs of the answer to the original bill; they have been frequently read and commented on during the argument, and, having regard to these transactions, as well as to those which are shown to have taken place as mentioned in other paragraphs of the same answer, commencing with the 17th, and going down to and including the 29th, all which have also been read, it is difficult to see any just or sufficient grounds for a suit of this description. It is clear on the plaintiff's evidence that the existence of valuable minerals under the lands in question was known to the fifth Earl and his advisers before the date of the agreement for the exchange; it is as reasonably certain as anything can be that the grant of March 1799 was never supposed, either by grantor or grantee, or by any person whomsoever, until some sixty years after its date, to have had the effect now sought to be attributed to it, and unless that effect is plain almost to demonstration, and the true construction of the instrument so certain, and the rights of the parties under it so indisputable, as not to be open to serious controversy, we should not hesitate in coming to the conclusion that the bill was rightly dismissed.

These considerations lead to a review of the arguments adduced on behalf of the appellant, as substantiating that construction of the point on which he has been advised to rely. They may be summarised, so far as is necessary, thus: First, the *Prince's case*, in vol. 4 of Coke's Reports, part 81a, was referred to. The charter constituting the grant of the duchy is then set forth, and the following passage, being the grant of free warren, was read from page 10, namely, "We have, moreover, for us and our heirs, granted, and by this our charter we have confirmed, to the aforesaid duke, that the said duke, and the heirs of him, eldest sons, dukes of the same place for ever, have free warren in all the manors, lordships, castles, lands, and other places aforesaid, so as the said lands be not within the bounds of our forests; and that none enter into them to hunt in them, or to take anything which to warren appertaineth, without the licence and will of the said duke, or other dukes of the same place, upon pain of forfeiture of ten pounds." Next, the following passage in Coke upon Littleton, tit. 1, cap. 1, sec. 2, was cited: "So it is of a forest, parke, chase, vivarye, and a warren in a man's owne ground, by the grant of any of them not onely the priviledge but the land itselfe passes, for they are compound." It was stated that this passage was not known, or at all events not quoted in the court below. Shepherd's Touchstone, and other works of authority, were also referred to as recognising and respecting the law as laid down in Co. Litt., and the case of *Rice* v. *Wiseman*, as reported in the Rolls Reports, p. 259, and 3 Bulstrode, p. 82, was cited; and it was said that, inasmuch as the soil belonged to the duchy, it followed on these principles that it passed under the term "warren;" and furthermore, that this view was fortified by the context of the grant, and especially by the words "all and singular the rights, members, and appurtenances whatsoever in Bromby aforesaid, and that lodge or house thereupon built," and the words "commonly called or known by the name of Bromby Warren;" and a series of leases was referred to, commencing in the time of Henry VIII., and ending with the lease of 1777, mentioned in the grant. It was urged in addition to these arguments that the 38 Geo. 3, c. 60, under authority of which the grant was made by the duchy, did not authorise the sale of such a thing as a right of warren as distinct from the soil, but only the sale of a "tenement," not of a "hereditament;" that the authority given by the Act must be taken to have been followed, and, therefore, that the grant on the occasion of the sale must be taken to be a grant of the soil with its incidents.

It may be well to deal with these authorities and arguments, omitting only those founded on the context of the grant, before going to the exact terms of the grant itself. They can be, and in fact have been, completely answered.

First of all, the charter referred to as granting the free warren, as well as the leases, established that there was a right of free warren in gross belonging to the Duchy of Cornwall, and extending over Bromby and other places; there is no ground in law for saying that a person having a right of free warren generally, may not grant a limited right a grant of a "warren of conies;" nor because the term "warren of conies" is used in the leases and in the grant of 1799, and the expression so used differs from the grant of the charter, is an intention to pass an estate in the soil to be inferred. The intention must be found in the instrument itself; "warren of conies" is not so extensive as "free warren;" the term itself was obviously taken from the leases, particularly that of 1777, and probably originated in the fact of the conies being in that locality the only beasts, or at all events the only beasts of warren of any value. The terms of the charter, therefore, do not advance the appellant's case.

With respect to the passage from Coke upon Littleton, Mr. Preston, in his edition of Shepherd's Touchstone, adds to the passage very significantly this observation: "generally without any qualification or context." The passage uses the term "warren" generally. The primary signification of that word when speaking of a "right of warren," or of "free warren," or when speaking of a "warren of conies," most assuredly does not mean an estate

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in the soil; a grant of land or of a manor according to the authorities, does not pass a right of free warren. A number of Exchequer decrees and proceedings have been quoted showing the use of the term "warren" in connection with terms of locality; from these it is manifest that the use of the word "warren," and more especially of the words "warren of conies," does not necessarily, or usually, or according to any primary acceptation, mean an estate in the soil; to warren of any description there must be a local boundary, and it is impossible, in our opinion, to attribute any other weight or meaning to the passage than that "warren" may be so used as to mean to pass, and may pass, an estate in the soil, provided that the context of the instrument in which it is so used shows that to be the intention. Then the case of *Rice* v. *Wiseman* appears from the reports to be this:—"The defendant having a warren in a park, called Braddock Park, demised *Warrenam suam, anglicè* the game of conies, unto the plaintiff, and did covenant that he should enjoy the benefit of his demise; for breach of covenant the action brought, and lays the breach in killing of the conies in the park, *sibi dimisso;* and also for his not suffering of him to come there, and to kill the conies to him demised—*quia ipsum intrare et venare non permisit.*

"Coke, C. J.—If I have warren in my land, and I demise my warren in such a place, clearly the soil doth pass. If the soil be in him by a grant or lease of the park, the soil doth pass.

"Dodderidge, J.—A man may have a warren in another man's land, and there by the grant of the warren the soil doth not pass.

"Coke.—By 33 H. 6, if one grants his warren, excepting the soil, the same doth not pass, and therefore it followeth that if it had not been excepted the same would have passed.

"Dodderidge.—I cannot have a park in another man's land. If I grant unto one my manor of Dale, *Manerium de Dale, anglicè* any close in Dale, the manor shall pass. So here in this case the warren doth pass. Also a man (as here in this case) may have a warren in his park; by his demise of the warren in his park, the soil doth not pass.

"Coke agreed with him herein, because he is here to have the park himself otherwise; it were if he had no park.

"The court all agreed in this, that the warren here demised is intended to be in the whole park, and this to be as large and broad as the park, and that here is a good breach of covenant assigned, and so by the rule of the court judgment was entered for the plaintiff."

The action, as is plain from the report of the case, did not involve any question of the right to the soil, and Lord Coke is reported as plainly admitting that the demise or grant of a warren in a particular locality—as "in his park"—does not pass the soil.

There then remains the question said to arise in the Act of Geo. 3 c. 60, s. 57. It is plain that the Act confers the power to sell the two things combined, "land," and "right of warren." The greater must necessarily include the power to sell the less, that is the warren, or part of the warren; the estate and interest of the Duchy in the soil was the manerial estate and interest in the wastes and commons, the tenants having rights as to the surface; and if the terms of the grant, according to their fair construction, do not convey the soil, they can have no artificial or technical meaning because of the extent or nature of the power conferred by this Act. Moreover, a right of warren is a "tenement," as shown by the authorities quoted by the Master of the Rolls.

The leases do not support the appellant's case to any greater degree than they do that of the respondent; they are, to say the least of them, but of doubtful import, and, this being so, the question resolves itself into this, what is the true construction, intention, and meaning of the terms and expressions used in the grant? Those terms and expressions, as far as they are material, are these:

"All that piece or parcel of woodland situate in Bromby within the county of Lincoln, commonly called Princes-woods, containing by admeasurement twenty-three acres, one rood, and eleven perches, or thereabouts." Here there is a plain description of soil. Then, "And all that close or parcel of pasture land situate at the east end of the said woods, and commonly called Wood and Close, containing by admeasurement, four acres, three roods, and twenty-four perches, or thereabouts." Here again there is a plain description of soil. Then, "And all that warren of conies with all and singular the rights, members, and appurtenances whatsoever in Bromby aforesaid;" this being a warren of conies with a locality, and then, "that lodge or house thereupon built commonly called Bromby Lodge," and then "all that warren of conies with all and singular the rights, members, and appurtances whatsoever in Redburn, in the said county of Lincoln," again a warren of conies with a locality, and then, "both which said warrens of conies are now commonly called or known by the name of Bromby Warren, and do extend themselves in and over the wastes or east moores of Bromby, Frodingham, Scunthorpe, and Ashby, in the said county of Lincoln, which said several premises are parcel of the Lordship and Soke of Kirton, in Lindsay, in the said county of Lincoln, and parcel of the possessions of the Duchy of Cornwall, and were last demised, together with the fishery of the River Trent by his present Majesty King George the Third, by letters patent under his Exchequer Seal, bearing date the 15th day of August in the year of our Lord 1777, unto Robert Pindar, of Bromby Hall, in the said county of Lincoln, clerk, since deceased, for a reversionary term of nineteen years, to commence from the 13th July 1788, under the several yearly rents of 20*s.* for the said woodlands, and 3*l.* 7*s.* 4½*d.* for the said coney warren; and also all houses, edifices, structures, timber trees, and other trees, mines, quarries, waters, watercourses, roads, ways, easements, profits, commodities, privileges, advantages, emoluments, and hereditaments whatsoever, in or upon the said woods and lands, and the said warren and warrens of coneys, growing or arising, or to the same in any wise belonging or appertaining, at or for the yearly fine or sum of 800*l.* of lawful money of Great Britain, to be paid by the said Thomas Pindar within forty days from the date of this certificate or contract into the Bank of England, and carried to the account of the Duchy of Cornwall. And from and immediately after the payment of the said sum in manner aforesaid, and the enrolment of this certificate, and the receipt for the said purchase-money in the office of the auditor of the Duchy of Cornwall, and thenceforth for ever, the said Thomas Pindar, and his heirs, successors, or assigns, shall be adjudged, deemed, and taken to be in the actual seisin and possession of the said woodland and pasture ground, warrens and premises, so by him purchased, and shall hold and enjoy the same peaceably and quietly, in as full and ample manner, to all intents and purposes, as his said Royal Highness, the Prince of Wales, his heirs or successors, Dukes of Cornwall, might or could have held and enjoyed the same by force and virtue of an Act of Parliament passed in the 38th year of the reign of H.M. King George the Third, intituled An Act for making perpetual, subject to the redemption and purchase in the manner therein stated, the several sums of money now charged in Great Britain as a land tax for one year from the 25th March 1798."

The demise of 1777 referred to in the grant contains a description similar in terms to that which I have read from the grant, and it contains this reservation or exception—"excepting, nevertheless, and always reserving to us, our heirs and successors, all timber trees, and all fair sapling oaks apt to become timber, and also sufficient stabbles in every acre of the said woodlands, according to the form of the statute in that case made and provided, and also all mines, minerals, and quarries of and in the said premises; which said premises are parcels of the lordship and soke of Kirton in Lindsey aforesaid, and parcel of the possessions of the duchy of Cornwall." And the rest is reserved as follows: "Under the several yearly rents following, that is to say, for rent of the woodlands the sum of 20*s.*; for the coney warren the sum of 3*l.* 7*s.* 4½*d.*; and for the fishery the sum of 10*s.*" And there is a covenant to keep the coney warren stocked and stored with a sufficient number of conies, and a provision for the lease to become void in the event (amongst other things) of default being made in payment of the rents, or any of them, and a proviso for re-entry and resumption of the premises.

The lease follows the description in former leases; two only have been produced in which the "warren of conies" was alone leased without lands being in terms leased with it, and in those there was no reservation of mines and minerals.

The first observation that occurs is that there is no grant of moors or wastes; the next, that where land is intended to be granted, the grant and description are unmistakeable and explicit; the next, that there is not a grant of the warren *simpliciter*, but of "all that warren of conies" with a fixed locality; that is, as regards the first, "in Bromby aforesaid;" as regards the second, "in Redburn;" both are further stated to be "commonly called or known as Bromby Warren, and to extend over certain wastes or eastmoores." There is not, as has been before said, any grant of the wastes or eastmoores; the grant of a "warren of coneys" is essentially a grant of the coneys, and the right to take and kill the coneys; a grant of a warren in a particular locality, as in a park, Lord Coke himself admits, does not pass the soil, and here there is plainly nothing more. That the warrens are commonly called Bromby Warren, and are situate in particular places, and extend over particular wastes or moors, in no way extends the meaning of the words "warren of coneys" to an estate in the soil, and cannot, either in technical legal language, or according to any rules or mode of construction, technical or untechnical, be held to have any such effect; the reservation of mines and minerals in the lease applies to the land plainly and actually demised; the rent is reserved *out of* the land, but *for* the warren; and the addition of "that house or lodge thereupon built, commonly called Bromby Lodge," seeing that a lodge or house is incident to a warren and always has been, and always has been leased and dealt with in connection with the right of warren in question; that "thereupon" may either mean "in Bromby," or built there for the purposes of the warren, or connected with or incident to the warren. Seeing this, the addition is wholly insufficient to show that an estate in the waste or eastmoores was intended to pass. In fine, nothing of the kind was intended but "warren of coneys" and only "warren of coneys;" and whatever is fairly incident to, or necessary for, the exercise of the right of preserving and making profit out of coneys.

There was yet another ground urged, in which it was said that the appellant ought to succeed, namely, that the manor of Bromby was his, and that he had proved his title to it in the cause as claiming through Thomas Pindar. It is plain, however, that it is part of the manor or soke of Kirton; that during the whole time courts have been held in Bromby for the whole manor or soke of Kirton, and as plain that he showed no title to the wastes or moors of Bromby, or any act or right in any way excluding the rights of the lord of the superior manor. We do not think it necessary to go through the details which the Master of the Rolls referred to in his judgment as decisive in this part of the case.

On all these grounds, therefore, we are of opinion that the appellant's case has wholly failed; that the real mistake has been the supposition that his rights have been mistaken; that the bills were properly dismissed with costs in the court below, and that the appeal must likewise be dismissed with costs.

Solicitor for the plaintiff appealing, *Walford.*

Solicitors for the defendant respondent, *Baxter, Rose, Norton,* and *Co.*

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Tuesday, July 13.

Re BARNED'S BANKING COMPANY (LIMITED); FORWOOD'S CASE.

Company — Winding-up — Secured creditor — Proof — Date of claim — General order of the 11*th Nov.* 1862, *rule* 20.

A banking company wrote a letter of guarantee to F. wherein they agreed, in consideration of F. accepting bills to a certain amount against a ship and her freight, to provide F. with funds to meet the bills at least seven days before maturity. F. accepted the bills. The banking company was ordered to be wound-up, and the usual advertisement for claims was issued. Soon after this, and two days before the bills arrived at maturity, a notary employed by F. presented the letter of guarantee to the official liquidator, and demanded payment:

Held, that this was not sending in the particulars of claim as required by the general order of the 11*th Nov.* 1862, *rule* 20, *and that therefore F. was entitled to prove only for the balance of the amount guaranteed after deducting the amount realised by the sale of the ship, &c.*

Particulars of a claim under the 20*th rule of the General Order of the* 11*th Nov.* 1862 *must be sent in in writing.*

This was an application by Messrs. Forwood, trading at Liverpool as Messrs. Leach, Harrison, and Forwood, to be admitted to prove as creditors of Barned's Banking Company for the sum of 15,000*l.* in respect of two guarantees signed by the Banking Company for 9000*l.* and 6000*l.* respectively.

The facts of the case are as follows:—

On the 27th March 1866, the banking company wrote to Messrs. Leach, Harrison, and Forwood the following letter:—

Gentlemen,—In consideration of your accepting the drafts of Messrs. T. M. Mackay and Co., at three months' date for 9000*l.* against the ship *Naval Reserve* and her freight, and on your agreeing to renew such drafts for a further period of three months, we agree to provide you with funds to meet such drafts at least seven days before maturity; it being understood that if we are called upon by Messrs. James Baines and Co. to pay you the amount of the drafts, you transfer to us your said security.

Messrs. Leach, Harrison, and Forwood accordingly accepted the drafts of Messrs. T. M. Mackay and Co. for 9000*l.*

On the 4th April 1866, the banking company wrote to Messrs. Leach, Harrison, and Forwood, a similar letter of guarantee for further drafts of Messrs. T. M. Mackay and Co. for 6000*l.*, which drafts were duly accepted by Messrs. Leach and Co. They were drawn, and were expressed in the letter

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of guarantee to be drawn, against the ship *Golden South*, and 60-64ths of the ship *Golden Empire*, and their freights.

Barned's Banking Company stopped payment on the 18th April 1866, while all the bills were current, and was shortly afterwards ordered to be wound-up.

The drafts for 9000*l.* matured on the 27th June 1866, and those for 6000*l.* on the 6th Aug. 1866.

In May the usual advertisement was issued for claims against the banking company to be sent in on or before the 22nd July following.

On the 25th June, two days before the drafts for 9000*l.* fell due, Joseph Coleman, clerk to Mr. Lowndes, who was a notary public, and who acted on behalf of Messrs. Leach, Harrison, and Forwood, took the letter of guarantee of the 27th March 1866, to the banking company's offices, and handed it to a clerk behind the counter and requested him to pay the amount thereof, viz., 9000*l.* The clerk took the letter upstairs to show it to the official liquidators, but soon returned and handed back the document, stating that it could not be paid. Lowndes afterwards, on the same day, affixed to the letter of guarantee the notarial memorandum, "cannot be paid."

The same was done on the 1st Aug. with the second letter of guarantee.

The ships which had been mortgaged to Messrs. Leach, Harrison, and Forwood, were sold in Sept. 1866. The *Naval Reserve* produced over 8000*l.*, and the two others produced little more than 2000*l.*

After the presentation of the letters of guarantee by the notary's clerk, no further claim was made till the 18th March 1868, when Messrs. Leach, Harrison, and Forwood wrote to the official liquidators of the banking company as follows:

Golden Empire.

We beg to hand you statement of our claim upon you against advice per this vessel, under your letter of guarantee per said advance dated the 4th April 1866, and shall be glad to receive dividends on account of the same, viz., 2904*l.* 1*s.* 5*d.*

On the 12th June 1868 a formal claim for the whole 15,000*l.* (the amount of the two letters of guarantee), was sent in by Messrs. Leach, Harrison, and Forwood.

The only question in the case was whether the presentation of the letters of guarantee by the notary's clerk was such a notice of the claim as is required by the 20th rule of the General Order of the 11th Nov. 1862, so as to entitle the applicants to prove for the whole amount of their debt without deducting the amount realised by the sale of their other securities.

Jessel, Q. C. and *Hemming*, for the applicants, contended that the claim was duly sent in by the notary's clerk taking the letter of guarantee to the offices of the bank, and that they were entitled to prove for the whole amount. They cited

Re Barned's Banking Company, Kellock's case, 18 L. T. Rep. N. S. 671; L. Rep. 3 Ch. App. 769;

Sir *Richard Baggallay*, Q. C. and *Kekewich*, for the official liquidators, contended that no such notice had been given as is required by the 20th rule of the General Order of the 11th Nov. 1862, as it was clear from the words of the rule that such notice must be in writing.

Jessel, Q. C. was heard in reply.

Lord ROMILLY.—I am of opinion that the Messrs. Forwood did not send in their claim on the 25th June or 1st Aug. 1866. The sole question is, whether under the decision of the Lords Justices (*Kellock's case* (*sup.*) and under the General Order, the showing the letters of guarantee to the official liquidator was sending in their claim. Now, in the first place, let us look at it without any legal technicalities. What is meant by a man sending in a claim? "I, John Romilly, send in a claim for 1000*l.* for such and such services, and the evidence of it consists of certain documents which I produce and show to you." Can anybody say that my sending these documents without making any claim at all, and without sending in my name, is sending in a claim? The case is nothing more than this—Barned's Banking Company wrote to Messrs. Forwood and said, "If you are not paid before a certain time, we will guarantee you the payment;" and that letter is an original document, an original security, which, of course, the persons who have got it will not part with. Unquestionably they sent it to the official liquidator to be shown to him, and they parted with it to the clerk for that purpose; but they knew that they were among merchants, men of honour, who would not think of abstracting the security. Suppose the official liquidator had taken it up and put it in the fire, would he not have been required to make it good in every respect? It is a mere security which they have got to prove and establish their claim by. Now, I wish to consider what is meant by the words of the general order, and then to look at the words of the Lord Chancellor upon this subject in *Kellock's* case; but the sole question that I have to determine is, whether a notary public (not the creditor himself, or his agent in any other respect than as a notary public), merely taking a bill to be noted for the purpose of protesting it, and for the purpose of enabling him to have his recourse against the other persons who had signed the bill, is making a claim. That is the whole question I have to determine, because if that was not a claim, they did not make it at any other time. (His Lordship stated the facts as to Mr. Lowndes presenting the letters of guarantee.) The question is, whether that is sending in a claim by Messrs. Forwood to the official liquidator. If so, it is the oddest form of claim I ever saw put in. The letter of guarantee is a document from which you may infer, very reasonably, that they have a claim to make, and that, if they are not paid, they will make a claim; but they may have been paid from other sources, and it is necessary to produce this guarantee, because they may otherwise lose their equities against other persons. But as I have said, they may have been paid in full. Then the question arises, whether it is necessary that the claim should be made in writing. I will disregard, as having nothing to do with the case, all those observations about its being the official liquidator's duty to ascertain from the books whether there is a debt due or not. If that were so, no claim need ever be made, because the official liquidator must make the claim himself. That has nothing to do with the case. Now the words of the 20th rule of the General Order (11th Nov. 1862) are:—"For the purpose of ascertaining the debts and claims due from the company, and of requiring the creditors to come in and prove their debts or claims" (that is the object of it) "an advertisement shall be issued at such time as the judge shall direct, and such advertisement shall fix a time for the creditors"—to do what?—"to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any), to the official liquidator, and appoint a day for adjudicating thereon." Therefore, it is a notice for the creditors to send their names and addresses and particulars of demand, and the names and addresses of their solicitors (if any). Whether there was a solicitor or not in this case I do not know, but I should think probably there was. As to sending the names and addresses, nothing of the sort occurred here; as to sending the particulars of the claim, nothing of the sort occurred here; but there was simply a document in which the company for whose estate

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the official liquidator was acting is mentioned, and the name of the person to whom he binds himself to pay a certain sum of money. Then I would refer to what the Lord Chancellor says in *Kellock's case* (*sup.*). He says, "The 20th rule of the General Order under the Act of 1862 directs that an advertisement fixing the time for the creditors to send the particulars of their debts or claims to the official liquidator, and appointing a day for the adjudicating thereon. The court, therefore, is to adjudicate upon the debt or claim so sent in." The order says they shall send their names, addresses, and particulars of demand. I hold that means in writing, and that to send a person to show a document from which it may be inferred that you have a claim, is not a compliance with that order; and so, I think, the Lord Chancellor understood it, for he says, "The court, therefore, is to adjudicate upon the debt or claim so sent in." Was the notary public a proper person for taking it in? If he had been asked to take it, whether he would have assented or not, I do not know; but it would only have been to leave some document with them. And when the Lord Chancellor says, "the only way of adjudicating upon it must be to adjudicate upon what was due when the debt or claim was sent in," then I say no debt or claim was sent in this case; and it was impossible, from what was sent in, to ascertain what the amount was, or who the persons were who made the claim, or on whose behalf it was made, or who their attorneys or solicitors were. I am, therefore, of opinion that this claim was not made until after the ships were sold, and the summons must be dismissed with costs.

Solicitors for the applicants, *Haigh, Herbert,* and *Co.*, for *Haigh, Son,* and *Co.*, Liverpool.

Solicitors for the official liquidator, *Freshfields.*

Friday, July 16.

Re SOUTH BLACKPOOL HOTEL COMPANY; JAMES'S CASE.

Company—Winding-up—Debenture—Set-off.

It was provided by the articles of association of a company that a certain sum of money should be paid by way of reimbursement and remuneration to the promoter, he indemnifying the directors from all costs, charges, and expenses down to the allotment of the shares. In payment of this sum the promoter accepted seventeen debentures of the company of 100*l.* *each. Instead of paying the costs, &c., included in his indemnity in full, the promoter left such costs, &c., to the amount of* 208*l.* *unpaid, and this amount was proved against the company, which was in liquidation:*

Held, that the official liquidator was entitled to set off this amount pro ratâ on each of the debentures, though the promoter had assigned them to other persons.

This was an application by a Mr. James, who was the holder of three debentures of the South Blackpool Hotel Company for the sum of 100*l.* each, for liberty to prove against the company, which was in process of liquidation, for the amount due on the debentures. The official liquidator claimed that he was entitled to a set-off under the following circumstances:

By clause 56a. of the articles of association of the company it was provided that the sum of 1750*l.* should be paid to Mr. Carter, the promoter of the company, by way of reimbursement and remuneration to him for all costs and expenses, as well preliminary as otherwise, including the cost of advertising, printing, brokers' charges, and all other costs, charges, and expenses of whatever nature or kind soever (except law costs and charges) incurred in and about the promotion and formation of the company, he (Mr. Carter) "indemnifying the directors from all costs, damages, and expenses (except as aforesaid) down to the allotment of the shares."

The promoter accepted in payment of this sum seventeen debentures of the company of 100*l.* each and 50*l.* in cash. Three of these debentures were assigned to Mr. James after the company had been ordered to be wound-up.

The promoter had not paid all the costs covered by his indemnity; various sums, amounting to about 208*l.*, having been left unpaid, had been proved against the company in the winding-up; and the question was, whether the official liquidator was entitled to set-off this sum against the proof of the holders of the debentures.

Jessel, Q. C. and *Gardiner*, for Mr. James, argued that a right to damages for breach of an agreement to indemnify could not be set-off against a debt either at law or in equity. Moreover, it was not the company, but the directors, who were to be indemnified. They cited

Re Blakely Ordnance Company; Ex parte New Zealand Banking Corporation, 18 L. T. Rep. N. S. 132; L. Rep. 3 Ch. App. 154;
Re Natal Investment Company; Claim of the Financial Corporation, 18 L. T. Rep. N. S. 171; L. Rep. 3 Ch. App. 355;
Re General Estates Company; Ex parte City Bank, 18 L. T. Rep. N. S. 894; L. Rep. 3 Ch. App. 758.

North, for the official liquidator, was not called upon.

Lord ROMILLY.—This is a perfectly clear case, and cases of this kind are not to be determined on technicalities, but on principles of common sense. A man is to receive 1700*l.*, indemnifying the company against certain costs and expenses. Instead of cash, he accepts seventeen debentures in payment of the amount. Then it turns out that, instead of paying the costs in full he has left 208*l.* unpaid, and that is proved against the company. I am of opinion that, upon the principle of *Re Natal Investment Company* (*sup.*), decided by Lord Cairns, the company are entitled to set-off against him and his assignees the amount of the debt proved against the company. The amount of the debt must be set off *pro ratâ* on each of the seventeen debentures; as the debentures are all for the same amount, one-seventeenth of the amount of the debt must be set-off against each debenture. The order will be, that proof be allowed of the debentures, deducting from each decenture one-seventeenth of the amount provable under Carter's guarantee.

Solicitors for Mr. James, *Le Blanc* and *Tarr.*

Solicitors for the official liquidator, *Westall* and *Roberts.*

V. C. JAMES'S COURT

Reported by W. H. BENNET, and R. T. BOULT, Esqrs., Barristers-at-Law.

Thursday, July 29.

FLOOD *v.* THE NORTH-EASTERN RAILWAY COMPANY.

Specific performance—Jurisdiction—Covenant—"First-class station."

A "first-class station" means a station at which all trains other than express, mail, or special trains are in the habit of stopping.

Where, therefore, a railway company had taken land with respect to which there was a covenant existing "that the land should for ever thereafter be used as a goods depôt, and as a first-class station for taking up

and setting down passengers travelling along the company's line of railway;" and the company had only allowed third-class or merely local trains to be advertised to stop at the station built on the land, and there was no goods depôt provided:

Held, that the company was bound by the covenant; and an injunction granted to restrain them from allowing the ordinary fast trains to pass the station.

This was a bill filed by the plaintiff, the former owner of a piece of land which had been purchased by the North-Eastern Railway Company in the year 1838, which was subject to a covenant in the purchase-deed that the "land should be for ever thereafter used as a goods depôt, and as a first-class station for taking up and setting down passengers travelling along the company's line of railway," to have it declared that the railway company had committed a breach of this covenant, alleging that they had not performed it, inasmuch as none but third-class or merely local trains were advertised to stop at the station built upon this land, and that no sufficient accommodation had been provided for horses or carriages conveyed along the line, and that the company had not provided any depôt for goods.

The bill prayed in addition to a declaration of the breach of the covenant, that an injunction might issue to restrain the use of the land in any other manner than as a first-class station for taking up and setting down passengers, and as a depôt for goods.

The main question in the cause turned upon what was to be considered as a first-class station.

Amphlett, Q. C. and *Jones-Bateman*, for the plaintiff.

E. E. Kay, Q.C. and *G. Williamson*, for the defendants, the railway company, contended that the court had not jurisdiction to decree specific performance of such a covenant as the present. There was no negative term, express or implied, on which an injunction could be granted. That plaintiff must be left to his remedy at common law, if any such he had. That the term "first-class station" was wholly ambiguous and indefinite. That the condition of railway travelling had much altered since 1838, when the purchase of the land was made, and that there was no necessity for the stoppage of fast trains at this station. That the plaintiff had had reasonable accommodation at this station which had been provided by the company. That it was unreasonable and inequitable to expect the court to allow the whole system so long adopted by the company to be disarranged by compelling them to cause every train to stop at a small village station which the present was.

F. O. Haynes for other interested parties.

The VICE-CHANCELLOR said it was quite clear that there had been a breach of this covenant by the defendants, the railway company, and which had been expressly stipulated for by the plaintiff's predecessor in title to the land in question, which was in existence at the time of the land being purchased by the company in 1838. He should hold that a "first-class station" had a definite meaning, which was a station at which all trains, other than express, mail, or special trains, were in the habit of stopping. The company had not only not allowed fast trains to stop at this station, but had gradually withdrawn the accommodation formerly provided by them, and therefore they had clearly committed a breach of the covenant. The case was one in which substantial relief could be given, without imposing any unnecessary or unreasonable burden on the company. The terms of the order he should make would be a declaration that the defendants, the railway company, had committed a breach of the covenant; with a reference to chambers to inquire what rooms and conveniences ought to be supplied by them for the accommodation of a first-class station, with a direction that the company should provide the same. And an injunction to restrain the company from allowing any of its ordinary fast trains, other than express, mail, or special to pass the station without stopping for the purpose of setting down and taking up passengers: with liberty to apply to the court for a relaxation of this order, should it be made to appear that sufficient accommodation was provided without stopping all the ordinary or fast trains.

Solicitors, *Tennant, Newstead*, and *Co.*, Leeds; *Richardson, Gutch*, and *Co.*, York.

Wednesday, July 28.

BLOUNT v. WHEBLE.

Will—Construction—"Surviving."

A testator by his will gave and bequeathed three legacies of 3000l. each to his three brothers, in the words following: "I leave and bequeath to my brother Jas. W. 3000l., in trust to his surviving child or children, to my brother Robert W., 3000l. in trust to his surviving child or children; failing issue, I leave the said 3000l. to my brother William W., in trust to his surviving child or children; failing such issue, I leave the said 3000l. to my brother Daniel O. W., in trust to his surviving child or children; failing issue, I leave the said 3000l. to the children of my brother Jas. W."

Similar legacies of 3000l. each were given to the brothers Robert and Daniel, with the same phraseology as to "failing of issue, &c:"

Held, that the word "surviving" in the bequest meant surviving at the deaths of the respective fathers, and that the brothers of testator took life interests in these legacies.

The testator also devised a freehold estate (which he declared should be considered as personalty) to his executors and trustees, upon trust "for the second surviving son of my brother Jas. W., on his arriving at the age of twenty-five years, the annual rental, in the meanwhile (after all just and necessary expenses for the benefit and maintenance of the estate being deducted), to be annually divided between my surviving brothers. In failure of such second surviving son of Jas W., I leave the said estate to my brother Daniel W., and his heirs male. Failing such heirs male, I leave and bequeath the said estate to the heirs of the W. family."

Daniel died in the lifetime of testator.

E. J. W. was the second son of Jas. W.

Held, that E. J. W. was entitled in fee simple absolute to the estate, subject to a term from the death of the testator until such day as E. J. W. should attain, or but for death would attain, his age of twenty-five, which term was vested in the testator's three brothers, as tenants in common.

This was a bill filed by a surviving executor and trustee against the several parties taking interests or presumable interests under the will for the purpose of having a construction put upon portions of the will of Edmund Joseph Wheble.

Edmund Joseph Wheble, by his will dated 27th April 1861, after declaring that his estate at Hippenscombe should be deemed and taken as personal estate, devised all such estate to his executors and trustees, Daniel O'Connell Wheble, and Gilbert Robert Blount, upon trust as follows:

For the second surviving son of my brother James

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Wheble on his arriving at the age of twenty-five years, the annual rental in the meanwhile (after all just and necessary expenses for the benefit and maintenance of the estate being deducted) to be annually divided between my surviving brothers. In failure of such second surviving son of James Wheble, I leave the said estate of Hippenscombe to my brother Daniel O'Connell Wheble, and his heirs male. Failing such heirs male, I leave and bequeath the said estate to the heirs of the Wheble family.

The testator also gave to the right Rev. Dr. Thomas Grant, of St. George's, Southwark, "or other the person who at the time of my death shall be officiating Roman Catholic Bishop of Southwark, 1000*l.* free of legacy duty—the entire interest thereof to be annually applied to the maintenance and support of the officiating chaplain of the Roman Catholic church of St. James', Reading, in the county of Berks," and then proceeded:

I leave and bequeath to my brother James Wheble, 3000*l.* in trust to his surviving child or children; to my brother Robert Wheble, 3000*l.* in trust to his surviving child or children; failing issue, I leave the said 3000*l.* to my brother William Wheble, in trust to his surviving child or children; failing such issue, I leave the said 3000*l.* to my brother Daniel O'Connell Wheble, in trust to his surviving child or children; failing issue, I leave the said 3000*l.* to the children of my brother James Wheble. To my brother William Wheble, 3000*l.* in trust to his child or children; failing issue, I leave the said 3000*l.* to my brother Daniel O'Connell Wheble in trust to his child or children; failing issue, to my brother Robert Wheble, in trust to his surviving child or children; failing such issue, to the surviving children of my brother James Wheble. To my brother Daniel O'Connell Wheble, 3000*l.* in trust to his surviving child or children; failing such issue, to my brother William Wheble, in trust to his surviviving child or children; failing such issue to my brother Robert Wheble in trust to his surviving child or children; failing such issue, to my brother James Wheble and his children.

Daniel O'Connell Wheble died in the testator's lifetime without having had a child.

The testator's brother James Joseph Wheble (his heir-at-law), Robert Wheble, and William Francis Wheble, and Maria Jane Wheble, and Lucy Catherine, wife of Michael Henry Blount, were his next of kin.

When the bill was filed, the brothers Robert and William Wheble had not been married. James Joseph Wheble had had seven children, of whom Ernest Joseph Wheble was the second son.

The cause now came on for a hearing.

J. Hinde Palmer, Q. C. and *S. Blount* for the plaintiffs.

Amphlett, Q. C., *E. Fry*, Q. C., *Wickens*, *F. H. Riddell*, *G. Williamson*, *Whitehorne*, and *Martineau* for the several parties defendants and interested under the will.

The VICE-CHANCELLOR said he must hold that Ernest Joseph Wheble, the second son of the testator's brother James, was entitled in fee simple absolute to the Hippenscombe Estate, subject to a term from the death of the testator until such time as the said Ernest J. Wheble should attain or but for death would attain, twenty-five years of age; and that such term vested in the testator's three brothers, Robert, William, and James, as tenants in common. There would be the usual reference to chambers, and directions to settle conveyances, if necessary. He should also declare that, as to the gifts of the several legacies of 3000*l.* each, the word "surviving" meant surviving at the deaths of the fathers of the several children, and that the fathers (the testator's brothers) were respectively entitled to life interests in those legacies. The several amounts would have to be brought into court and invested in the usual way, and the interest and dividends of 3000*l.* directed to be paid to Robert Wheble, of 3000*l.* to James Wheble, and 6000*l.* to William Wheble for life or until further order. A declaration would also be made that the 1000*l.* to Dr. Grant should abate in the proportion which the value of the impure personalty bore to the whole personal estate, and the amount of the legacy, after such abatement, directed to be paid into court to a separate account, with the usual directions as to investment and a reference to chambers as to the payment of the income arising from it.

Decree accordingly.

Solicitors: *Slaughter* and *Co.*; *Ward*, *Mills*, and *Co.*; *Williamson*, *Hill*, and *Co.*

Friday, July 30.

MARSHALL *v.* ROSS.

Trade mark—Word "patent"—Definition of.

The word "patent" may be used, in certain cases, although the party using it has not, in fact, obtained a patent for the manufacture of the article so said to be patented.

This was a motion in the terms of the prayer of the plaintiff's bill, to restrain the defendant, James Ross, a shipping agent, from removing or parting with certain packages of thread, in wrappers, bearing labels in imitation of the plaintiff's labels. The thread had been manufactured in Belgium, and had been consigned by the manufacturers, Messrs. Dietz and Company, to the defendant Ross in this country, for the purpose of being shipped by him to Australia. The label which the plaintiff had adopted contained the words "Marshall and Co., Shrewsbury." "Patent Thread."

The labels of the defendants were worded "Marchal; Schrewsbury." "Patent Thread." It appeared that the thread manufactured by the plaintiff was not, in fact, patented; but it was alleged and proved that the word "patent" was so used to designate a certain class of thread well known in the trade; that that term had for many years past been used by manufacturers to distinguish it from thread of a general class.

E. E. Kay, Q. C. and *A. G. Marten*, in support of the motion, contended that it was an evident infringement of the plaintiff's trade mark, which the word "patent" implied; was deceptive in its character, and caused injury to the plaintiffs.

Davey, contra, urged that the defendant was in the present case only a simple consignee, and could not be presumed to know anything of the label in question as an imitation of the plaintiffs' label. The plaintiffs, in fact, had no right to make use of the word "patent" in reference to the character of their thread, when no patent had ever been granted in respect of it, and they therefore could not have the relief by injunction as prayed.

The VICE-CHANCELLOR said, that the word "patent" might be used in such a way as not to deceive anyone, or cause a belief that the goods so called were protected by a patent. He instanced the case of "patent leather boots." In the present case the term "patent thread" had been so long used in this particular trade, that it might be said to have become a word of "art." He did not consider that there had been any such misrepresentation by the plaintiffs in using the term to prevent them from having it protected by the injunction prayed for. There must therefore be an order for the injunction as prayed.

Order accordingly.

Solicitors: *Paterson* and *Co.*; *Betteley.*

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Common Law Courts.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Thursday, June 10.

HART v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway company—Accident by collision—Driver of engine seized with a fit—Pointsman turning engine on to branch line to avoid collision with express train on main line—Collision on branch line—Alteration of siding points subsequently to accident—Evidence of negligence—Number of men on engine—Liability of railway company—Subsequent alteration of rails no evidence of previous negligence.

At the Miles Platting station on the defendants' main line of railway, a few miles from Manchester, there were sidings leading from the main line of rails to coaling and engine sheds, the points of which sidings were always open on to the main line. On the day in question, an engine had, in accordance with the usual practice, been taken by the servant of the company appointed for that purpose to the coaling shed and been coaled, and was returning slowly therefrom on its way to the engine shed. In the ordinary course of things, the engine would have gone along the siding until it had passed the points of the siding leading to the engine shed, when it would have been reversed and backed over them into that shed; but at the moment that the man in charge of the engine should have reversed its action, he fell down in a fit on the footboard of the engine, which consequently proceeded on towards the main line. At this same time a down express train from Manchester, and an up express train from Rochdale were approaching the station at full speed, and the pointsman in charge of the points at the spot seeing the runaway engine, with the man lying on the floor approaching, in order to prevent its getting on to the main line, and coming into collision with either of these express trains, deliberately, as a choice of evils, turned the points so as to send it on to a branch line of railway from Ashton, which formed a junction at this station with the main line, at the platform of which branch line he knew that a train was stopping for tickets to be collected. The consequence was, that the engine ran into the stationary branch train, and the plaintiff, a second class passenger in one of the carriages of that train, received bodily injuries from the collision, for which he sued the company for compensation, on the ground of negligence, first, in not having two men on the engine while coaling, and running it from the coaling to the engine shed; and secondly, in having the points of the sidings so arranged that the engine must necessarily, in case of accident to the driver, pass on to the main line; and the fact of an alteration having since this accident been made, so that a runaway engine would pass on to a supplementary siding leading up to a "dead end," was urged as evidence of their previous negligence in this respect; it being admitted, on all hands, that the pointsman had acted with great presence of mind, and for the best under the circumstances.

A verdict with damages was found for the plaintiff, but upon a rule for a new trial on the ground that there was no evidence of negligence in the defendants fixing them with liability, it was

Held, by the Court of Exchequer (Kelly, C.B., and Bramwell, Channell, and Cleasby, BB.), making the rule absolute, that there was no evidence of negligence in the defendants on which the verdict could be supported. First, there being nothing dangerous or attended with peculiar risk in the operation of coaling, the engines, and running them to and from the coaling and engine sheds, and it being an operation usually well performed by one man, the not employing two men to perform it was not negligence in the defendants. Secondly, the arrangement of the sidings having been used for twenty years without accident, the defendants could not be held bound to have foreseen the accident, or be held responsible for it upon its happening, nor was the subsequent alteration of the siding rails evidence of antecedent negligence on their part in that respect.

This was an action brought by the plaintiff to recover from the defendants damages in compensation for bodily injuries received by him through the negligence of the defendants whilst the plaintiff was travelling as a passenger upon their line of railway from Ashton to Manchester.

At the trial before Brett, J. and a common jury, at Liverpool, at the last spring assizes, the following appeared to be the facts of the case:—At the Miles Platting Station, on the defendants' main line of railway, a few miles from Manchester, where the accident happened, there is a junction, at which a branch line of railway leads off to Ashton, the main line running on in a straight line to Rochdale. About 400 or 500 yards from the junction, and on the Manchester side of the station, there is a siding running from a point of the main line to an engine shed, and at about 200 or 300 yards from the said point there is also a branch siding to a coaling shed. A few yards from this same point there is a signal and pointsman's box, at which the pointsman works the points, which are open towards Rochdale, so that an engine running from the siding on to the main line would, unless the points were turned, go on to the up line leading from Rochdale to Manchester; there are also points further on, on the main Rochdale line, by which a train or engine can be turned from the up to the down line, and there is communication between the signal boxes at the various points. The traffic at the station is very great, upwards of 200 passenger trains, besides goods trains, passing the station daily.

The plaintiff was travelling in a second-class carriage from Ashton to Manchester, and the train by which he was travelling was stopping for the purpose of the Manchester tickets being collected at the Miles Platting platform of the branch line from Ashton before-mentioned, and some 300 or 400 yards from the spot where the points from the sidings open on to the main line.

The coaling shed before-mentioned is the place where the engines are supplied with coal, and on the 20th Oct. an engine which had just come off a journey had, in accordance with the usual practice in such cases, been given in charge by its driver and stoker to a servant of the company, whose business it was to see to the coaling of the engines. It had been coaled by him at the coaling shed, and was slowly returning therefrom, and in the course of being taken by him from the coaling shed siding to the other siding leading to the engine shed. In the ordinary course of things, the engine after coming from the coaling shed would have gone along the siding, until it had passed the points of the siding leading to the engine shed, when it would have been reversed and backed over them into that shed, but just at the moment when the man in charge of the engine should have reversed its action, he was seized with a fit and fell across the footboard of the engine in a state of insensibility. The consequence was, that the engine, instead of being backed into the engine shed, proceeded onwards upon the siding towards the points opening on to the main line at the moment that a down express train from Manchester, and an up express train from Rochdale were approaching the station at full speed on the up and down main lines. At this juncture,

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the pointsman in charge of the signal box and points at the part of the line, seeing the engine, with the man lying across the footboard, approaching the main line of rails, and having but an instant in which to decide what to do, came to the conclusion that the least hazardous and dangerous course to pursue, was to turn the points of the main line, so as to send the engine on to the Ashton branch line, knowing that if any train might happen to be there it would be either slackening its speed, or at a stand still, whereas if he had let it go upon either of the main lines of rail it would infallibly have come into collision with one or the other of the before-mentioned express trains travelling at top speed, when the consequences would in all probability have been far more disastrous. Under these circumstances, therefore, the pointsman deliberately turned the runaway engine on to the Ashton branch. The result of his so doing was, that the engine ran on until it reached the spot where the train in which the plaintiff was sitting was standing as before-mentioned, and, coming into collision with it, caused the injuries to the plaintiff of which he complained in his declaration.

It appeared too that, since the accident, the defendants had altered the siding in question, so that on leaving the coaling shed the engines now run, not on the same line, but on a supplementary siding, leading to a "dead end," where a runaway engine would be brought to a standstill.

The learned judge told the jury that the liability of the defendants depended on the negligence of their servants being proved, and that it was negligence to do that which, under the circumstances, was dangerous, or to omit to do what ought to be done, but it was not negligence simply to omit to do the best under the circumstances. The question was for the jury; was there any negligence in the pointsman, or was there negligence in the defendants having only one man to coal the engine? The man had done it for years, and, but for his unforeseen and unexpected illness it would have been safely done on this occasion. The company did not know, nor was it proved, that he was liable to fits. Then as to the siding, no doubt it had been altered since the accident, but it was not negligent in them not to guard beforehand against an accident which could not reasonably have been foreseen.

The jury found a verdict for the plaintiff for 110*l.* damages, and a rule was afterwards moved for and obtained by *Manisty*, Q. C., on the part of the defendants, for a new trial, on the ground that there was no evidence of negligence in the defendants to go to the jury, upon which liability could be fixed on them, and also that the verdict was against the weight of the evidence, and now

Holker, Q.C. and *McConnell*, for the plaintiff, showed cause against it, and contended that the verdict of the jury establishing negligence in the defendants was well warranted by the facts and evidence of the case. We do not complain of the act done by the pointsman, for probably he did the best thing which under the circumstances of the moment he could do, for had the engine been allowed to proceed as it was going it would have gone on to the main Rochdale line and came into collision with the Yorkshire express, and had he turned it on to the other main line of rail a like result would have followed with the Manchester express. The jury, however, considered there was negligence in the company, and the plaintiff says the negligence consisted in this; first, that there should have been two men employed on the engine at the coaling process. A man engaged in such a job is very liable to become affected by the sulphurous vapour arising from the burning coal. By one of their printed regulations they seem to provide against the very event of the sudden illness of a driver of an engine, by always having two men attached to the engine on a journey, and it cannot be contended that, if two men are necessary on an engine when running on the main line, they are not equally so when travelling up and down a siding, where if the engine runs away it must get upon the main line. [BRAMWELL, B.—You might almost as reasonably argue that there ought to be three men on the engine in case two should fall ill at the same moment.] The second point of negligence was in the arrangement of the siding rails, the points of which before the accident stood always open on to the main line, but which have been altered since by adding a small supplementary siding, so that an engine now running away from the coaling shed would not get upon the main line as it would previously have done, but would run on until brought up at a "dead end." This obviously shows what the defendants should have done before; the precaution is an obvious one, and the defendants as public carriers were bound to use and adopt every possible reasonable precaution against accident, and especially at so dangerous and much frequented a part of their line. [BRAMWELL, B.—It is a mistake to say that because the company are wiser now they were foolish before. KELLY, C.B.—You would say it was the duty of the railway company to anticipate every possible form of accident.] No doubt Brett, J. took a strong view at the trial against the plaintiff, but we contend that it was more, indeed that it was peculiarly, a question for them, and that the verdict was right. They cited *Christie* v. *Griggs* (2 Campb. 79) and the observations of Sir J. Mansfield, C. J.

Manisty, Q. C. and *Edwards*, for the defendants, *contra*, were not called on to support their rule.

KELLY, C. B.—I am of opinion that the defendants' rule in this case must be made absolute. The jury, no doubt, have found that the accident to the plaintiff was caused by negligence on the part of the railway company, but I think that there was no negligence at all, and I must confess that I see no evidence of any. It has been contended on the part of the plaintiff that there ought always to be two men on the engine, not only, as is the case when it is being used to pull or propel a train of carriages on the main line, but on every occasion whenever an engine is moved about on a line of rails, whether by itself or attached to carriages, so that if one of the men should happen to drop down dead, the other may be at hand at once to take his place, and thus the probability of such an accident as the present happening may be avoided. But, if it be that that is a necessary regulation in the present case, I see no reason why it should not be a necessary one in every imaginable case where a man is employed in any duty whatever about a railway. But we must use our common sense in the matter. Now, in the present instance there was nothing dangerous or attended with any peculiar risk in the duty upon which the man was occupied, although the learned counsel for the plaintiff assumed, as a matter of course, that it was an occupation very liable to produce a fit of some kind. But surely it was never heard that sickness of any kind was ever produced by it. If then this be an operation usually conducted by one man, and without any ill results arising therefrom, it would surely be a very strong thing to say that the not employing two men to perform the operation was negligence on the part of the company. There is, I think, nothing in that contention of the plaintiff. But then it has been suggested that the siding leading to the coaling shed should be so constructed that what is called a "runaway engine" could not by possibility get upon the main line. But if it must be so in one case it must be

so in another. No doubt the company have altered the mode of constructing the sidings. But it is a new mode of construction, and I see no reason for saying that there is not as much danger from the one way as from the other. It is enough to say that it is new. The old plan had been adopted and used by the company for twenty years, and no accident had ever before happened; and it appears to me that it would be most unreasonable to suppose that the company could or ought to have foreseen this accident, or to hold them responsible for it upon its happening.

BRAMWELL, B.—I am entirely of the same opinion, and am quite satisfied that this rule must be made absolute. I agree with the Lord Chief Baron and my brother Brett, and confess that I cannot see any evidence of negligence in the matter. Although I have no desire to occupy time unnecessarily, I think that there are matters of considerable importance involved in this particular case. One of them is, that people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before. Moreover, I think that in such a case as the present, an expert, if I may so say, some scientific medical man, practically acquainted with the nature of the duty to be performed by the engine man here should have been called to inform the minds of the court and the jury as to the duty in question, and whether or not it was a dangerous one, and likely to be productive through the fumes arising from the burning coal of any attack in the nature of a fit, and that it should not have been left to the bare statement of the learned counsel. Here counsel on the one side assert that it was a very dangerous occupation, and the counsel on the other side assert the contrary. Who is to decide between them? But suppose that we were to hold that this verdict is right, and the Lancashire and Yorkshire Railway Company were to do, what I think they would not be blameable for doing, viz., to publish a new and increased tariff of their rates of charge, and to say, "Whereas the Court of Exchequer have laid it down as law that two men are necessary on every engine, under all possible or conceivable circumstances, where only one man was accustomed to be employed before, therefore we have raised our fares to such and such prices, to meet the extra expense imposed on and incurred by us in complying with the decision of the court," what, I wonder, would people think of the Court of Exchequer then? But there is another point to be noticed in this case. Here it was owing to the voluntary and deliberate act of the pointsman himself that the engine went in the direction in which it did go. Mr. Holker even, on the part of the plaintiff, says that he does not blame the man for that; on the contrary, he really thinks the man exercised a wise discretion in doing what he did, and that I think is quite true. But, nevertheless, the man *did it;* it was his own voluntary and wilful act; and, if the truth must be spoken, I cannot see what answer he would have had if an action had been brought against him. He might say, and no doubt with extreme truth, "it is a very hard case, I did the best I could, and my duty," and no doubt *it would* be a very hard case; but the plaintiff might also truly say, "I cannot help that, you ran over me, and hurt me very seriously." Take the case of a man driving a carriage through a street, and, to avoid a certain accident, he turns a little out of his course and drives over A. and inflicts upon him serious injuries, surely A. might say to him, "Why did you select me as the object to be driven over?" Then it is said that people are responsible for the acts of their servants. Here I doubt very much whether the pointsman had not the authority of the company for what he did, for he was not only doing the best he could to avoid an accident, but the best probably for the property of his employers, as the result of a collision on the main line with the coming express train then just due, had the engine been permitted to pursue its course on that line, would, in all human probability, have been attended with infinitely more serious results. I have thought it right to mention these points, for peradventure the case may go farther, and I think there is a point upon it in the plaintiff's favour, though it has not been discussed. But the present rule must be made absolute, on the ground that the verdict is against, or rather without, evidence.

CHANNELL, B.—I am of opinion that this rule should be made absolute, on the ground that there was no evidence on which the verdict can be supported. I think the pointsman was justified in turning the points in the way he did, and that the railway company are not bound to warrant that the men employed by them on their engines shall be free from attacks of illness. With regard to the branch siding and its alteration since the accident, it is not because the defendants have become wiser and done something subsequently to the accident that their doing so is to be evidence of any antecedent negligence on their part in that respect.

CLEASBY, B.—I am of the same opinion. In all these cases we are bound to look at the proximate cause of the accident; and, if that is found, we cannot in general go beyond it. No doubt it is a very hard case for the plaintiff, sitting quietly and lawfully as he was in his proper place in the railway carriage, that the points should be deliberately turned so as to send the engine down straight upon him; but so it is. That act was the voluntary act of the pointsman himself, and was, as is admitted on all hands, the best thing that could be done under the circumstances; and I have grave doubts whether the company could be held responsible for an injury proximately caused by such an act of their servant done under such circumstances. As to the other question, namely, that the company have, by subsequently altering the sidings, made some evidence against themselves of previous negligence, I agree with my Lord and my learned brother that that is not so.

Rule absolute.

Attorneys for the plaintiff, *Gregory, Rowcliffe,* and *Rawle,* 1, Bedford-row, W.C., agents for *Leigh* and *Ellis,* Wigan.

Attorneys for the defendants, *Clarke, Woodcock,* and *Ryland,* 14, Lincoln's-inn-fields, W.C., agents for *T., A. J., J. S.,* and *E. A. Grundy,* Manchester, and Bury, Lancashire.

NISI PRIUS.

CAMBRIDGE SUMMER ASSIZES.

July 30 and 31.

(Before BYLES, J.)

REG *v.* CASBOLT.

Night poaching—Limitation of proceedings—9 Geo. 4, c. 69, s. 4.

J. C. was indicted for night poaching on the 6th Feb. 1868. *He pleaded guilty, but subsequently applied by his counsel for leave to withdraw the plea, and to move in arrest of judgment, upon the ground that the pro-*

ceedings against him had not been commenced within twelve calendar months, as directed by the 4th section of 9 Geo. 4, c, 69:

Held, per Byles, J., that the application to withdraw the plea was one which ought to be granted, and that as no warrant and information was produced showing that proceedings had been commenced within twelve months, that the objection was fatal.

Quære, at what time during the trial ought such an objection to be taken.

The prisoner, James Casbolt, who, when taken into custody, was in the Metropolitan police, pleaded guilty to an indictment, under 9 Geo. 4, charging him with night poaching on 6th Feb. 1863. A bill had been sent up for an attempt to murder the gamekeeper, James Tikbrooke, but was thrown out by the grand jury, a true bill being found for night poaching.

Mills for the prosecution.

Naylor for the defence.

Naylor applied for leave for the prisoner to withdraw his plea of guilty, in order that he might move an arrest of judgment upon the ground that no proceedings had been taken within twelve calendar months, as directed by sect. 4 of 9 Geo. 4, c. 69. He quoted

Reg. v. *Kilminster*, 7 C. & P. 228.

Mills, contra, quoted *Reg.* v. *Austin*, 1 C. & K. 621. [Byles, J.—That does not help you.] The prisoner was apprehended on the 19th July 1869, on the original warrant granted in 1863. [Byles, J.—Was that warrant served on the prisoner within twelve months of the commission of the original offence?] No.

Naylor.—It is not only necessary that the warrant should be served, but the information sworn.

Mills.—No notice has been given of this application. The prisoner was included in the original information.

Byles, J.—Where is the original indictment?

The Clerk of the Assize.—At London.

Byles, J.—There is no evidence of any prosecution having been commenced except the finding of the indictment yesterday.

Mills.—Unfortunately through the prisoner pleading guilty we had no chance of giving evidence. Perhaps your Lordship will reserve the point for the Court of Crown Cases Reserved? [Byles, J.—No.] If there was an adjournment I could produce evidence. [Byles, J.—I rather think, from circumstances which have come to my knowledge, that this defence is not contrary to the ends of public justice. I shall give the prisoner an opportunity of withdrawing his plea.] The point to be decided was whether the warrant being obtained was not the commencement of the proceedings.

Byles, J.—The answer to that is that it is not, unless it is served. The case of *Reg* v. *Hull*, 2 F. & F. 16, is exactly in point.

Naylor.—The warrant contained no reference to night poaching at all.

Mills.—The shooting at Tikbrooke was part of the occurrence.

Byles, J.—I will look over the cases and hear further arguments to morrow morning.

July 31.—*Mills.*—This is a motion in arrest of judgment.

Naylor.—No; it is for permission to withdraw a plea.

Mills.—It is in arrest of judgment. [Byles, J.—Even if that were so, I should allow the prisoner to withdraw his plea to meet the real merits of the case. My impression is, that it is a good defence upon the general issue.] *Mills.*—We had no notice of this motion, and, therefore, when the prisoner pleaded guilty, sent all our witnesses away, and it is impossible to get them here. [Byles, J.—If you had no witnesses you might be prepared to meet this case. This is a case in which the point now before us is documentary. What is wanted, is the warrant and indictment.]

Naylor.—And the information.

Mills.—I can produce the warrant, but not the information, that is at Saffron Walden. [The warrant was produced.]

Byles, J.—This is a warrant for felonious shooting; it is for a different offence. This is not the offence with which the prisoner is charged.

Mills.—The question was, did not the present charge arise out of the offence alleged in the warrant? [Byles, J.—This warrant clearly does not show the prosecution commenced at the right time.]

Mills quoted in supported of his view,
Reg. v. *Brooks*, 2 C. & K. 402;
Reg. v. *Austin*, 1 C. & K. 621.

Naylor relied on
Reg. v. *Hull*, 2 F. & F. 16:
Reg. v. *Parker*, 33 L. J. 135, M. C.

Byles, J.—It is no use going into this case; the offence was committed six years ago. I am of opinion that this is a good defence both on principle and authority; upon principle, because the statute says that the criminal proceedings must be commenced within a certain date—twelve months. I have no information here that any criminal proceedings for this offence were commenced within twelve months; on the contrary, as far as I can judge from the warrant which has been produced it was for a different offence. We may fairly assume that the information, if there was one, was for the same offence as that stated on the warrant. The information is not produced, therefore we may draw any inference. With respect to the time when this objection was taken, in the cases cited, I do not know, but suppose at the same period as has been taken in this case. That being so, and the prosecution being too late, I have in one sense no jurisdiction to try the prisoner, and must direct the jury that there is no evidence to find the prisoner guilty, and as there are only two courses open to them, their duty will be to find him not guilty.

The jury was then sworn, the prisoner given in charge, and he was found not guilty.

Election Petitions.

Reported by F. O. Crump, Esq., Barrister-at-Law.

THE COUNTY OF NORFOLK (NORTHERN DIVISION).

Wednesday, May 24, 1869.

(Before Blackburn, J.)

Coalition by candidates—Agency—Undue influence—By landlords in turning out tenants—By employers in dismissing servants—Threat to withdraw custom—Question of degree—Treating—Employment of persons guilty of corrupt practices—31 & 32 Vict. c. 125 s. 44—Evidence.

There being a coalition between candidates, the agent of one becomes the agent of the other; and if a corrupt act is brought home to the one, both are unable to hold

their seats. But personal corruption must be proved against each individually: the proof personally against the one does not prove it personally against the other.

Doing or threatening violence to an elector to induce him to vote or refrain from voting, vitiates the election, although done by an agent only. And if that is done which a man has a perfect right to do, but with a view to influence a vote, it is intimidation. Ex. gr. if a landlord threatens to turn out, or does turn out a tenant for his vote, that is inflicting harm or loss within the statute.

An employer who dismisses his servant on account of his vote is also guilty of undue influence.

Whether the withdrawal of custom from a tradesman, or a threat to withdraw it, amounts to undue influence is a question of degree.

Semble, where the loss proposed to be inflicted in this way would seriously affect the saleable value of the goodwill of a business, it would be such a loss as is contemplated by the statute.

The loss must be so serious that a judge could direct a jury in a criminal court that a person threatening to inflict or inflicting it was guilty of a misdemeanor.

A threat to exercise undue influence must be deliberately uttered with the intention to carry it into effect, and not in a moment of anger; whilst the loss to be inflicted must not be too remote.

An act of treating under sect. 23 of 17 & 18 Vict. c. 102, does not affect the election. If it comes within the 4th section it will affect the election. But the candidate will be responsible if he is in any way accessory to the giving or providing of refreshment corruptly, i. e., with the view of influencing votes at the election then pending.

The question whether the intention was to influence votes must depend upon the circumstances and the manner in which the refreshment was given, the time when it was done, and very much upon the nature of the entertainment.

The difference between the giving of meat and the giving of drink considered.

There is no law which prohibits the giving of feasts to electors after the election. The authority of a person requested to canvass, and so made an agent, ceases with the election; and, unless there is something to show continuing authority, that person could not, by giving a feast ten days after the election, upset that election.

The 44th sect. of 31 & 32 Vict. c. 125, says that if any candidate is proved to have personally engaged as a canvasser or agent for the management of his election any person, knowing that such person within seven years previous to such engagement has been found guilty of corrupt practices, the election shall be void:

Held, that it is enough if such a person is engaged with the candidate's knowledge.

Held further, that the statute is not confined to paid agents, but the person engaged must be an agent for the management of at least part of the election.

P. was scheduled by Bribery Commissioners within seven years, and acted in a way which would have made him an agent for the purpose of affecting the seats of the candidates by ordinary corrupt practices. The candidates, however, both denied any knowledge that he was in the schedule, or that he was acting as the chairman of a certain ward committee. There was no evidence that either candidate had wilfully shut his eyes to the engagement of P., and it was

Held, that the engagement did not affect the election.

This was a petition against the return of Sir E. Lacon and Major Walpole. There was a novel allegation, that the respondents had engaged a person who within seven years had been found guilty of corrupt practices. All the material points are noticed in the judgment.

Counsel for the petitioners, *Ballantine*, Serjt., and *Blofeild*.

For the respondents, *Rodwell*, Q. C. and *O'Malley*, Q. C.

BLACKBURN, J.—It is to be observed, first, that the petition is against both the sitting members. In ordinary cases the seat of each member would be dependent upon himself alone, unless there was something to show that the two members had made common cause. As a general rule, in election matters it is not merely what the candidate himself does, but also what he does by his agents, which avoids the election, even though the agent has gone much further than was intended by the candidate. It is a general rule in election matters that if the agent does a corrupt act, though quite unintended upon the part of the candidate, it will vacate the seat. I have not had much opportunity of reading the different judgments delivered by different judges; but since I have had the opportunity of considering them, I find, as far as personal observation enables me to say, that they have all agreed very closely on what is the law on these different matters, though of course the difficulty is to apply the law to the facts in the different cases. Upon this particular matter about agency, I find the Scotch judge (Lord Barcaple), in the *Greenock* case, lays down the rule in exactly the same way as I should myself lay it down. I cite what is laid down by a Scotch judge, as showing that a Scotch lawyer has come to exactly the same conclusion as the English judges have come to; and I prefer taking it in his words rather than my own. He says, talking of agency, "I think that there are three principles applicable to three kinds of matters. There is, first of all, the strictest of all principles, that which is applicable to a criminal charge; and there you are responsible for nothing at all except your own individual guilt. That is a thing consistent with ordinary common sense. There is, then, the principle that is applicable to actions of a civil kind, raised against a party on the ground of a wrong done, and in which it was proved that the wrong was done by the defender's agent, that is to say, a person employed by the defender while he was doing the thing which he was employed to do. But there comes in the principle that he was employed to do the particular work, and that he was not employed to do the wrong. Then there is the third class of cases, with which we are at present engaged, where, in these election petitions, it being proved that a candidate is having his election carried on by a committee, or by certain canvassers, those canvassers do something which, if the candidate is responsible for it, will invalidate the election, and it is held that he is responsible for it in the sense of making the validity of the election depend upon it. I do not see how these election petitions would be of the least use otherwise, because I suppose that there are very few candidates indeed who undertake the practice of corruption with their own hand. I presume there are equally few candidates, or very nearly so, who ever say to their agents that they are to proceed corruptly in the matter." That is the passage at page 97 in the Blue Book which I am quoting from, in which Lord Barcaple lays down three classes, and points out where agency in an election petition differs from agency in other matters. He does not say, and he has no occasion there to say, what constitutes agency, which is a difficult question, and upon which, where it becomes necessary to inquire into it in the present inquiry, I will make any observations that occur to me as material. Now, that being so, we

have to see was there any corrupt act practised by the agent of the sitting members, either or both? It happens that in this case Major Walpole and Sir Edmund Lacon have stood jointly; they have chosen to what we commonly call coalesce. They united in a canvass, and in fact have made each an agent of the other, and they have chosen to stand or fall together; consequently, if any corrupt act is shown to be done by an agent appointed by one member, it will affect both. Such are the consequences of a coalition. A candidate is not only responsible for his own individual agent, but, having made a coalition, he becomes responsible for the acts of the agent of the other candidate with whom he has coalesced. Major Walpole, therefore, as far as those matters are concerned, is exactly in the same position as Sir Edmund Lacon. If a corrupt act is brought home to the one, both are unable to hold their seats. There is, however, another point in the petition that is included here namely, the new enactment, which says that wherever a member employs, "personally engages" is the phrase that is used, a person who has been scheduled or declared guilty of corrupt practices, then he has done that which defeats his seat; the Act (whether wisely or unwisely it is not for me to consider) has pointedly and markedly said that that shall be proved against the member personally; by which I understood it to mean, proved, as in that first class where Lord Barcaple says, as in criminal cases, a person is responsible for his own individual guilt and not otherwise, it must be proved to that extent. That being the case upon that head of the inquiry, necessarily and essentially the two members stand quite in separate positions; it must be proved against either of them personally. The proof personally against the one does not prove it personally against the other; so that so far as that is concerned, their cases are necessarily separate. The first class of cases brought forward in the evidence, which I will take first, are those which it is said proved that there had been undue influence exercised by agents, for whom the members are responsible. That offence of undue influence is created and defined by the statute, the 17 & 18 Vict. c. 102, of the Corrupt Practices Prevention Act, sect. 5; and the only part which I have to consider here, is the first part: "Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, make use of, or threaten to make use of, any force, violence, or restraint, or inflict or threaten the infliction by himself, or by or through any other person, of any injury, damage, harm, or loss, or in any other manner practise intimidation upon or against any person in order to induce or compel such person to vote, or refrain from voting"—then come some other points which I will not read—"shall be deemed to have committed the offence of undue influence, and shall be guilty of a misdemeanor, and in Scotland an offence punishable by fine or imprisonment, and shall also be liable to forfeit the sum of 50*l*." Now, the first thing to consider is, what is the true meaning and construction of that Act. I think there can be no doubt when you look at the earlier part of it, which I have already read, that it is meant and intended to say, that where there is any force, violence, or restraint, or any threat of injury, or any injury, those are cases which of course would embrace all the cases where a wrongful act is threatened; but I do not think the Act is at all confined to that. I feel no doubt at all where a person, in order to prevent another from voting, or to force him to vote, either beats him or threatens injury to his person, or breaks the windows of his house, or threatens injury to his house, or the like, that is what is here called undue influence. But I do not think it is confined to that; where such a thing is done, and it is brought home to the agent, it avoids, according to my view, the election. Just immediately before I came down here, in the case of *Stafford*, I was obliged very much against my will to put that doctrine in force, when I was convinced that Mr. Pochin, the sitting member, had come down to a very corrupt borough, and had, by a sort of direction on his part, prevented corruption upon his side, and hindered the other side in consequence from exercising corruption to any great extent, and in fact saved the borough from a commission. Of course I thought it highly meritorious upon the part of Mr. Pochin, and I was very sorry to have to decide as I did, but it was proved to my satisfaction that an agent of his, a man he had employed, a paid agent, did hound on a mob to beat and molest people on the day of the election so as to terrify men from coming to vote. I could not, according to the rule of law which has been laid down, say that because Mr. Pochin had been a meritorious man I would preserve his seat, and I was obliged to come to the conclusion that he had by his agents been guilty of undue influence, and consequently I had to unseat him. That was a case where the injury was a wrongful and violent injury. But I think the section is not at all confined to that. It goes on to say, if he shall inflict, or threaten to inflict, by himself, or by or through any other person, any injury, damage, harm, or loss. In another manner that is intimidation. I think that harm or loss is not confined to these cases; I think it would apply to cases where, though a person has a perfect right to do it, if he does not do it with the motive of affecting the vote, yet the doing of it does inflict harm upon the other side. I take it that where a tenant who holds his land from year to year, to whom consequently the landlord can at any time give six months' notice to quit, the landlord has a perfect right to choose his tenant and turn him out; but if the landlord threatens to inflict, or does inflict, that turning out of his tenant for his vote, that is inflicting harm or loss within the meaning of the Act; and I think that sort of thing was intended to be struck at by the statute. So, again, where a person employs a servant, and the servant is continuing in his employment, and would in all probability continue in his employment in the ordinary course of things, the master of course may dismiss his servant at pleasure, giving him proper notice; he may dismiss him and change him at pleasure, and therefore he commits no wrong in so doing, but there again, if he does it on account of the vote, and for the purpose of coercing the voter, the statute intends, I think, to make that an infliction of loss which was to be punished, and punished severely. That has been acted on on more occasions than one. In the case of the Westbury election, to which I referred in the course of Mr. O'Malley's address, where it was proved that a manufacturer who had exercised coercion of that sort on a large scale in order to force his workpeople to vote, it was held, and I think it was held most undoubtedly properly, that that was an infliction of damage or loss which, being proved to be done by an agent, vacated the seat. Other cases there have been something similar to that. In some of the towns in the north, Blackburn and Oldham, where something similar was ruled, it was clearly enough held, and I think rightly held, that though the loss and harm to be done to the man is not an illegal harm, not a matter that would be a crime, like beating the man or destroying his property, yet, if it be a loss inflicted for that purpose it is brought within the statute. Then I come to other matters which are not quite so clear upon the construction of the statute, what you may call a precarious loss. For

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instance, if a person who is in the habit at intervals of frequenting a shop and giving the tradesman some custom, were to choose no longer to be giving that custom, but to go elsewhere, if he chose to threaten to take away that custom and go elsewhere, is that a loss or not? It seems to me to be a good deal a question of degree. Acting on the same principle which I have been pointing out, I cannot but think, where the loss which is proposed to be inflicted in this way is, I may say, to such an extent and in such a way as would seriously affect the saleable value of the goodwill of a man's business, it would clearly be a loss; but such a trifle as that of a lady looking at a box of ribbons, and upon learning that the man was a Whig or a Tory, leaving the room and not buying, would be such a trifling thing that it could hardly be acted upon. I must weigh the matter as a question of degree, and see whether it is serious or not, for it is not to be forgotten that this section enacts that the offence shall be a misdemeanor, and shall be one which if it is made out shall subject the offender to fine and imprisonment; and I ought, therefore, in construing the statute, to remember that it is intended that such an infliction of loss, or such a threatening of infliction of loss, must be so serious that one could direct a jury in a criminal court to find that a person was guilty of misdemeanor. I cannot help thinking when you are looking at the principle of construction, that it must be taken in that way; if the loss where it comes to be this precarious loss (which expresses my idea perhaps as well as any other phrase), where it comes to be the loss of this chance, such as it would be in the case of a shopkeeper, it must be made out that it is done to a serious extent; and recollecting that to be so, you must see whether or not it is so made out. Then when one comes to see whether the thing is proved or not, of course the very essence of it all is, that it should be done on account of the vote. If there was an actual injury actually done, by the landlord dismissing or turning away his tenant, then of course the only question would be, was that done on account of the election; that is, as I have said, was it inflicted on account of his vote or not? Therefore, it would always come to be a question, more or less, of evidence, and no doubt the scale on which it was done would be an important thing to consider. If immediately after the election a landlord dismissed fifty or sixty tenants who had all voted against him, I do not mean to say the thing would not be capable of being explained, and it might be shown that it was not done upon that ground, but that there were very good reasons for turning them out. In many such cases, where *primâ facie* it appeared as if there had been an act of coercion, they have been capable of explanation. I think that was the case at the Tamworth election, where a great deal was made of Sir Robert Peel, or his land steward, immediately after the election, having given notice to quit to, I think, about twenty cottagers, of whom two or three had voted against him, and no doubt that fact required explanation. My brother Willes, who tried that case, took, as far as I can understand it, exactly the view of the law which I laid down just now, and I think, as far as I am aware, there has never been any difference of opinion among any of the judges as to the law. He took exactly that view, and inquired into and was satisfied upon the evidence that, though this act of evicting the tenants had taken place, yet it had nothing whatever to do with the election. He was satisfied that for some purpose—I think, if I remember, for improving the estate—it was intended to pull down the cottages before the election came on. The cottages were pulled down because of that intention, and that being so, of course it was held that there was no undue influence exercised. It would be monstrous if it were laid down that a landlord was obliged to keep on a tenant to whom he would otherwise give notice to quit, or that a master should be obliged to keep his servant whom he would otherwise send away, merely because he had voted against him; it must be shown that it was done on account of the election. Wherever an injury has been actually inflicted, wherever a thing is done which, for this purpose, would be a loss actually inflicted upon the tenant who has been turned out, or where a servant has been discharged, or the like, the proof is comparatively easy; but when it comes to be that he was merely threatened to go (which is equally within the statute), where a threat has been made, or what is supposed to be a threat, and not acted upon, the point is very much more difficult to determine. But I need hardly point out that in any such case it becomes a question always, more or less, whether or no the threat was a real threat. I think where a person, in a time of great excitement, uses what the Americans call "tall talk"—where an angry man says something that would apparently amount to a threat—in such a case, for instance, as one of the witnesses referred to when he said (I do not know whether he was using a Norfolk phrase or not) that Mr. Postle, in a time of excitement, was very "lavish" in his talk. I do not think that such a thing as that—an angry word spoken in that way, and not intended to be acted on, an angry thing, probably forgotten as soon as said—would amount to a threat at all. Of course it all comes to the question of fact; was this a serious and deliberate threat, meant to affect the vote (though perhaps repented of, and not afterwards acted upon), or merely angry words, not meaning anything? It always must be very difficult to satisfy the minds of those who have to decide the fact, whether the threat, which is not acted on afterwards, be a real threat or not. But when it comes to be a case of what I have called precarious benefit, arising from being a customer or the like, I think there, also, you ought to see tolerably well that the matter is made out to such an extent that you might, if the indictment were laid before a jury, fairly and properly leave it to the jury as a criminal matter, and direct the jury to find the prisoner guilty. In such a case as this I think the legal maxim, *de minimis non curat lex*, does to a considerable extent apply; and in seeing whether or no there is undue influence from a threat of some loss, you ought to see whether the loss is really considerable or not, and you ought also to see that the loss is not what a lawyer would call too remote. I will explain what I mean by reference to what occurred here. It appears in the evidence in this case that Postle, one of the persons who was complained of, was very angry with a man who had, as he, Mr. Postle thought, promised him that he would not vote at all, and he found afterwards that the man was going to vote the other way. Mr. Postle, no doubt, perfectly and sincerely, thinks he was angry at what he considered a breach of faith, not angry at his intention to vote for Wodehouse and Gordon, but angry at his breach of promise in not standing neutral. As I said before, I have no doubt Postle persuaded himself that that was the cause of his anger: but I must take the liberty of assuming, if the man had broken his word by promising to stand neutral, and had then gone and voted for Walpole and Lacon, Mr. Postle would not have been angry. I cannot doubt that his real anger was because the man was going against him. But in this case, Postle, remembering during his angry words that the man had told him when they were friends before, that if, two or three years hence, when the young lady upon the coming of age of whom the sale of

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the property depended, the land should be sold, and if the land went at a tolerably low rate, he would like to buy the reversion and become his own landlord—Postle, suddenly remembering this, says in his rage and anger (he agreed he did say so), "When that comes to be done, I can buy it over your head, or, if I am dead, my son can do it for me," or some phrase of that kind. If that was said, was that a threat to inflict loss, which I am to treat as a misdemeanor, and which was to void the election? I have already said I think the loss must not be too remote; and if I were to come to the conclusion that Mr. Postle seriously and truly meant to do this little piece of long-lived spite which in a moment of anger he said he would do, I cannot think that it would come within the meaning of the statute. But to do justice to Mr. Postle, I have no doubt that as soon as his anger had cooled, before he went to bed, and certainly after he had slept upon it, he would as soon have cut off his little finger as have done it; it was merely a piece of what the witness called "lavish talk," rather than a threat seriously affecting the election. I have said thus much on what does amount to undue influence, which to a great extent disposes of the cases under that head which were brought forward, and which were but few. [Having referred to these, his Lordship proceeded:] But we now come to a much more serious part of the case, namely treating; as to which the difficulty I find is very considerable indeed, in determining for myself what are the inferences I ought to draw, and what is the idea and intention which would make the treating a corrupt act under the statute. Corrupt treating is a different thing altogether from what I have just been speaking about, namely, undue influence. It always was the law, and is the law still, that when a man is directly induced to give his vote by meat or drink, it is just as much bribery as anything else. If a man sells his vote for a mess of pottage it is just as much bribery as if he sold his vote for the money which the mess of pottage was worth. That always was the law, and still is. But then there was a habit of giving the meat and drink for the purpose rather of keeping people to their colours, to keep them steady; and that had become excessively common centuries ago. When it was first endeavoured to be checked, I think the House of Commons endeavoured to check it far more with the desire of keeping down the expense of elections, and saving candidates heavy expense, than anything else; but by degrees they have more and more considered the extent to which this treating would corrupt the constituency; and finally, we have an Act of Parliament, the Corrupt Practices Prevention Act, the 4th section of which is the one that governs the matter. But before coming to that 4th section I will mention the 23rd section, the mention of which now will clear the way, and relieve me from a great deal of after-matter. There was a very common belief that, at election times, upon the nomination-day, and day of polling, where men had come to attend the nomination, or to attend the polling, they had a fair claim to have something given them for refreshment, and it was a very general practice indeed to give it them; and whether or no it was an illegal practice was a matter upon which committees of the House of Commons entertained different opinions. One of the witnesses here, Mr. Beck, in mentioning that he had done that very thing, said, fairly and frankly, that he thought he had a perfect right to do it; and had done it before, and would do it again. He did not stand singular in that respect; a great many have thought so; but in the 17 & 18 Vict. (the Corrupt Practices Prevention Act), the Legislature thought it necessary to stop it; and here is the enactment which they thought fit to put in. It states, "And whereas doubts have also arisen as to whether the giving of refreshment to voters on the day of nomination or day of polling be or be not according to law, and it is expedient that such doubts should be removed, be it declared and enacted that the giving, or causing to be given, to any voter on the day of nomination or day of polling, on account of such voter having polled, or being about to poll, any meat, drink, or entertainment, by way of refreshment, or any money or ticket to enable such voter to obtain refreshment, shall be deemed an illegal act, and the person so offending shall forfeit the sum of 40*s.* for each offence, to any person who shall sue for the same, together with full costs of suit." It is obvious, upon reading that, that the Legislature say distinctly that this shall be illegal; but they do not say it shall be a corrupt act, the doing of which shall avoid the election; they thought it was not like bribing or the like. They did not think it was so bad as to say that the election should be void if such an act were done; but they said it is a mischievous practice, we forbid it; and if any person, not only a candidate or a candidate's agent, but if any person gives meat or drink on account of attending on the nomination day, or on account of polling, or on account of having polled, or being about to poll, it shall be an illegal act. Then they thought that they had devised a remedy to prevent it being done by the subsequent part of the section which enacts that persons so offending shall forfeit the sum of 40*s.* for each person receiving the same. I should have thought that that would have been an efficient remedy. There were a considerable number of attorneys in London who used to make a trade, which, I am happy to say, is a good deal hindered now, by getting up actions for the sake of costs; there are many men I could name, men whom my brother Ballantine and Mr. Rodwell know, too, who used to get up actions for the purpose of getting their costs in actions for 40*s.* damages against poor people, out of whom it was difficult to screw the amount, except by selling them up. If I had been asked if this were an efficient remedy I should have said, "Yes; Mr. So-and-So is pretty sure, for the sake of his 40*s.*, to come down and sue, and he will carry out the intention of the Legislature; not that he cares about that intention, but in order to get his 40*s.* and costs of suit." But fifteen years have elapsed, and nobody has done so, and, as the Act expires this session, it is not very likely that anybody will do it, though perhaps they may think there is a good crop to be made here. I do not know how that may be, but I do not think it likely. Therefore, if the Legislature, in considering the matter, desires that the practice of giving refreshment should be stopped, they will have to devise some penalty which shall effectually carry out their intention But, though they made it illegal, the statute does not in the slightest degree touch its effect upon the result. You may, by giving money for refreshment upon the polling day, subject yourself to a penalty of 40*s.*, and it may be bribery if it is given for the vote, or treating if with the intention, and bribery or treating, none the more and none the less, because it comes within the 23rd section. Then comes the section which governs the matter, and which we have to consider, and that is the 4th section, which says, "every candidate at an election who shall corruptly." Now I may stop at that and say, that I believe all the judges have considered that the word "corruptly" governs the whole, and that that means, with the object and intention of doing that thing which the statute intended to forbid. What that is I will see presently. It does not mean corrupt in the sense that you may look upon a man as a knave or a villain, but that it is to be shown that he was meaning to do that thing which the statute

forbids. The section proceeds, "who shall corruptly, by himself, or by or with any other person, or by any other ways or means on his behalf, at any time either before, during, or after any election, directly or indirectly give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay, wholly or in part, any expenses incurred for any meat, drink, entertainment, or provision to or for any person, in order to be elected, or for being elected, or for the purpose of corruptly influencing such person, or any other person to give or refrain from giving his vote at such election, or on account of such person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be deemed guilty of the offence of treating," which is not made a misdemeanor but merely made subject to a penalty. Upon the construction of that statute, I think, as far as I can observe by looking through the judgments of the Judges who have sat upon these election inquiries, we have had no difference of opinion at all; I believe every judge has come to the same conclusion, that it is essential that the candidate should be mixed up in it, because the statute only makes it an offence in the candidate. The candidate must do it, but he need not do it with his own money or by himself personally, if he shall be in any way accessory to the giving or providing; and consequently if the candidate's agent, for whom he is responsible as agent, does give the meat and drink, that has, as far as the avoiding the election goes, the same effect as the candidate giving it. But then comes that which governs the whole; does he do it in order to be elected, or for the purpose of "corruptly," that is corruptly according to the intention of the statute "influencing such person or any other person to give or refrain from giving his vote?" That governs the whole, and that, I take it, is the key-note of the statute. Then we are to see was it done with that object; was the purpose that which the statute defined; that is to say, was the giving of the meat and drink with the intention of influencing the voters at this particular election? I take it that, influencing the voters to give their votes, means at the election then pending; and it comes to be a question then whether or no that intention is made out as a matter of fact. As I have already said, I think every judge who has dealt with these matters, has agreed completely with what I am now saying. The words may have varied; different judges may have used different words, but the meaning has been always the same. If I were directing a jury, I would say, "You, gentlemen of the jury, are to say whether or no, in point of fact, this meat and drink was given with the intention of influencing the voters at this election, assuming it to be given by the agent of the candidate; if so, you will find that it is corrupt treating." Unfortunately I have not a jury to leave it to; if I had, my task would be at an end. It is a very difficult thing to say in each particular case, whether or no that intention is made out. It must be a question of degree more or less in every case. I can only say upon that, as I have said several times before, that the question what is the intention of people must be inferred from the whole of their acts. As a good canon of the law of evidence, a man must be taken to intend the natural consequences of his act. If a man does a thing from which natural consequences ensue, we must say that he intended the consequences of his act. If a man in his sober senses stabs another with a knife, we must suppose that he intends to do him grievous bodily harm. The canon of evidence is, that where an act would have a certain natural consequence, and a rational man does it, you must suppose that he intended the consequences of his act. That being so in the present case, the fact whether or no the giving of meat or drink was intended to influence the votes, must depend upon the circumstances and the manner in which it was given, the time when it was done, and very much upon the nature of the entertainment which was given. And here I must remark upon one fact which has a great bearing upon the present election; that is, that there is a very great difference between meat and drink, although the statute makes no difference at all as to the law of the matter. If meat be given with the intention of influencing the voters, it is as bad as if drink be given. But when we come to the question of fact as to what was the intention, that becomes to my mind excessively different. No doubt a man may be influenced as to his vote by giving him a sandwich to eat, and, on the other hand, a man may be made extremely drunk without influencing his vote. But when we come to look at the probability of what a man intended, there is a very great difference indeed; and then the question of whether it was meat or drink becomes an important question, I think, though it has been truly said by some of the judges, that the statute makes no difference if once the intent is established, whether it is a thimbleful of drink given with the intent of inducing a voter to vote at the election, or whether it is a hogshead; nevertheless, upon the same principle of reasoning, when you come to look at the intention, that quantiiy is of very considerable importance. It seems to me that it is difficult to suppose that any person would throw open public-houses to voters, and make them all drunk, without intending to influence their votes, and whether a man gives them a small quantity of drink, it is a different matter. It comes to a matter of degree and extent; and we have leave to consider whether or not it is intended to produce the effect contemplated. Now I must say a few words about the particulars in this case. I feel quite satisfied, from the evidence here, that there has been a very general practice (it is highly probable that it was adopted also on the other side, although it not being material it has not been entered into) of farmers or clergymen, and the clergy in this case where the Church was supposed to be in question, naturally enough took a considerable part in the election, arranging with their neighbours to meet at such and such a place where a conveyance was to be ready to take them to the poll; and when they came to the place there would be breakfast for them. Sometimes the time at which the breakfast would be ready would be mentioned before, and sometimes the breakfast was there without having been mentioned at all; but breakfast was given on such occasions pretty generally. Whether it was a universal practice I cannot say, and I do not much doubt that in a very large number of these cases it would be illegal within the 23rd section, because the men were going to the poll. It does not at all necessarily follow that it would be so, although I think in a great many cates it would be so. But assuming that all these people were agents, when one comes to look whether or not they were not agents, I can hardly come to the conclusion that as regards any of these clergymen who have been mentioned as giving a small breakfast in that way (I put an emphasis upon the word "small," because the extent and degree is an important matter), even if they were proved to be agents, it could fairly and properly be said that it was done by them with the intention of influencing voters. It was given incidentally in the course of their bringing the voters to the poll, and it would probably subject them to a 40*s.* penalty; but I do not think I could treat them as giving them entertainments in order to influence voters, even if they were agents in all cases. Then there comes a further class of cases, with regard to which I stopped

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counsel from commenting upon them, but I must render the reason why I did so. It appears that in a very considerable number of cases after the election was over, in some cases a day or two afterwards, and in some cases two or three weeks after the election was over, some landed proprietor, some squire or large farmer gave a dinner to his tenants and people around him, celebrating the victory their side had obtained; and he naturally enough might be expected not to invite those who had voted on the other side; with rare exceptions those people invited their own side. Now I have already said, in pointing to the words of the statute, that it says that it is necessary, in order to make it treating within the 4th section, that it should be given by the candidate, or that the candidate should by his agents be accessory to the treating; and though the statute in express terms says if given after the election it shall be just the same as before, yet nevertheless when given after the election it must be given by the candidate or somebody who still continues to be connected with the candidate. Now the agency at the election, which was solely from the canvassing before the election, expires with the election. Whether or no a person who had been requested to canvass would be an agent whose misconduct would avoid the election, would depend upon the evidence; but unless there is something to show continuing authority, that person could not, if he had given a feast ten days after the election, by that act upset the election. I have no doubt that most of these feasts, though not all of them, which were given after the election, were connected with the election; I have no doubt that the motive in the mind of the giver was connected with there having been an election. The intention was not to induce the electors to vote, because their votes had been already given; but no doubt these dinners, if you would come to the real motive of their being given, were given with the view to increase the influence of the squire who gave them; he gave the meat and drink with the intent of increasing his influence over his tenants and others who would be voters at any future election. No dout that was the real motive with which these dinners were given; whether it be a right motive or a wrong one, whether it be a wise or a foolish thing to do, I have nothing to do with. All I have to do with is, that as yet no statute whatever has struck at it. If it is thought, as it may be thought, that such things ought to be prohibited, the Legislature must say that they intend to prohibit them; and, as I said before, they had better, with the experience which they have had of the working of the 23rd section, devise some remedy by which it can be enforced better than merely by subjecting the offender to some penalty. At present I only say that those things are not struck at, and are consequently out of the question, in considering this case. [His Lordship then dealt with particular cases of treating and bribery, and then said.] Now, I come at last (and that concludes the whole matter) to the point that arises upon the enactment in the new statue which for the first time is now attempted to be put in operation, and consequently I am the first person, I believe, who judicially expresses any opinion upon its construction. That enactment, the 44th section of the 31 & 32 Vict. c. 125, is as follows: "If on the trial of any election petition under this Act any candidate is proved to have personally engaged at the election to which such petition relates as a canvasser or agent for the management of the election, any person knowing that such person has, within seven years previous to such engagement, been found guilty of any corrupt practice by any competent legal tribunal, or been reported guilty of any corrupt practice by a committee of the House of Commons, or by the report of the judge upon an election petition under this Act, or by the report of commissioners appointed in pursuance of the Act of the session of the 15th and 16th years of the reign of Her present Majesty, chap. 57, the election of such candidate shall be void." That is the section we have to deal with; in the first place, it is to be observed that the Legislature, probably from thinking that otherwise there would be such very great danger of elections being upset upon matters that should not bring about that result, have carefully confined the operation of the enactment to the candidate having personally engaged. In the passage I quoted from Lord Barcaple's judgment, where he is dwelling upon the different kinds of agency, the first class of cases to which he refers are those where, in order to prove a man guilty of a criminal charge, you have to prove the individual guilt of the man charged; not necessarily that he did it with his own hand, but his own personal guilt. So here the Legislature have said, that in order to bring the man who is alleged to have committed the offence within the enactment, it is necessary that he shall have been personally guilty of such offence. I do not construe personal guilt in the sense of doing it with his own hand in order to bring him within this section. I do not think it is necessary to show that the candidate went and spoke to the scheduled man himself and said, "Act as my agent;" but I think the statute means that it must be brought home to his personal knowledge. If I send a man out with directions to hire somebody in order to shoot somebody else, I am personally guilty of murder if it is done, though I may hire the murderer in a roundabout way, and though I may not know who ultimately did it. I think, however, what is required is, that it should be personal on the part of the candidate. I think this particular section means that where it is done with the candidate's "knowledge and consent," which is the phrase used in the section immediately preceding, then it amounts to a personal engagement. Then I proceed further to consider what the nature of the employment of the scheduled person is to be. It must be "as a canvasser or agent for the management of the election." I think, in construing the statute, and seeing what is the sort of agency that is pointed at, it is not confined by any means to a paid agent. I do not think that is the meaning of the statute, but I think he must be an agent for the management of the election. I do not think it is necessary that he should be an agent for the management of the whole election, it is enough if he is agent for part of the election; he must be not simply an agent who might be employed to such an extent as might make the candidate answerable for corrupt practices committed by him, but he must be employed in the way of managing a portion of the election. Taking that view of the matter, and Mr. Preston being the only one whose case we have to consider, the question is, is there any evidence here that Mr. Preston was engaged by either of the candidates personally as an agent in the sense I have intimated, in the management of the election? In the first place, as far as Major Walpole is concerned, there is no pretence whatever for saying that he engaged him in any such sense. Major Walpole tells us to-day he was well aware that there was a list of scheduled persons, and that he avoided meddling with them at all. He says that he was in ignorance that Mr. Preston was in the schedule, which I fully believe. I think it is a very natural and probable thing; for though Mr. Preston was put in the schedule for what was done in 1859, still there is no more reason why Major Walpole should have known that he was in the schedule, than that he should have heard of the 500 or 600

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other persons in the schedule. His was not one of the cases in which what was done would be prominent and notorious, and known to everybody. But Sir Edmund Lacon did not know it, and it was much more likely that he would be intimately aware of all that took place in that inquiry. And then comes the question whether Sir Edmund Lacon knowing that, knowingly consented to the employment of Mr. Preston in such capacity as I have mentioned, as a manager of the election? It is avowed, and not disguised at all, that Mr. Preston was asked to be chairman at one or two of the public meetings. It is not disputed (the candidates of course both knew of it) that Mr. Preston was asked by Sir Edmund Lacon to propose him at the election, and he did do that; but neither of those acts in themselves are acts which in the slightest degree make him an agent for the management of the election. Then, further than that, we have evidence that Mr. Preston did act in a capacity which would have made him an agent in the management of the election to some extent. I think it appears, though there was some difficulty in getting at it, that Mr. Preston attended the meetings of one of the committees, the Yarmouth committee, that he took an active part in it, that he was the chairman of it and acted as such, and I think that was evidence tending to show that he was manager of part of the election, so as to bring him within the statute. There was a good deal of difficulty in getting at handbills and circulars, which it was alleged were signed by Mr. Preston. One was put in to-day signed by Mr. Preston, and I can hardly doubt that the others were also signed by Mr. Preston. It certainly is rather a remarkable thing that with the exception of that produced to-day, not one of those handbills should be forthcoming, and I cannot much doubt that the others would have borne the same signature, and consequently, I come to the conclusion that Mr. Preston was acting as the chairman of the committee, and if the question were solely if he had committed an ordinary corrupt practice, whether such act committed by him had been brought home to an agent of the candidate, I should have thought that it was so brought home. I have very little doubt that the people at Yarmouth did know this; but the Legislature has for some reason thought fit to enact that the employment of the scheduled person, in order to bring the case within the statute, must be a direct personal engagement by the candidate. Sir Edmund Lacon says that he did not know of Mr. Preston's acting as chairman of the committee and so on, and I think it probable that he did not. I suppose that Mr. Preston's so acting was with the knowledge of Sir Edmund Lacon's agents; they were aware of this statute, and they were aware that by the employment of scheduled persons there would be a risk of upsetting the election; nevertheless, they thought it better to have the influence of Mr. Preston, and one or two others, acting on the committee in the same way. But at the same time, while they so procured their influence, they would do, as they had done in former cases, take great care that Sir Edmund Lacon should not know of it. Sir Edmund Lacon having been practised in former elections at Yarmouth, having seen the wisdom of not asking about money, or about questions of this sort, there is a great probability that this was not known to Sir Edmund Lacon. That would not prevent me coming to the conclusion that it was personally done by him, if I could see any evidence to show that he knew really that it was going to be done; his wilfully shutting his eyes to it would not prevent me from concluding that Sir Edmund Lacon was responsible for it, but I cannot find any such evidence. That being so, I can only come to the conclusion that that part of the case fails. That part of the case was a very proper one indeed to investigate, and if the petition had been confined to that point alone, and had been against Sir Edmund Lacon only, I should have thought the petition a very proper one indeed to be brought forward; and if that had been so, probably, though I decided against the petition, I should not have decided that the petitioner should pay the costs. But the petition has been brought against both members, and has extended over all the county; and it is impossible not to see that large expense must have been incurred on matters in which there has been a complete failure of proof. So that I must come to the conclusion, which what I have already said has indicated, that both members were duly elected, and that in the present case there is no reason to depart from the ordinary rule that the costs must follow the event, and therefore the petitioner must pay the respondent's costs.

Agents: *Wyatt* and *Hoskins*; *Brown*, Pall-mall.

House of Lords.

Reported by Douglas Kingsford, Esq., Barrister-at-Law.

April 15 *and* 16.

(Present—The Lord Chancellor, and Lords Chelmsford, Colonsay, and Cairns.)

Gossip (app.) v. Wright and others (resps.)

Mortgage—Sale by mortgagor to mortgagee—Right of repurchase within limited time—Want of professional assistance—Undervalue.

A mortgagor conveyed the mortgaged estate to the mortgagee, and by a contemporaneous agreement a right of repurchase was reserved, if exercised within six years, on repayment of the purchase-money, together with all expenses and moneys laid out on the property. The right of repurchase was not exercised by the mortgagor, but he, seventeen years after the date of the above conveyance, filed a bill, praying that the transaction might be declared to be not a sale, but a mortgage, with the right to redeem:

Held (affirming the decree of Kindersley, V. C.) that the transaction was, what it purported to be, a conveyance by way of sale, with a right of repurchase within six years; the evidence showing that this was the intention of the parties at the time, and proof of want of professional assistance, of under-value, and of unfair pressure on the mortgagor having altogether failed.

This was an appeal from a decree of Kindersley, V.C.

The bill, filed on March 16, 1861, amended in Feb. 1862, and re-amended in Oct. 1862, prayed a declaration that certain indentures, dated May 28 and 29, 1844, ought to stand as a security only for such amount, if any, as the defendants Charles and Robert Wright, could prove to be justly due thereon; for an account of the receipts by the said defendants in respect of certain lands and property; that the defendants might be decreed to convey and re-assign the said lands and property to the plaintiff on receiving what should be due to them as mortgagees; that the plaintiff might have damages awarded to him and assessed by the court; and that the said defendants might pay the costs of the suit.

The circumstances were these:

In 1838, the appellant, John Hatfield Gossip, being owner in fee of the Hatfield Moor Estate, in Yorkshire, applied to the defendant Robert Wright to advance money to improve the estate by the process of warping. This Robert Wright agreed to do, and by an indenture, dated Oct. 13, 1838, Gossip mortgaged in fee to Robert Wright part of the said

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estate, to secure the re-payment of 15,000*l.* lent, or agreed to be lent, by the latter to the former. On the same day was executed an agreement between Gossip and Charles and Robert Wright. This recited that the 15,000*l.* was borrowed to enable Gossip to complete the purchase of Hatfield Moors, and to pay off incumbrances and improve the lands by warping, or laying alluvion from the old and dry river Idle in the immediate neighbourhood. And the effect of the agreement was that, in the first instance, the sum of 10,000*l.* should be placed in the hands of Charles Wright for the purpose of paying off incumbrances, and of warping and improving the estate, and, if the scheme of warping should appear likely to succeed, Robert Wright was, at his discretion, to advance further sums, all sums so advanced to be applied in warping and improving the estate.

Various other mortgages, of the same and other parts of the Hatfield Moor estate, and of the plant for warping, were made on further advances, and in May 1844, 37,669*l.* was owing on these securities. By indenture, dated May 29, 1844, after reciting that Robert Wright had contracted with Gossip for the absolute purchase of the hereditaments comprised in the several indentures therein mentioned, free from all incumbrances and all equity of redemption thereof, in consideration of 39,370*l.*, Gossip appointed and conveyed all the premises and hereditaments, and all the equity of redemption, right, interest, and demand, at law and in equity, unto and to the use of Robert Wright, his heirs and assigns, for ever. By an indenture, dated the previous day, Gossip had assigned to Robert Wright all the warping plant, in consideration of 2630*l.*, making the whole amount of the purchase-money 42,000*l.*

Contemporaneously with these deeds an agreement was executed, dated May 29, 1844, between Robert Wright of the one part and Gossip of the other part, by which, after reciting the deeds of the 28th and of even date, and that the aggregate of the moneys therein mentioned amounted to 42,000*l.*, and that upwards of 3000 acres of the moorland sold to Robert Wright remained uncultivated, but was capable of being improved by warping and cultivation; and that, on the treaty for the said purchase, it was agreed that Robert Wright might if he thought proper improve the said hereditaments, and that, whether he so improved the same or not, Gossip should have a right of "pre-emption" of the said hereditaments and personal estate and effects from the said Robert Wright, on payment of 42,000*l.*, with interest at 5 per cent. and all expenses of warping and cultivation; it was witnessed that in case Gossip, his trustees, executors, administrators, or assigns should at any time or times thereafter, within six years from the date thereof, agree to repurchase and tender and pay to Robert Wright, his executors, administrators, or assigns the sum of 42,000*l.*, with interest at 5 per cent. per annum, and all expenses of warping, improving, cultivating, or building on the estates, or in exchanging parts of them, or in employing any persons, or in purchasing any plant, including the said Robert Wright's personal expenses in superintending, &c., and for loss of time; then that he the said Robert Wright, his executors, administrators, and assigns, would release, convey, and assign the said hereditaments and personal estate and effects unto the said Gossip, his heirs, executors, administrators, and assigns; in which case Gossip was to be entitled to the improvements and the plant, and to have credit for the amount realised by any sale, as well as any rents or other moneys up to that time received by Robert Wright. The agreement also contained the following proviso: "And provided further, and it is clearly and well understood and agreed, by and between the said parties hereto that for anything herein contained to the contrary, he the said Robert Wright, shall not be prejudiced, hindered, or molested in the enjoyment, cultivation, and improvement, and management of the said estates, and in having and receiving the produce, and rents and profits thereof, in the same manner as if this agreement or power to repurchase on the terms herein contained had not been made, the object of the parties being to give to the said John Hatfield Gossip the preference of repurchasing within the period aforesaid; but that the said Robert Wright, in the meantime, and at all times, shall peaceably have, hold, occupy, possess, and enjoy the same freehold and copyhold estates and hereditaments and premises and personal estate, as his own absolute estates under the said recited indentures, and according to the uses, ends, intents, and purposes therein contained, and the true intent, meaning, and effect thereof, as and for his own freehold estates of inheritance in fee simple in possession, and copyhold estate of inheritance, and the said personal estate as and for his own use absolutely."

Robert Wright took possession shortly after the execution of the deeds of 1844, the expenses of preparing which were paid by him. Out of the 3000 acres, not more than 310 were warped, and the six years expired on May 29, 1850. Wright, at Gossip's request, extended the period limited for repurchase to Jan. 1, 1853. No proposal to repurchase was within that period made by Gossip.

In 1858, Robert Wright conveyed the estate to his brother, Charles Wright.

In Aug. 1852 a suit was instituted by the infant children of the appellant, suing by one Wilmer as their next friend, against the respondent and the appellant for the purpose of establishing certain charges on the estate, to the benefit of which they were entitled. In this suit, Kindersley, V. C., in March 1855 held that Robert Wright had constructive notice of these charges, and they were accordingly established. In the course of the suit it was suggested and insisted on, as a matter of law, on behalf of Robert Wright, that the mortgage executed to him existed for the purpose of protecting him from these charges; but Robert Wright was treated by all the parties to the said suit and by the court as the absolute owner of the estate originally mortgaged to him.

The bill in the present case was filed on March 16, 1861, and the appellant in it charged that when he executed the indentures of May 28th and 29th 1844, he had no intention to assign to the respondent his equity of redemption in the premises therein comprised, nor did the respondent suppose that the appellant had any intention of so doing; and that it was well understood that they were only intended to be a further security for moneys advanced or to be advanced, and that the appellant had not sufficient professional assistance when he executed those deeds, and also that the mortgaged estates were of large and increasing value. The respondents by their answer denied the allegations of the appellant.

Much evidence was brought forward on both sides to show the intention of the parties, the history of the transaction, and the alleged want of professional assistance.

The cause came on for hearing upon replication before Kindersley, V. C. on April 22nd, 25th, 26th, 27th, 28th, 29th, and 30th, and on May 2nd 1863. His Honour gave judgment, dismissing the appellant's bill with costs (8 L. T. Rep. N. S. 627). This decree was the subject of the present appeal.

Jemmett, for the appellant, cited the following cases and authorities:

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Douglas v. *Culverwell*, 3 Giff. 251; 5 L. T. Rep. N. S. 484;
Newcomb v. *Bonham*, 1 Vern. 8;
Howard v. *Harris*, Id. 190;
Fulthorpe v. *Foster*, Id. 476;
Talbott v. *Braddill*, Id. 183;
Manlove v. *Ball*, 2 Vern. 84;
Lord Darnley v. *The London, Chatham, and Dover Railway*, 8 L. T. Rep. N. S. 94, 9 Jur. N. S. 452;
Croft v. *Graham*, 9 L. T. Rep. N. S. 112, 589; 2 De G. J. & S. 155;
Burrowes v. *Molloy*, 2 J. & La. T. 521;
Lawless v. *Mansfield*; 4 Ir. Eq. 126;
Baker v *Wine*, 1 Ves. sen. 160;
Fee v. *Cobine*, 11 Ir. Eq. 486;
Neale v. *Morris*, Beatty 599;
Alderson v. *White*, 2 De G. & J. 97.

Sir *Roundell Palmer*, Q. C., *Hanson*, Q. C., and *Dunning*, for the respondents, were not called on.

April 16.—The Lord CHANCELLOR.—I consider it is not necessary for your Lordships to hear the respondents in this case, regard being had to the character of the instruments against which it is proposed now to act, because it is impossible to say that, upon the construction of these instruments themselves, there can be any doubt as to the real intention of the parties. We are now asked, in effect, to give a totally different operation to these deeds from that which on the face of them they purport to express; and that, as it seems to me, without one trace throughout the whole of the proceedings of any case of surprise, or fraud, or mistake, which could induce us to come to the conclusion that the deeds are not *bonâ fide* expressing the object or intention which every one of the parties to them had in view. Now, the character of the transaction, very briefly stated, is this — that Gossip, the appellant, was the owner of an estate which he and others, the Messrs. Wright among them, thought might be greatly improved by the operation called "warping." The estate was of some value in itself, yielding a rental of about 1000*l.* a year with reference to the land already reclaimed, and it was considered that a very large sum might be obtained by reclaiming about 3000 acres then unreclaimed upon the property. The Messrs. Wright appear from time to time to have been disposed to assist in this operation, and to have advanced money to Mr. Gossip to enable him to effect an improvement of this estate; but, after a time, whether it was from their finding that the profits were not so great as the expenditure, or that the expenditure was greater than had been anticipated—whatever the reason might be—the Messrs. Wright appear to have felt that they had advanced (for that appears to me the true construction of what passed between the parties) as much as prudent men could be justified in advancing, and as much as seemed to them to be about the full value of the estate, and, therefore, the arrangement which was come to was this. There is some little controversy whether they or Gossip first proposed the arrangement. The Vice-Chancellor appears to have been inclined to the opinion, as I confess I am myself, that, looking at the whole transaction, the probability is that Mr. Gossip was the first to propose it, and that Messrs. Wright then came into the arrangement; that in 1844 they should give at once the value of the estate—as things then stood—about 42,000*l.* Certain items were thrown into consideration which are not worth mentioning at the present moment. They said, "We agree to give that sum as the full value of the property, but we have already advanced that sum, or nearly that sum, to you, and further we will, if you suppose you can get any better value for the estate, give you six years to obtain that better value; but then you must remember this, that we too must have the option of acting as we may think best hereafter, according to circumstances, if any change should take place either in the character of the property or in our means of effecting the improvements. We must ourselves have the option of improving during all the six years. We cannot do so in our character of mortgagees, therefore we propose now to take the estate at once into our own hands, to make ourselves masters of the property, with full liberty to us to make all improvements that we may think fit to make, and at the same time with full liberty to abstain from making any improvements that we may think fit not to make. In other words, the estate shall be ours to deal with it as we please, but you shall have six years, during which you may take it out of our hands if you can find anyone who will give you more for it, but in that event you must deal with us upon this footing, that an account must be taken, as if we had continued to be persons advancing money for the improvement of the estate, to be repaid our advances, and you must repay us the money so advanced." To carry this arrangement into effect, three deeds were drawn up, which seem to me to make the whole matter as clear as possible. Two of them only need be considered. One assigns the machinery and implements that were employed in the operation. The first of the two deeds which we have particularly to consider is a sale out and out of the property for the sum of 42,000*l.* Mr. Jemmett admits, as he could not help doing, that that was in effect upon the face of it a complete sale, and, if the case had stood there, nothing could have been advanced against what had been done other than the second branch of the argument, which was brought in at the close of Mr. Jemmett's speech, viz., any question that might arise as to whether this gentleman, being in distress, had been imposed upon in the transaction. Then the next instrument, upon which a good deal of reliance has been placed by Mr. Jemmett, is this—it is an instrument perfectly consistent with the other instrument, agreeing with it in all its provisions, but saying, "You have sold the estate, and conveyed it to us by the former deed, but during six years you shall be at liberty to have what in the recitals is called, the pre-emption, and which, in the operative part of the deed, is expounded in full, clear, and definite terms, which admit of no mistake or confusion whatever, to be this:—You shall have the right of re-purchasing (as it is there termed) the whole property, by paying to us all that we shall have advanced in the meantime, and advanced in this sense, advanced on our own account if we retain the estate at the end of the six years, and advanced on your account and for your benefit if it turns out that you, by re-purchasing, become the owner of it, and have the benefit of the improvements made by us. In that case all that we advance for the improvement of the estate is to be repaid. It says nothing about pre-emption in its more strict and definite sense, viz., the right of having the first offer when a person is about to make a sale. It does not deal with that at all, but it gives this gentleman the right at any time, whether the Messrs. Wright were going to sell or not, of coming with the money and saying, "Here is the 42,000*l.*, and all the money that you have laid out; now let us have the estate." That that is the clear and definite meaning of the deeds seems to me to be beyond all doubt. I cannot at present see that it would make any difference if it were called a right of pre-emption, taken in the strict and narrow form of the right, viz., to step in when a person is about to sell. I think that would be an irrational interpretation of an instrument of this nature,

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but, even if it had that meaning, the simple answer would be that when the end of the six years has arrived that right is over. Thus, therefore, the two deeds stand together, and, unless it can be shown that undue advantage was taken of this gentleman, who is alleged to have been in want of money, there is nothing more to be said upon the instruments standing by themselves; and the clear intent and meaning of the parties must be taken to be an out-and-out purchase, but that the seller has the opportunity of repurchasing within the period of six years. Such a transaction might of course be reopened by an extension of time by agreement, or there might be collateral circumstances shown by which the purchaser might be held to have made a concession, either express or implied; but there is nothing of that kind here beyond a certain date, which is of some importance, because it seems to explain what would otherwise seems to be ambiguous, namely, the talk which occurred from time to time about advances after the expiration of the six years, which would not be in itself quite consistent with what I have held to be the meaning of the parties to the deed, unless there had been an extension of time, because at the end of the six years all questions about advances would be put an end to. But there is a witness, whose evidence does not seem to be in any way impugned, Mr. Liddle, who says distinctly that the time was extended liberally by Messrs. Wright from some time in the year 1850, when it expired, to Jan. 1853, and from that time no further time was granted, and, as far as the Messrs. Wright were concerned, they were at liberty to stand upon their rights. All that you read about advances between 1850 and 1853 tends to show that everybody recognised it as a matter of mortgage and not a matter of sale; but after 1853 we find nothing of the kind, although I do find undoubtedly letters written which have something of that aspect. There is a talk of "your mortgage," and the Messrs. Wright say that they do admit that there is a little fencing between the parties on the subject. But after Jan. 1853, there is no substantial question between them. Then, if anything can make this more clear, it is the introduction of that able solicitor, Mr. Baxter, who upon the second branch of the case was quite competent to protect the interests of his client from advantage being taken of him in his circumstances of distress, as to the question of construction which was put by everybody upon these instruments. What can be clearer than the correspondence to which Kindersley V.C. alludes in his judgment, viz., the correspondence shortly before the expiration of the time allowed for re-purchase, showing that the Messrs. Wright were disposed to exercise a certain degree of indulgence, and were then calling upon Mr. Baxter himself, saying, "Why don't you get your client to re-purchase the estate, we have no particular desire to retain it? Do find a purchaser for the estate, or buy it yourself. If you purchase it yourself, Messrs. Wright will give you time, if they have anybody that they can deal with, and who they think is *bonâ fide*, furnished with funds, for completing the purchase. But do see if you cannot put your client into a more suitable frame of mind upon the subject." Then comes that remarkable letter of Mr. Baxter's in answer, in which he says, "I should like to see the deed which you call the deed of pre-emption, and which you recollect that we specially settled together." Now that letter, in substance most remarkably agrees with his evidence. It is open to the observation that the evidence is of a much later date than the letter, and, therefore, without the slightest imputation of any intention do otherwise than give a most accurate representation of the transaction, we must credit Mr. Baxter with having a better memory of the transaction at the time of writing the letter than at the later period of his giving the evidence, but they most remarkably fit into each other. Mr. Baxter tells you that his client, the present appellant, told him that the Messrs. Broomhead, the solicitors for the respondents, were pressing him for the execution of these deeds, and that he took Mr. Baxter with him to their office because it was there that the deeds were to be executed. Mr. Baxter says that he perused the deeds, and, having so done, he allowed his client to execute them. As Mr. Baxter allowed his client to execute the deeds, he must be taken to have had a perfect knowledge of what the contents of the deeds were, and he would know whether they agreed with the instructions which he had received from his client upon the subject, and which he is not called upon to disclose; so that we find that in 1850 (six years after these transactions occurred) his memory is perfectly and accurately impressed with the character of the deeds, and at that time he so accurately recollects their effect that he describes the deed of purchase and reminds Mr. Broomhead that he specially settled it with him. That special settlement, I should assume, from Mr. Baxter's character, would have been a necessary consequence of his being told that his client felt himself to be under some degree of pressure with reference to the deeds to be executed, and if the Messrs. Broomhead were pressing him to execute them, he would take care that his client was justly treated, and that the deeds represented just what had taken place between the parties, and I have no doubt that he did so. Then, that being so, there only remains the question last suggested by Mr. Jemmett, that we might give leave to amend, in order to enable the appellant to make out a case of undervalue and of undue pressure, in a sense in which the Court of Chancery would say that the proceeding was fraudulent, by reason of undue advantage being taken of a person in distress. Now, in the first place, as regards the value of the property we have really nothing to show that the property was in any way taken at an undervalue. There were a variety of schemes suggested. Mr. Jemmett commenced by opening a prospectus to satisfy us that the property was of greater value. But, although that prospectus was issued by certain speculators, no company was ever formed. No persons were found weak enough to act upon the prospectus, and nothing has been shown in the way of evincing the opinion of any person in the world that the value of the property was more than was given; but, beyond that, this case is remarkable as being one of re-purchase, and certainly in a case where six years are allowed for the repurchase, it would be a very difficult thing for any person to overthrow an arrangement of that kind, on the ground of pressure, or on the ground of a want of opportunity for thought and consideration; for the party has six years to think about it, and to go about and consult whomsoever he pleases, and to see if there is anyone who will give him more. The appellant had a most reputable and able solicitor to advise him during the whole of those six years, a gentleman than whom it would be hardly possible to select a better to advise him, and to find him a person to advance money upon any undertaking that was likely to be successful. Then how can we say that there is the slightest evidence of undervalue? How can we say that there is the slightest evidence of any pressure being put upon him, when, on the contrary, we find that indulgence was granted to him for a year and a half beyond the six years? How can we say that any injustice has been done him by Messrs. Wright? The litigation is an unfortunate one. It is a case in which a person having sold his property is vexed at having

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been obliged to part with it, and makes vain attempts to recover it at the expense of those from whom, at the time of the sale, he received its full value. Upon the whole, it seems to me that what I ought to suggest to your Lordships is that you should dismiss this appeal. Being a pauper case, of course costs cannot be given. Therefore the appeal will be dismissed in the usual form, but without costs.

Lord CHELMSFORD.—I entirely agree with my noble and learned friend upon the woolsack. The case, indeed, is abundantly clear. There is no ground for supposing, under the circumstances that appear before us, that there was any over-reaching on the part of the Messrs. Wright, or any unfair advantage taken of the appellant. The deeds, therefore, which were executed must be taken to express the real intention and agreement of the parties. Now, the deed is clearly a deed of sale, with a power of repurchase within six years, given to the appellant upon certain conditions. The argument of the appellant amounts, as I understand it, to this—that the appellant having failed to execute that power which is given to him by the deeds, the relation of mortgagor and mortgagee reverts, and the power of redemption revives. Now, I confess that it appears to me only necessary to state this view of the appellant's case to show that it is utterly without foundation. Under these circumstances, I agree with my noble and learned friend that this appeal should be dismissed, and I agree with him also in the opinion that this is not a case in which we ought to grant any leave to amend.

Lord COLONSAY.—I have nothing to add to what has been stated. It appears to me that looking at these deeds, which are clearly a deed of sale with an agreement to re-acquire by purchase, and looking at the history of the previous proceedings, there was nothing unreasonable or unfair in such a transaction, taking it as it appears upon the evidence before us. Then the question comes to be, whether there is any reason why these deeds should not receive their full effect according to the clear construction to be put upon them. I have heard no reason. It is suggested that it really was a transaction of a hidden character; that it was a mortgage that was really intended between the parties, although they put it in another form. That is a suggestion which has no support from any facts appearing before us. Therefore I can have no doubt of the judgment we ought to pronounce—that we should dismiss the appeal.

Lord CAIRNS.—I cannot help feeling that this is a case that presses with peculiar hardship on the respondents in the appeal, because they have to meet litigation carried on at your Lordship's bar without the ordinary means by which, in the case of one not suing as a pauper, they would to some extent be reimbursed the expenses incurred. Upon the merits, it appears to me that the appeal altogether fails. The transaction which is impeached is, on the face of the deeds, clear and distinct. No words of any conveyance could more clearly have described the transaction. It is a transaction in which a mortgagor parts with his whole right and equity of redemption in consideration of the sum due from him at the time to the mortgagee. And in this particular case the deed further stipulates that if he shall be minded within a limited time to become the purchaser back of that which he has sold, he may do so on certain terms. Now, if that was the real transaction, and not a mask of some transaction of a different kind, I am not aware of any rule of law, or of any principle upon which courts of equity have hitherto acted, that would stamp that transaction with any kind of illegality or unfairness. It appears to me to be a transaction into which a mortgagor and mortgagee may well enter, supposing there is no fraud or unfairness in the matter. This being the transaction on the face of the deeds, is there any colour for the suggestion that it was not the real transaction between the parties? I attended with anxiety to the evidence given in the case of that which happened at the time, and that which is said to have happened afterwards, between the parties, what we may term the register between the mortgagor and mortgagee, and in the whole of that evidence I have been unable to place my finger on any one fact or statement, on either side, during the number of years that elapsed after the execution of these deeds, which would raise in my mind even a suspicion that the deeds did not truly and accurately describe the transaction between the parties. On the contrary, I find expressions used, upon the one side and upon the other—or, I perhaps should say, expressions used on the part of the Messrs. Wright and those acting with him, and not in any way controverted on the other side—which assigned to Messrs. Wright the same position which the deeds upon the face of them assigned to them. I cannot avoid adverting to one matter which happened subsequently to the execution of the deeds, and which left on my mind a very disagreeable impression. I recollect another suit in the same names—a suit of *Gossip* v. *Wright*, instituted in the Court of Chancery by the children of the appellant—as to which all that the appellant can say is that he did not take an active part in it, but he carefully abstains from saying that it was not a suit promoted by him and carried on with his concurrence and support. In that suit the children of this appellant alleged as the foundation of their claim against the Messrs. Wright, that they had become the purchasers, out and out, of the equity of redemption of this property, and on that assertion they were able to substantiate a claim, according to the well-known and established principles of the court, against the Messrs. Wright, by which they obtained from them payment of a charge on the estate. Without that assertion, the Messrs. Wright would have been under no liability whatever to have paid anything to those children. After that suit, conducted in the presence of the appellant (because he was a defendant in the suit) conducted by his own children, for him to turn round now, at this distance of time, and insist that all that was maintained in that suit was a fiction, and that, although his children recovered money upon the faith of their assertion that Messrs. Wright had purchased the equity of redemption, no such purchase ever took place. I say for an appellant so to act appears to me to be an act which cannot be passed over in your Lordships' House without some observation and reprehension. As regards the application which was finally made to us, to allow an amendment of the appeal, I am glad to find that your Lordships are not in any way disposed to entertain that application. It appears to me that such an amendment, if made, would entirely fail. That Mr. Gossip, the appellant, had professional advice of the most eminent kind at the time of the execution of these deeds, is perfectly clear. Then with regard to what is said as to the sale having been at an undervalue, I cannot find any evidence whatever upon that point. I find that, after a number of years had elapsed, a speculative company was set on foot, and certain statements were made as to the value of the property. But it is to be observed that at the time when this transaction took place, viz, in 1844, when the deed in question was executed, the property, with the exception of a very small portion of it, was poor land utterly unproductive; it was entirely a matter of speculation what the effect of

warping might be and to what extent it would make it productive; but there is no evidence whatever upon which I can lay my finger at this moment that would lead me to say that the sum of money in consideration of which the equity of redemption was conveyed was in any way insufficient. Therefore, I see no evidence on which the appeal could be sustained, even if amendments were allowed. I entirely concur with my noble and learned friends that the appeal must be dismissed.

Jemmett.—My Lords, will you permit me to make an observation? I did not sign this appeal, and therefore I had not occasion to consider whether *in formâ pauperis* the appellant might appeal to this House or not. But I appeared in support of this appeal at your Lordship's bar because I felt it my duty to do so, as having been counsel in the case in the court below.

Decree affirmed.

Solicitor for the appellant, *Mason.*

Solicitors for the respondent, *Broomhead* and *Wightman.*

In Parliament.

Reported by Frederick Clifford, and Pembroke S. Stephens Esqrs., Barristers-at-Law.

COURT OF REFEREES ON PRIVATE BILLS.

Monday, March 22.

(Before Mr. Dodson, M.P., Chairman; Mr. Rickards, and Mr. Bonham Carter, Referees.)

Midland and London and North-Western Railway Companies' Bill.

Objections to the *locus standi* of: (1.) The Lancashire and Yorkshire Railway Company; (2.) The North British Railway Company.

Abandonment of railway—Competition—Through routes—Traffic arrangements—The English and Scotch traffic agreement.

A Bill was promoted by two railway companies to enable them to enter into agreements that would place it in the power of one of the companies to dispense with the construction of an independent and competing line authorised in 1866, which it was proposed by the Bill to abandon. Petitions against the Bill were deposited by two other railway companies, one to the north and the other to the south of the authorised line, but not actually in contact with it, complaining of the proposed abandonment, on the ground that their traffic would or might be impeded by the loss of this new and independent route between England and Scotland, and that the Bill placed in the hands of the promoters powers of unduly favouring and influencing the course of traffic:

Held, that the petitioners respectively had a locus standi.

The Bill, among other objects, proposed to sanction the abandonment of the Settle and Carlisle Railway, a line seventy-seven miles in length, and authorised in 1866, after a severe contest. By means of this line a new and independent route from the Midland districts to Carlisle, the starting point of most of the great railway systems of Scotland, was to have been afforded. In lieu of this direct communication, the Bill now proposed to sanction arrangements between the Midland and London and North-Western Companies, under which traffic coming from the Midland Railway and going northwards would find its way on to the North-Western system at Lowgill, a point considerably south of Carlisle, by means of the Ingleton and Lowgill branch, which forms a connecting link between the Midland and North-Western Railway systems. The Lancashire and Yorkshire Railway Company, whose territory does not actually touch, but lies somewhat to the south and east of the line proposed to be abandoned, and the North British Company, whose system would join the Settle and Carlisle Railway, when completed, at Carlisle, petitioned, each in their own behalf, against the powers of abandonment and arrangement sought by the Bill.

The *locus standi* of the Lancashire and Yorkshire Railway Company was objected to, on the following grounds:

1. The Bill does not contain any provision for taking, using, or interfering with any lands, railways, stations, works, or accommodations of the petitioners, or for running engines or carriages upon or across the same, or for granting any facilities over or in respect thereof.

2. The petition does not allege, nor does the Bill disclose, any such competition or interference with competition, as according to the practice of Parliament entitles the petitioners to be heard against the Bill.

3. The allegations of the petition with respect to competition, or interference with competition, are inapplicable, and are not such as to entitle the petitioners to be heard against the Bill.

4. The Bill does not contain any provision whereby the agreement referred to in paragraph 6 of the petition (as to conveyance of traffic on the Lancaster and Carlisle Railway) is altered or affected.

5. The proposed abandonment of the Settle and Carlisle Railway does not so affect any property, right, or interest of the petitioners as to entitle them to be heard against the Bill.

6. The petitioners have not any property in the Lancaster and Carlisle Railway, nor have they any such right or interest therein, or in respect thereof, as entitles them to be heard against the Bill.

7. The petition does not contain any allegation upon which, according to the practice of Parliament, the petitioners are entitled to heard against the Bill.

The objections taken to the *locus standi* of the North British Railway Company were precisely similar in their nature, but contained an additional allegation to the effect that there were not in the Bill any provisions by which the existing arrangements as to traffic between that company and the Midland Company would be altered or affected.

Denison, Q. C. for both the petitioning companies.—The Lancashire and Yorkshire Railway Company are directly affected by the provisions of this Bill. They now have access to Carlisle by the Lancaster and Carlisle Railway, with respect to which an agreement exists between themselves and the London and North-Western Company; and they also join the Midland Railway at Colne, and have running powers over that line as far as Skipton. The London and North-Western Company, and the Lancashire and Yorkshire Company, are competitors for traffic over the whole of Lancashire, and pretty nearly the whole of Yorkshire. When the agreement between them as to the Lancaster and Carlisle Railway comes to an end in 1876, the whole of their relations will be changed, and the Lancashire and Yorkshire may be left to their own resources for getting beyond Preston, and may be driven into the hands of the Midland Company. It is, therefore, important that the Midland Company should be left free to deal with us, without any connection with the London and North-Western. Supposing the Ingleton and Lowgill branch of the Lancaster and Carlisle Railway to form properly part of the London and North-Western system—a matter which is disputed—the petitioners, under the existing or some future agreement with the North-Western, may get their traffic carried over that branch; but

if it should turn out otherwise, then the Lancashire and Yorkshire Railway may find some years hence that they have a totally independent company to deal with. The Midland Company propose by this Bill to agree with the London and North-Western for joint use, though not joint ownership, of the Lancaster and Carlisle Railway from Lancaster to Lowgill, and also of the Lowgill to Ingleton branch. This would give them a line between Settle and Carlisle nearly as short as the one they propose to abandon. The Lancashire and Yorkshire, as long as its agreements subsist with the London and North-Western, can have its traffic carried by the Lancaster and Carlisle Railway up to Carlisle, as if it were London and North-Western traffic. But in the case of traffic originating as far east, for instance, as Manchester, it would be more advantageous for the Lancashire and Yorkshire, if the direct Settle and Carlisle line were constructed, to hand over that traffic to the Midland Railway at Skipton for conveyance to Carlisle, or to agree with them for running powers. But now, if the Midland Company acquire by agreement the power of using the Lancaster and Carlisle line, they will not be able to depute that power to any other company, and their own direct line to Carlisle will meanwhile be given up. Next, let us see the position, under the Bill, of the North British Railway. These petitioners will be as seriously affected, north of Carlisle, by the abandonment, as the Lancashire and Yorkshire are south of that point; being engaged in active competition with the Caledonian Railway Company. The Waverley line, that *viâ* Hawick to Edinburgh, was granted to the North British Company as a new and independent line; and in continuation of it they are greatly interested in having an independent route from Carlisle to the south, free from the control of the London and North Western. Accordingly, when the Settle and Carlisle line was projected, the North British Company gave to the passing of the Act every assistance in their power. By a decision of the Court of Chancery, the Waverley route has been held to be free, and *a fortiori* the Settle and Carlisle line would be free, from the provisions of what is known as the "English and Scotch traffic agreement." It follows that the North British and the Midland Companies would have the strongest interest in carrying all the traffic in their power by the Settle and Carlisle line, when made, for they could keep in their own pockets every pound they received on that line, instead of being subject, as under the English and Scotch agreement, they would be to a per centage distributable among the other companies to that agreement. The Lancashire and Yorkshire, like the North British, were no parties to that agreement; and their interest accordingly lies in finding a route to Scotland free from its provisions. Such a route has been authorised by Parliament in the case of this Settle and Carlisle Railway; and a Bill for the abandonment of a portion of that route, is the one against which they now seek a *locus standi*. There is nothing in the Standing Orders which limits in the smallest degree the discretion of the court in admitting parties to be heard against an abandonment Bill. Even if the case were doubtful, it is one of such magnitude, of almost national importance, that the court will be slow to exercise their discretion in the direction of shutting out the petitioners. (Counsel further read and relied upon paragraphs in the petition of the Lancashire and Yorkshire Company, which stated that the Bill did not contain any of the provisions usual for giving publicity to agreements between the companies, and did not incorporate the provisions of the Railways Clauses Act 1863, which gave to the Board of Trade control, and provided for the periodical revision of such agreements; that the agreement contained in the schedule of the Bill was in all respects equivalent to a transfer to the Midland Railway Company of a joint ownership during fifty years of the portion of the Lancaster and Carlisle Railway between Ingleton and Carlisle, whilst the 23rd clause would enable the two largest railway companies in the kingdom to make from time to time, at their discretion, secretly, and without any control, agreements for a portion of all their revenue, and as far as their profits were concerned, to effect a virtual amalgamation; that the Midland Company thus becoming joint owners of a main ingredient in the Western route to Scotland, might by acting in concert with the London and North-Western Company, place such impediments in the way of Lancashire and Yorkshire traffic, and extend such facilities and advantages to the traffic arising on their own systems as would ultimately secure to themselves a monopoly; that the power to construct the Settle and Carlisle railway was deliberately sought by the Midland Company, the absolute need of that line for the purposes of their own traffic established, and the benefits to the public demonstrated; that there was no ground for pretending that the Midland Company were prevented by pecuniary difficulties from fulfilling the duty thus voluntarily undertaken, inasmuch as the company, according to the Bill itself, had issued in shares the necessary capital; that it was of evil precedent for a company to obtain powers from Parliament for the execution of a great public work, and to use those powers, not for accomplishing the purpose intended by Parliament, but as a means of making a better bargain with a rival company; and finally, the petition asserted that the real nature of the interest possessed by the North-Western Company in the Lowgill and Ingleton branch of the Lancaster and Carlisle Railway, forming the proposed avenue of approach to Carlise by the Midland Railway, was misrepresented by the Bill.

The paragraphs of the North British Company's petition specially relied upon by counsel were to the effect that the Waverley route—by which the distance from Edinburgh to Carlisle was ninety-eight miles—had been recognised by Parliament as a competing route with the Caledonian Railway—by which the distance from Edinburgh to Carlisle was 101 miles—and the petitioners placed under restrictions in the use of its competitive powers against the Caledonian Company; that the Midland Company having developed a new line of communication between London and the North, *viâ* Bedford, Leeds, and Ingleton, mutual arrangements were entered into between them and the petitioners for facilitating the transmission of traffic upon their systems through Carlisle; that the London and North-Western Company not only obstructed the transmission of traffic between the petitioners' railways and their own system, but, being lessees of the Lancaster and Carlisle Railway (over which between Ingleton and Carlisle all Midland traffic between England and Scotland must pass), they also by every means in their power impeded the flow of traffic between the Waverley and Midland routes, refusing to allow the passenger carriages of the petitioners to pass between Carlisle and Ingleton, though they allowed free transit between the same points to the carriages of the Caledonian Company; that the North-Western dislocated the goods, as well as the passenger traffic of the petitioners in manner set forth in the petition; that in order to obviate difficulties experienced in the conveyance of traffic to and from Scotland, and also to accommodate important local interests in the North of England, the Midland Company in 1865 projected the Settle and Carlisle line, which the petitioners strongly supported; that in connection with that Bill, and in the same session, an agreement

with the Midland Railway Company was entered into and confirmed, establishing a joint goods station at Carlisle, and measures had since been taken to acquire land for that purpose; that the abandonment of the Settle and Carlisle line, now proposed, would not only deprive the petitioners of an independent means of communication with the important districts which that railway was intended to traverse, but would render it more difficult for them to obtain free transit for their goods, &c., to Liverpool, Manchester, and other places in England, over the Lancaster and Carlisle Railway; that, including the Waverley route, there were three existing lines of railway communication from Scotland to Carlisle, and were the Settle and Carlisle line abandoned the Lancaster and Carlisle would constitute the sole approach for the traffic of those three railways to and from points south of Carlisle; that the proposal to hand over the exclusive control of the Lancaster and Carlisle Railway to the London and North-Western and Midland Companies, was one accordingly pregnant with danger; lastly, that the object of the powers of arrangement contained in the Bill was to give to the Midland Company a use satisfactory to themselves of the Lancaster and Carlisle line, but to prevent their extending those advantages in the slightest degree to any other company.

Venables, Q.C. for the promoters.—The Lancashire and Yorkshire Company will not be affected by this Bill in any way entitling them to a hearing. They neither touch nor come near the Settle or Carlisle Railway, which it is proposed to abandon. On one side they come in their own right to Preston, and there join the Lancaster and Carlisle Railway; on the other they join the Midland system at Colne, from which point to Skipton they have running powers, but those powers extend no further in a north-westerly direction. That being the case they clearly have no claim to a *locus standi* on the ground of the abandonment. If the Lancashire and Yorkshire want to send any traffic to Carlisle from Colne now, they must hand it over at Skipton to the Midland Company; and they will equally have to do that whether this Bill passes or not. As to any contemplated agreements between the Midland and North-Western Companies, what can it signify to the Lancashire and Yorkshire whether the line from Ingleton to Carlisle be worked by the Midland or by the North-Western? With respect to the agreement between the London and North-Western and the Lancashire and Yorkshire for the use of the Lancaster and Carlisle Railway, the Bill in no way interferes with that. Then as to the allegation that the London and North-Western and the Midland companies may place impediments in the way of the petitioners' traffic so as to secure for themselves a monopoly, that might still have been done had the Settle and Carlisle line been made. But the question for this court to consider is this: No fresh power of obstruction is created by the Bill, for the Midland Company will only do under it what they might have done had their own line been constructed. We contend that the Lancashire and Yorkshire Railway is too far from the Settle and Carlisle line to give them a claim to be heard; and this view is supported by the fact that last year when the proposed amalgamation of the Midland Company with the Glasgow and South-Western Company was under consideration, the Lancashire and Yorkshire petitioned and their *locus standi* was refused, the argument being that they were too remote. The Bill does not assume that the Midland Company will have larger rights than the London and North-Western in the Lancaster and Carlisle Railway, nor does it confirm any lease or agreement respecting that line. Supposing the London and North-Western to have no rights whatever in that line, or in the Ingleton and Lowgill branch, as the petitioners rather suggest, then the Midland will get half of nothing, which cannot injure anybody. The Bill, no doubt, is founded on the assumption that the Lancashire and North-Western have rights over that line; but it cannot matter to the Lancashire and Yorkshire Company that the Midland are granted a share of whatever rights the London and North-Western Company may possess. Then as to the petition of the North-British Railway. The English and Scotch agreement has been imported into the argument; but it is plainly beside the question, for that agreement expires this year.

Denison.—It was to endure for fourteen years from the 1st Jan. 1856, and thenceforward till determined by six months' notice.

Venables.—Then if this Bill should operate prejudicially, there will be an additional reason for giving notice to terminate the agreement. The North British, as the proprietors of the Waverley route, wanting free intercourse with the Midland system, supported the Settle and Carlisle Railway. But the Midland Company now offer them what is equivalent to a line in their own hands, *i.e.*, a line in which they will have equal user and control with the London and North-Western Company.

Denison.—But the Midland Company cannot act as owners of the line, and let in other companies?

Venables.—Not singly; but by arrangement with the North-Western it might be done. At any rate, as to the carriage of traffic, whether the traffic be that of the North British or of any other company, they will have the same powers as the London and North-Western Company. They will certainly not be able to give the North British running powers over the Lancaster and Carlisle line; but they have not got them at present, neither have they running powers over the Settle and Carlisle line. Consequently the petitioners will lose nothing by the abandonment. Their traffic will be conveyed as freely over the Lancaster and Carlisle line as it would have been over the Settle and Carlisle. As to the joint goods station at Carlisle, the Bill does not interfere with the argreement on that head. With respect to the allegations about loss of communication with Manchester and other English towns, the petitioners will have a route practically as short as by the abandoned line. By whichever of the existing routes Scotch traffic gets to Carlisle, from that point onwards, it must pass into the hands of two English companies, the London and North-Western, and the Midland. Whether the Settle and Carlisle line be made or not, there will still be the same two companies for the Scotch lines to deal with. And for such portion of their traffic as is intended for the Midland line, whether that traffic be carried on to the Midland system at Settle by a direct line to that point from Carlisle, or by the existing railway passing through Lowgill and Ingleton, can matter very little to third parties.

After consultation, the Referees allowed the *locus standi* in the cases both of the Lancashire and Yorkshire, and of the North British Railway Company.

Locus standi allowed.

Agents for the Lancashire and Yorkshire Company, *Dyson* and *Co.*

Agents for the North British Company, *Lock* and *Maclaurin.*

Agents for the Bill, *Sherwood* and *Co.*

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(Objections to the *locus standi* of the Caledonian Railway Company.)

Abandonment Bill—Competing line—Traffic arrangements—Access to station.

A Bill promoted by two railway companies to sanction traffic arrangements having for their object to render unnecessary a competing line, authorised in 1866 at the instance of one of those companies, and now proposed to be abandoned under the Bill, was opposed by a third company, on the ground of apprehended monopoly and diversion of traffic, but chiefly on the ground that access to the station at C., of which station the petitioning company was joint owner, was proposed to be retained under the Bill, though the competing line, in respect of which that access had been obtained in 1866, was about to be abandoned:

Held, that the petitioners had no locus standi.

The Bill was one (*vide sup.*) "for confirming an agreement between the Midland and London and North-Western Railway Companies, with respect to the use of the Lancashire and Carlisle Railway; for the abandonment of the Settle and Carlisle Railway; and for other purposes."

The *locus standi* of the petitioners was objected to on the following grounds:

1. The Bill does not contain any provisions for taking, using, or interfering with any lands, railway stations, or accommodations of the petitioners, or for running engines or carriages upon or across the same, or for granting any facilities over or in respect thereof.

2. The petition does not allege, nor does the Bill disclose, any such competition, or interference with competition as, according to the practice of Parliament, entitles the petitioners to be heard thereon against the Bill.

3. With respect to the statements contained in paragraphs 16 and 17 of the petition (representing that the running powers and facilities at present enjoyed by the petitioners would be diminished) the Bill does not contain any provision whereby the running powers therein referred to are in any way altered, prejudiced, or affected.

4. The Bill does not contain any provision whereby the agreement (*i, e.*, the English and Scotch traffic agreement) referred to in paragraph 18 of the petition is in any way altered, prejudiced, or affected.

5. The proposed abandonment of the Settle and Carlisle Railway does not prejudice or affect the petitioners in such a way or to such an extent as, according to the practice of Parliament, entitles them to be heard against the Bill.

6. The petition does not contain any allegations upon which, according to the practice of Parliament, the petitioners are entitled to be heard against the Bill.

Clerk, Q. C., for the petitioners.—The Caledonian Company might object to this Bill on the ground merely of its being an abandonment Bill; but they do more. They rest their claim to a *locus standi* principally upon the fact that the Bill gives power to the Midland Company to make arrangements with the London and North-Western Company, which will be very prejudicial to the petitioners' interests. The Caledonian Company are joint owners with the London and North-Western Company of the Citadel Station at Carlisle, and are accordingly entitled (Standing Order 129) to be heard against the Bill, the 28th clause of which enacts that certain parts of the Settle and Carlisle Act of 1866, shall remain in force as regards the use of the Citadel Station, notwithstanding the repeal of other parts of that Act. In 1866 when the Midland Company came with their independent Settle and Carlisle line affording a new channel of traffic for Scotch traffic to the south, certain powers of using the Citadel Station were conferred upon them in consideration of specified payments. They now seek to abandon the Settle and Carlisle line, but at the same time to take advantage of all those arrangements which were sanctioned in 1866 under an entirely different state of circumstances. The Midland Company now occupy a widely different position from what they did in 1866. They then came with a competing line to the London and North-Western Railway Company, whereas now, they put forward a proposal which is virtually for amalgamation with them. It will be a great injustice, if one joint owner of a joint station be allowed to hand over its interest, without the other joint owner being heard. Under the Bill, and the heads of agreement contained in the schedule, the London and North-Western and the Midland Companies with regard to traffic coming from any part of their extensive systems to Carlisle to be exchanged with Scotland, may make such arrangements as they think fit, provided only that they are not inconsistent with the heads of agreement. The result of such an enactment, if passed, would be, that the companies might make arrangements in favour of one only of the three Scotch companies, diverging at Carlisle, and might direct the traffic along the line of whichever of those companies they chose, or they might impose onerous conditions on any or all of those companies in giving them a through rate. Under the Scotch Amalgamation Bills, companies, standing in the position in which the Caledonian Company stands towards the present promoters, were heard, and obtained facilities and running powers and protective powers over the whole of the amalgamated systems. This may not be an amalgamation Bill, as far as the shareholders of the North-Western and Midland are concerned; but practically it is an amalgamation Bill in its effects upon other companies. We contend that the whole object of the Bill is to diminish competition; in the first place, by the abandonment of the line from Settle to Carlisle, and, in the next place, by the very wide power of making agreements taken in the 23rd clause. By the Act of 1865, under which running powers were given to the Midland Company and to the London and North-Western Company over the Scotch lines, the Caledonian Company obtained power to run from Carlisle to Ingleton, there to join the Midland Railway, which at that time was a line competing with the London and North-Western. The power so given to the Caledonian Company was a valuable protection, but if the Bill passes in its present shape, that power will virtually become useless. The Caledonian Railway Company, therefore, claim the right of going before a committee to ask, in the interests of the public, that they shall have further powers given them over the system of the Midland Railway, in view of the entire alteration of circumstances which will take place, when the Midland Railway is brought to Carlisle along the rails of the London and North-Western.

Venables, Q. C. for the promoters.—There is no pretence for saying that the petitioners are injured. When the Settle and Carlisle Act was under discussion in 1866, it was admitted, on all hands, that the Midland Company must get to Scotland through Carlisle, and the only question was, whether they should go from Settle to Carlisle by a direct line, or should follow the course of the Lancaster and Carlisle Railway. To the Caledonian Company, and to every other Scotch company, it is imma-

passes along the Settle and Carlisle line, as proposed in 1866, or along the Lancaster and Carlisle line, as now proposed. Their only interest is that it should reach Carlisle. When the Settle and Carlisle Bill was before Parliament, the Caledonian Company petitioned and obtained a *locus standi*, because the Midland proposed to take powers over the Citadel Station; and the Caledonian contended that the Midland should do exactly what they are going to do by this Bill. Now, however, the promoters take no new powers over the Citadel Station; they simply leave matters with respect to that station as they were left in 1866; the clause in the Act now in force is continued, and will be used for the same purposes which were then contemplated, *i.e.*, to take the Midland traffic into the station. The Caledonian Company are no more affected by the change in the mode of approaching Carlisle than they would be by a deviation of the authorised Settle and Carlisle line. The Midland Railway Company, in fact, will come into Carlisle by the same door as before.

The CHAIRMAN.—Yes; but they will come in arm in arm with the London and North-Western.

Venables.—We shall come in the same way that we already have the right to come, striking the Carlisle station at precisely the same point. No change is made in any existing agreement with the petitioners. As things stand at present, the Midland Company and the London and North-Western Company have a separate interest to exchange as much traffic as possible with the Caledonian Company. When the Bill passes, they will have a joint interest to do the same thing. Objections of a very similar character to those now raised, and apprehensions closely resembling those expressed by the petitioners, have been urged on a former occasion, and held not to constitute ground sufficient for granting a *locus standi*:

North British and Edinburgh and Glasgow Railway Companies Bill 1865;
Petition of the Great Northern Railway Company, 12 L. T. Rep. N. S. 401.

The Caledonian doubtless wish to take this opportunity of trying to get running powers somewhere. But the question for the court is, have the petitioners any substantial interest under the Bill, and what is the injury that will be done to them?

The COURT, after consultation, decided that the Caledonian Company had not a *locus standi*.

Locus standi disallowed.

Agents for the petitioners, *Grahame* and *Wardlaw*.

Agents for the Bill, *Sherwood* and *Co.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Wednesday, June 23.

(Before the LORDS JUSTICES.)

ALLEN *v.* JARVIS; JARVIS *v.* ALLEN.

Accounts—Solicitor—Bills of costs—Direction to taxing master to assist the judge—Cons. Order XL., rule 25—Order in chambers—No adjournment into court—Appeal from—Application for leave to appeal.

J. was solicitor of A., the testator in these causes, for many years before his death, and was appointed one of his executors. He delivered his bills to the testator's widow, an executrix, and the amount was paid by a cheque drawn by J. himself upon the bankers of the executors, who were three in number. This was in June 1843, soon after which J. died; and in 1865, a suit to execute the trusts of the will was instituted, and accounts of moneys received by the executors were directed. J.'s executor carried in the bills as items of discharge of his testator's estate, and the M. R., in chambers, without being attended by counsel, directed the taxing master "to tax and settle the bills" in respect of items which the persons beneficially interested in the estate questioned:

Held, on appeal against this order, that, as the Cons. Order above referred to provided that the judge may direct the taxing master to assist him in settling the costs, the order was erroneous, and it was varied by substituting a direction to the master to inquire and state whether any, and which, of the disputed items were fair and proper to be allowed, and to what amounts respectively.

Where under the above circumstances a judge has made an order, it is irregular for him to give leave to appeal against it, and application for such leave must be made to the Court of Appeal.

This was an appeal motion to discharge an order of the Master of the Rolls made in chambers, by which his Lordship had, under the 25th rule of the 40th Consolidated Order, directed the taxing master to tax and settle the bills of costs of Weston Jarvis deceased, who had acted as solicitor for the testator in the cause, in respect of certain items specifically complained of by the plaintiffs, in order to assist the chief clerk, in taking the accounts directed by the decree in the cause, to decide upon a proper allowance to Weston Jarvis's executors in respect of such bills.

The circumstances were as follows:

The testator in the two causes afterwards mentioned, Thomas Allen, by his will, dated the 14th Sept. 1841, after appointing his wife Fanny Allen, Fountaine Hogge, and the aforesaid Weston Jarvis, his executors, and making divers specific bequests, gave and bequeathed the residue of his personal estate to Weston Jarvis and Whincop Jarvis upon trust for his wife for her life, or so long as she should continue his widow, and after her death or second marriage upon trust for the said Fountaine Hogge for life, and after his death upon trust for the first son of the said Fountaine Hogge who should attain the age of twenty-one years, or die under that age leaving male issue; and if there should be no such son, then upon trust for Stephen Allen for life, with ulterior limitations in favour of the son of Stephen Allen and otherwise, which it is unnecessary now to state.

Upon the death of Thomas Allen, which took place on the 25th Oct. 1841, the will was proved by all the three executors. Mrs. Allen never married again, and died on the 16th Jan. 1857, having by her will appointed the said Weston Jarvis and Whincop Jarvis, and also Edward Hogge and William Seppings, her executors. Weston Jarvis died on the 19th Oct. 1857, having by his will appointed as his sole executor the said Whincop Jarvis, who duly proved the same. Fountaine Hogge died on the same day as Weston Jarvis, but later in the day, and he was the last survivor of the three executors of the testator Thomas Allen. His sole executrix was Caroline Clarke, who thus became the sole legal personal representative of the testator also.

The gift over to Stephen Allen and his son took effect on the death of Fountaine Hogge, by default of such son of his as the will mentioned, and Stephen Allen became entitled to the residuary personalty for his life. On the 2nd May 1865 h

and those interested therein in remainder instituted the suit of *Allen* v. *Jarvis*, to which Whincop Jarvis (as executor of Weston Jarvis), Edward Hogge and William Seppings (as executors of Mrs. Fanny Jarvis), and Caroline Clarke (as executrix of Fountaine Hogge, and, therefore, legal personal representative of the testator Thomas Allen), were named defendants. The bill alleged, amongst other things, that Weston Jarvis had been the solicitor of the testator, and had improperly retained in respect of bills of costs parts of the residuary personal estate, and it prayed execution, under the direction of the court, of the trusts of the will of Thomas Allen, and the usual accounts against his executors.

About the same time Whincop Jarvis filed his bill against the persons interested as aforesaid for execution of the trusts of the will.

Both causes were heard together, and on the 11th Feb. 1867 the Master of the Rolls made a decree in both, by which accounts were directed of the receipts of Weston Jarvis and the other executors, and those who represented them. Amongst other items which Whincop Jarvis, on the accounts being taken, claimed to have allowed to him as executor of Weston Jarvis, were bills of costs of Weston Jarvis, which amounted together to 599*l.* 6*s.* 11*d.* It was alleged that these bills were incurred by the testator in his lifetime, and that the business was done between the years 1830 and 1841. After his death Weston Jarvis delivered these bills to Fanny Allen, and they were paid, as it appeared, by a cheque for the aggregate amount, dated on the 23rd June 1843, which was drawn by Weston Jarvis alone, and was paid out of the banking account of the executors of the testator, Thomas Allen.

The 25th rule of Cons. Ord. XL., provides that where an account consists in part of any bill of costs, or where the judge is authorised to fix the amount of costs under the 24th rule, the judge may direct the taxing master to assist him in settling such costs . . . and the taxing master, on receiving such direction, shall proceed to tax such costs, and shall have the same powers . . . as if the same had been referred to him by an order, and he shall return the same with his opinion thereon to the judge by whose direction the same were taxed.

Acting under this order the Master of the Rolls made the order now complained of to the effect already stated. It was made in chambers by the judge in person, but without the presence of counsel. Soon afterwards the defendant Jarvis made an *ex parte* application at the Rolls for leave to appeal against it, although the case had not been adjourned into court, or argued by counsel, and his Lordship granted the application.

The appeal was now brought on, but it was not until considerable progress had been made in the arguments that their Lordships became aware of the circumstances under which the appeal was brought before them.

Jessel, Q. C. and *Batten* supported the appeal, and

Southgate, Q. C. and *Cracknall* his Lordship's order.

Without calling for a reply,

Lord Justice SELWYN said:—This case comes before us in a most unsatisfactory position, and the further discussion of the matter has only tended to confirm the impression which was entertained and expressed by the Lord Justice and by myself, that an appeal ought not to be brought before this court under circumstances similar to the present; and I entirely agree with what the Lord Justice has said during the argument, that such an appeal as this will not be allowed for the future in this court. And, speaking with the greatest respect for his Lordship the Master of the Rolls, I am satisfied that, if the matter had been brought to his attention, he would not have thought of giving any direction as to liberty to appeal to this court. The proceedings of this court must be conducted in a regular way, and an application for leave to appeal in an irregular manner to this court must be heard by us and us alone. I hope, therefore, it will be understood that, although for the sake of saving expense—as this matter had proceeded so far before we were aware of all the circumstances under which it came before us—we have thought right to deal with it, we shall not do so on any future occasion in a case similarly circumstanced.

Proceeding then to that which is the matter in dispute, it appears that the testator in this case died in 1841, but that the decree under which we are now proceeding, which is a decree for an account, was not made until the 11th Feb. 1867; and it is obvious from the mere statement of these dates, that the executors against whom these accounts are directed are necessarily placed in a position of considerable difficulty when called upon to bring in a discharge under such a decree. But, on the other hand, the court in taking such an account always bears in mind (and, from my long experience in the Rolls Court, I may say that, of all judges of this court the Master of the Rolls especially bears in mind) the length of time which has elapsed, and always in taking the account gives to the person rendering the account such a reasonable allowance in respect of that lapse of time as the justice of the case requires. But upon this present appeal motion, which is a proceeding under that decree, which does not in any degree question the justice of the decree or any portion of it, we must take it to be a fact clearly established, that justice requires that a decree for a general account should be made against these executors, including Mr. Lewis Whincop Jarvis, the executor of Mr. Weston Jarvis. Then under these circumstances he brings in a discharge in the ordinary manner, and among the items in that discharge are included certain bills of costs. It appears to me that it would be impossible to contend with any success that the parties beneficially interested, who have obtained that decree, and who are consequently entitled to that account, are not entitled to question those items.

Then, if they are entitled to question them, the general order of the court (the 40th Cons. Ord. Rule 25), is that the judge taking that account, where a part of it relates to a bill of costs, or where the judge is authorised to fix the amount, may direct the taxing master to assist him in settling the matter. And it would be, I think, a very strong thing for the Court of Appeal to interfere with the discretion of the judge who had, in taking such an account, desired the assistance of the taxing master, in settling the account. That is the first abstract question which we have to decide, viz., whether this order ought to be discharged or not; and it appears to me, having regard to the fact that there is a general decree for an account, that the plaintiff's right to that account is indisputable, that this is an item in the discharge, that these bills of costs are items included in the accounts, and that the judge has desired the assistance of the taxing master, we cannot discharge that order.

Then there arises the question, which really comes to be reduced to a question of words, as to the terms in which such an order ought to be expressed. It is admitted, of course, that after this lapse of time the matter as between solicitor and client is settled; the question is, whether the executor,

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or the executor of the executor, is to be allowed these amounts. And then we find that in this particular case the bill of costs was the bill of costs of one of the executors, and that he, in conjunction with his co-executors, was in fact paying his own bill. That, of course, very greatly strengthens the case in favour of the persons beneficially interested in the estate when they come and say that the matter must be looked into. Then it is to be looked into. But the terms of the order, which I do not believe were brought to the notice of the learned judge at all, do not, as is the usual form familiar to us all, direct the moderation of these bills, but they direct that the taxing master is to tax and settle the bills. That certainly is not according to my impression of what has always been in the practice of the court the proper form, without anything more to direct the moderation of the bill, under circumstances such as exist in the present case; that is to say, where the testator has been dead for a great length of time, where the bills have in fact been paid, and where the question in substance is, whether these bills are fair and proper, and such as ought to be allowed to the executors in their discharge under the existing circumstances. I think, therefore, that without in the least degree interfering with the judgment, or with the discretion, of his Lordship the Master of the Rolls (for I believe that neither judgment nor discretion has been exercised by him at all with reference to the terms of this order), the order ought to be modified in the way I have suggested, by striking out those words by which it is directed that the taxing master shall tax and settle the bills, and making it an order that he shall inquire and state whether any and which of the disputed items marked in red ink in the bill referred to marked 174 are fair and proper to be allowed, and to what amount respectively.

But I may again say if the discretion and judgment of the Master of the Rolls in such a matter had been exercised, and if he had wished to have the assistance of the taxing master with respect to these particular items, I should have been very loth indeed to have interfered with such a discretion. But as I am satisfied that no such discretion has been exercised by him, and that the matter has not been brought to his attention at all, I am bound to exercise my own discretion in the matter without any such restraint. I think, therefore, that the justice of the case will be best met by leaving the matter entirely unprejudiced, to be decided in the usual way by his Lordship, and under the very unsatisfactory circumstances in which this case has been brought before the Court of Appeal, I think the right course with respect to costs will be to direct that both parties in this matter should bear their own costs.

Lord Justice GIFFARD said:—I quite agree with what my learned brother has said as to the very unsatisfactory manner in which this appeal has been brought before the court. It is also clear to my mind that the form of this order was not brought to the attention of the Master of the Rolls, and certainly that it was not brought to his attention, regard being had to the mode in which the chief clerk proposed to send the matter to the taxing master.

Now, with respect to the two items, the one numbered 174, which is the subject matter of the appeal, although a great lapse of time with reference to that item has taken place since these costs were incurred, and since the sums were paid, yet, having regard to the fact that there is a decree for an account, and the much more important fact that the executor has paid himself, I think it right that there should be an inquiry to ascertain whether, as regards the particular items complained of, the bill is a fair and proper bill or not. That is the proper form, and not the form adopted by the order, which was to tax and settle the bills, and of course if the taxing master followed the order, he would simply tax in the ordinary way, and not adopt the course which is the right and proper one, namely that the mere items appearing upon the face of the bill should be looked at, and, having regard to those items, that the master should say whether they are fair and proper items.

That being so, the order will be varied as my learned brother has suggested, and I quite concur with him in saying that neither party ought to have the costs of this appeal; and I may repeat that, whenever an appeal is brought in the shape in which this appeal is brought before the court, we shall undoubtedly decline to hear it.

Solicitors for the appellant, *Wedlake* and *Letts.*

Solicitors for the respondents, *Field, Roscoe, Field,* and *Francis.*

Friday, July 16.

(Before Lord Justice GIFFARD.)

ALTON *v.* HARRISON.

POYSER *v.* HARRISON.

Fraudulent deed—Security to creditors—Possession by debtor notwithstanding conveyance of whole of his property—Preference—Subsequent sequestration—Statute 13 *Eliz. c.* 5.

By an order in the above-named suits H. was ordered to pay into court by a day fixed a sum found due from him in respect of certain trust moneys. He became aware that sequestration in respect of those moneys would be issued against him, and before the day for payment into court he executed a deed whereby he assigned by way of mortgage the whole of his property to trustees for the benefit of five of his principal creditors, not including amongst these the persons interested in the trust moneys. The deed contained a proviso for redemption on payment of the debts due to the five creditors within six months, and another proviso that H. should continue in possession of the property for six months, but not so as to let in or permit any execution, sequestration, or other process, and in case any such should be enforced, or attempted to be enforced, that the possession of H. should cease and determine. Default was made by H. in payment of the trust moneys, upon which a writ of sequestration was issued, and the sequestrators seized part of the property of H. On motion by the trustees under the deed the sequestrators were ordered to withdraw, that possession might be delivered to the trustees, and on appeal,

Lord Justice Giffard confirmed that decision, the question being whether the deed was invalid under the statute of 13 *Eliz., and not whether it was a fraudulent preference of the five creditors.*

This was an appeal by the plaintiffs in the first suit against an order of Stuart, V.C., the hearing of the original motion before whom is reported in 20 L. T. Rep. N. S. 1001, where the circumstances are fully stated.

Mackeson, Q. C. and *W. Wellington Cooper* supported the appeal, and referred to

Henderson v. *Lloyd,* 3 F. & F. 7;
Evans v. *Jones,* 11 Jur. N. S. 784;
Holbird v. *Anderson,* 5 T. Rep. 235; and *Hodgson* v. *Newman,* there cited;
Wood v. *Dixie,* 7 Q. B. Rep. 892;
Stewart v. *Moodie,* 1 Cr. M. & R. 777;
Goodricke v. *Taylor,* 2 De G. J. & Sm. 135; 10 L. T. Rep. N. S. 113;
Nunn v. *Willmore,* 8 T. Rep. 521;

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Riches v. *Evans*, 9 Car. & P. 640;
Ex parte Foxley, re Nurse, L. Rep. 3 Ch. Ap. 515; 18 L. T. Rep. N. S. 862.

Dickenson, Q. C. and *Solomon* appeared to support his Honour's order.

Lord Justice GIFFARD said.—I will not trouble you, Mr. Dickinson. I have no doubt that Mr. Harrison executed this deed at a time when he knew perfectly well that execution would be issued against him under the decree. Of that I have not the least doubt. At the same time I have no doubt also but that the law has been most accurately laid down by the Vice-Chancellor, and consistently with a large body of authorities which now exist on the subject. What the Vice-Chancellor says in his judgment is this: "In this, as in all other cases of the same kind, the question is as to the *bona fides* of the transactions. If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect."

Now there is not a suggestion but that under this deed these five creditors are to have the property, and that they are secured by it. There were, in point of fact, but two arguments raised upon the deed—the one, upon the form of the proviso in the deed with reference to the retention of possession by Mr. Harrison; and the other, that the deed comprises the whole of the bankrupt's property. With reference to the form of the proviso in the deed, I cannot infer, and certainly should not infer from that, that this deed was not to operate according to its tenour and effect. It is, in point of fact, a mortgage, and a mortgage which was not to be absolute for six months unless, previously to that time, there was execution; and, if previously to that time execution issued, then the trustees were to take possession of the property. Upon the evidence there can be no question but that the deed was intended to have that effect. That is so much as to the form of the deed, and so much as to the circumstances attending it.

Then, with reference to its comprising the whole of Mr. Harrison's property, we are not now dealing with bankruptcy at all, this being a question raised as between the execution-creditor and these five creditors who are secured by this deed. I asked the question, during the argument, why proceedings in bankruptcy have not been taken. The only answer I got was that a decision upon the validity of this deed was desired on this application. I can quite understand a decision being desired on this application, because, if this deed were held to be bad, then the result would be precisely that which is now complained of. The execution-creditor would be paid in full, and the other creditors would be left without anything. I have no hesitation in saying that, in principle, there can be no difference under the Statute of Elizabeth whether a man prefers his creditors with part of his property, or whether a man prefers his creditors with the whole of his property. If the deed is *bona fide* and without fraud (which means this, if the deed is to operate according to its tenour and effect, and is not a mere cloak for providing something for the benefit of the person who makes it), then that is a good deed, and you cannot complain of it under the statute.

For these reasons, I am of opinion that this appeal must be dismissed with costs. I think further it never ought to have been brought, and one has some satisfaction in thinking also that the bankrupt laws afford means by which any injustice in a case of this sort may readily be avoided; for certainly it would be exceedingly unjust to set aside this deed in order that one particular execution-creditor should be paid in full, to the detriment of all the other creditors.

Solicitors for the appellants, *Scott* and *Co.*

Solicitor for the respondents, *Jeanneret*, agent for *J. G. Jackson*, of Belper.

Friday, July 23.

(Before Lord Justice GIFFARD.)

Re THE LONDON AND COUNTY GENERAL AGENCY ASSOCIATION (LIMITED);

Ex parte PULBROOK.

Practice—Order settled—Appointment for passing—How to be made—Notice of—Cons. Ord. I, Rules 24, 25, and 27.

When it is desired to have a time fixed by word of mouth for passing and entering an order, which the parties have attended to settle, it should be done, in the presence of the parties, by the registrar himself; and when applications for an appointment are made to the clerk of the registrar, they should be simply applications for fixing a time in writing, which must be then served on the other parties in the manner prescribed by the General Orders.

And accordingly where, after appearing before the registrar to settle an order, the parties adjourned to the room of the clerk, from whom the solicitor having the carriage of the order obtained an appointment to pass it, of which appointment he alleged that he forthwith gave notice by word of mouth to his opponent, but which notice that opponent declared he never heard or was aware of, leave to vary the order, notwithstanding that it had been passed and entered, was given.

This was an original application, by special leave of the Court of Appeal, on behalf of Mr. Anthony Pulbrook, a solicitor of the court, that an order made by their Lordships in the matter of the winding-up of the London and County General Agency Association (Limited), upon an application of Mr. James Little, might be discharged or set aside, notwithstanding that the same had been passed and entered.

The order which it was now sought to discharge or set aside was dated the 23rd June 1869, and by it their Lordships ordered that Mr. Little's name should be struck out of an order of Stuart, V.C., dated the 18th Nov., by which his honour had settled Mr. Little's name on the list of contributories of the association, and out of an order of their Lordships dated the 10th Feb. 1869, refusing with costs an appeal from the Vice-Chancellor's order, thus retaining Mr. Little's name upon the list. The report of the hearing upon which the Lords Justices made the order of the 10th Feb. 1869, is in 20 L. T. Rep. N. S. 157, as *Hare's case*, the facts being that Mr. Hare, Mr. Little, and numerous other persons had been shareholders in the London Offices Company (Limited), which had amalgamated with the London and County General Agency Association, and, as it was alleged by the official liquidator of the latter, had, under arrangements between the two companies, accepted shares in the latter in lieu of those which they had held in the former. In disputing their liability in the association, Mr. Pulbrook had acted in conformity with a resolution of the London Offices Company, and in chambers, before the Vice-Chancellor, and before the Lords Justices, had professedly represented the whole body of these shareholders, including Mr. Little, but without any express authority from Mr. Little, who by his affidavit alleged that he had never authorised Mr. Pulbrook to appear for him or to use his name, and that until after their Lordships' order of the 10th Feb.

was made, he was not aware that any application had been made on his behalf.

Their Lordships, by their order of the 23rd June, directed that Mr. Little's costs of the application, and the costs of the official liquidator, should be paid by Mr. Pulbrook, excepting such costs as were occasioned by numerous affidavits filed on behalf of Mr. Little, which that gentleman was ordered to pay. But when the minutes of the order were prepared, it appeared that numerous other documents stated to be irrelevant, and of which the respondent, Mr. Pulbrook, had had no notice, were introduced into the list of evidence, as appeared by an affidavit of Mr. Pulbrook's clerk, John Hughes Crossman, in which he stated that on the 29th June he attended on behalf of Mr. Pulbrook to settle the minutes of the draft order; that he objected to the minutes being drawn up in any other way than that the whole of the costs of the affidavits above referred to should be paid by Little, and not a portion of such affidavits only; that he succeeded in that contention, and then noticed that a long list of evidence was attached to the draft order, and he objected to its insertion. The registrar decided that he must insert the evidence in the order, "whereupon I stated that my principal, Mr. Pulbrook, was out of town, and that I thought he would apply to the court on the subject, and the minutes of the draft order were settled by the registrar, subject to the said A. Pulbrook applying to the court as to the evidence to be inserted. The said registrar did not, on the occasion of the settling of the minutes of the said order, in my presence, name any day for the passing thereof, and I am positive that nothing whatever was said by the registrar when we were before him, as to fixing any day or obtaining any adjournment for the passing of the said order, and on leaving the room of the said registrar with the said George Kenrick (the solicitor for Mr. Little) and Messrs. Ditton and Warmington's clerk (solicitors for the official liquidator), I asked Mr. Kenrick to let me then take a copy from the draft order of the evidence proposed to be inserted; but he stated that he could not wait, and that if I called at the registrar's office on the next day I could then take a copy. I accordingly attended on the following day, and for the first time obtained a copy of the evidence proposed to be inserted, and I then told the clerk of the registrar that Pulbrook was going to apply to the court for leave to speak on the minutes, and asked him to stop the said order. And I say I did not then, or on any other occasion, hear, nor had I in any manner directly or indirectly notice, that any appointment whatever had been given for the passing of the said order, and I was not informed by the said Messrs. Rooks, Kenrick, and Harston, or by anyone on their behalf, of any day whatever having been fixed for the passing of the said order, and I never attended the passing of the said order, or knew anything whatever about it, and had I known of such appointment I should have attended the same and objected to the passing of the said order until after an application had been made to the court to speak upon the minutes."

Mr. Pulbrook stated by affidavit that he was absent from town on the 29th June, and being informed by Crossman of what had taken place, he, on the 2nd July, wrote to Messrs. Rooks, Kenrick, and Harston, a letter, in which he stated that, under the circumstances, he was compelled to apply for leave to speak on the minutes, and would instruct counsel to apply that same day, but that in the mean time he must request that they would not proceed with the order. The application was made on the 2nd July, that being the first day on which their Lordships (who were then frequently engaged at the Privy Council) sat, and granted. Mr. Pulbrook then stated that he at once saw the registrar and produced counsel's brief with the indorsement that leave had been so granted, and he also saw the registrar's clerk, who referred to his book and said that "the order had been left for passing and entry the day before, but had not then been given back to the parties as having been passed and entered; whereupon I told him that I had had no notice of passing, and requested him to stop the said order, and he wrote the word 'stop' in the column of his book wherein the date for entry would have to be inserted; and I say that in the common course of practice an order left for passing on the 1st July would not be delivered out, passed, and entered, until the 3rd July. I never knew or heard in any manner whatever of any appointment for passing the said order on the 1st July or any other date; and I never sanctioned or authorised any person on my behalf to attend the passing of the said order, neither, as far as I am aware, did any person attend on my behalf the passing of the said order; and, had I been aware of any appointment to pass the same, I should have attended and objected to the passing thereof until I had applied to the court to vary the minutes, and the passing thereof without my knowledge has taken me by surprise."

The statement of Mr. Crossman as to what took place before the registrar on the 29th June was confirmed by the affidavit of Mr. Edward Cairns, the clerk of Messrs. Ditton and Warmington, who then made the following statement: "The registrar did not, on the occasion of settling the minutes of the said order, in my presence, name any day for the passing thereof, but after we had left the registrar's room, and the presence of the registrar, the said George Kenrick went up to the junior clerk in the outer room, and afterwards came to me and told me that Thursday, the 1st July, at 1.30 p.m. was fixed for passing the said order. I did not hear the appointment given, or know that the said George Kenrick went up to the clerk for the purpose of obtaining it; and the said J. H. Crossman was not, as I believe, with him when he obtained it, and I did not hear the said G. Kenrick tell the said J. H. Crossman of the said appointment, and unless the said G. Kenrick actually told him, as he did me, I do not think the said J. H. Crossman would have heard of it, for I certainly should not have known it myself but for the statement to that effect made to me personally in a low tone of voice by the said George Kenrick. I attended the appointment to pass the said order, but neither the said J. H. Crossman, nor the said A. Pulbrook attended, and to the best of my knowledge no one attended on behalf of the said A. Pulbrook. . . . I examined the engrossment of the order to see if I had any objection to it, and then signed it in pencil and handed it back to the said G. Kenrick, and I did not go before the registrar to pass the said order."

Mr. Kenrick made an affidavit in which he stated that the registrar finally settled the said order on Tuesday the 29th June, and that he immediately, in the presence of Crossman and Cairns, proceeded to the outer room and obtained from the clerk of the registrar, in the usual course of practice, an appointment which he thereupon entered upon the notice paper prescribed by the practice of this honourable court for Thursday the 1st July at 1.30 p.m. to pass the said order; that he thereupon informed Crossman and Cairns of the appointment he had so taken, and the entry on the said notice paper was made by the registrar's clerk in their presence and in his (the deponent's) presence, immediately after the said order had been settled; that where the solicitors attend on the settlement of an order, it is not the practice to give any more formal notice of the appointment to pass than that already stated; "that both the clerks of Mr. Pulbrook, and of Messrs.

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Ditton and Warmington, took a note of the appointment in my presence, and the clerk of Messrs. Ditton and Warmington in due course attended on the 1st July to pass the said order," when he also attended, and the same was left with the clerk to be signed, passed, and entered in the usual course. He stated that "the said order was settled by the registrar on the 29th June without any qualification whatever, and in accordance with all the objections" made by Crossman, and he was not aware until the 5th July that leave to give notice of motion to vary the minutes had been granted. Mr. Jones, an articled clerk of Mr. Kenrick, confirmed that gentleman's statements; that Mr. Kenrick applied to the clerk for an appointment to pass the order, when Mr. Pulbrook's clerk was present, and did so in a tone of voice loud enough for him (the deponent), who was then about to leave the room, to hear. And another articled clerk, Mr. Goodfellow, stated that he heard Mr. Kenrick apply for an appointment, and heard the clerk state the time; "and I thereupon saw Mr. Kenrick turn round to the clerks attending on behalf of Messrs. Ditton and Warmington, and on behalf of Mr. Pulbrook, who were standing close behind him, within reach, and I heard the said Mr. Kenrick give them notice of the appointment to pass."

The statement that the order was not finally settled was confirmed by an entry in the registrar's book, "settled subject to court," and in the column of the clerk's book there was a short word written in pencil, but so much effaced as to be illegible; and it was suggested that this was the word "stop," mentioned in Mr. Pulbrook's affidavit.

The decision depended upon the 27th rule of the 1st Cons. Order, which is as follows: "When the draft decree or order has been settled by the registrar, he shall name a time, in the presence of the several parties, or else deliver out an appointment in writing of a time for the passing the decree or order. And in the latter case such appointment shall be served on the opposite party in like manner as is directed by the 24th and 25th rules of this order with reference to an appointment to settle the draft decree or order." And the 24th rule provides that a copy of such appointment shall be served on the opposite party one clear day at least before the time fixed thereby for settling the draft decree or order; and the 25th provides that service shall be effected by leaving a copy of the appointment at the place of service of the party to be served, or by sending a copy by post to that place.

When the motion to vary the minutes (leave to make which was granted on the 2nd July) came on, the respondent objected that the order was already passed and entered, and this appearing to be really the case, their Lordships ordered the motion to vary to stand over, with liberty to Mr. Pulbrook to move to set aside or discharge the said order, the two motions to be then in the paper together.

Dickinson, Q. C. and *Brooksbank*, in support of the motion, contended that whatever Mr. Kenrick might honestly believe that he had done, the Consolidated Order had not been complied with; that no time was named by the registrar himself in the presence of the parties, and that no written appointment for passing was ever made at all. Then there was a conflict of evidence, and in such circumstances the *onus probandi* was on the party insisting that notice had been properly given to show that what the order required had been actually done.

Karslake, Q. C. and *Bradford*, for Mr. Little, contended that the universal practice of the registrar's office had been strictly followed in this case, that for certain purposes the clerk of the registrar was equivalent to the registrar himself, and that an appointment by the clerk was the same as if made by the registrar. The registrar did not himself keep the appointment book, and it was impossible that he should personally attend to matters of such routine. Crossman himself stated that after the adjournment to the outer room he had held some conversation with Kenrick, and was therefore near enough to him to hear what was stated to himself as well as to Cairns.

Greene, Q. C. and *Cracknall*, for the official liquidator of the association, took no part in the argument.

Brooksbank was called upon to reply upon the question of costs only.

Lord Justice GIFFARD said.—The only question I have to decide on this motion really is whether the 27th rule of the 1st order has been complied with or not. As regards written notice, it is clear that no written notice was given; therefore, we must turn to the first part of the order, and that is in these terms: "When the draft decree or order has been settled by the registrar he shall name a time in the presence of the several parties, or else deliver out an appointment in writing, of a time for passing the decree or order." Therefore, the question is, whether I can be satisfied upon this evidence, which is very contradictory, that there was that description of notice of the time when this order was to be passed. The onus of proving the affirmative rests entirely upon Mr. Kenrick, and he says, according to his notion that proper notice was given. But, on the other hand, we have the evidence of Mr. Cairns and of Mr. Pulbrook's clerk, and I think it is clear that Mr. Pulbrook's clerk did suppose and did say, at that meeting on the 29th, that his principal he supposed would make a motion before the judge to have the minutes varied. Well, it is scarcely possible that the clerk should not have objected to the 1st of July if his attention had been clearly and distinctly brought to the 1st July having been fixed as the day for passing the order. I do not think that that day was fixed and said so that he did hear it. It might have been said so that he might have heard it, but I think that in order to the fixing of the day according to the terms of this order there must really be such an amount of notice in the presence of the parties, as that the parties must have known and had an opportunity of objecting to the day. Therefore, I am satisfied on this evidence that, the affirmative resting on Mr. Kenrick, Mr. Kenrick has not proved that affirmative. I do not think it necessary to go through the evidence. It is contradictory. Mr. Kenrick probably went up to the office, and went straight to the clerk, and got the time fixed, and may have said to three or four people standing by that it was fixed, but I think he was bound to do more than this, and unless he could prove what he swears he does not satisfy me that he gave such notice as is required by the rule. Therefore this order must not stand in the way of the motion which, I understand, is the next motion in the paper to vary these minutes.

I have no doubt that a very loose practice has grown up in the registrar's office. And in the future I desire to lay down this: that where it is desired to have a time fixed by word of mouth for passing and entering the order, that should be done in the presence of the parties by the registrar, and that when applications are made to his clerk they should be simply applications for fixing a time in writing. And if that is followed for the future no such question as this can ever again arise which has occupied the court for several hours. Mr. Greene's client

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will, of course, have his costs out of the estate of the association. There will be no other costs of the motion.

Solicitor for the applicant, *Pulbrook* in person.

Solicitors for the respondent, *Rooks*, *Kenrick*, and *Harston*.

ROLLS COURT.

Reported by HENRY PRAT, Esq., Barrister-at-Law.

July 27 *and* 28.

Re BARNED'S BANKING COMPANY (LIMITED);

COUPLAND'S CASE.

Company — Winding-up — Creditor holding collateral security—Proof of claim.

Messrs. C. drew two sets of bills of exchange on the B. company, under the authority of the B. company's letter of credit, against two cargoes of cotton. The first set of bills were accepted, but not paid by the B. company, and the second set were not accepted, as the B. company had been ordered to be wound-up before the bills were presented. Messrs. C. sent in a claim in the winding-up to prove for the difference between the amount of the bills and the proceeds of the sale of the cotton. At the date of making this claim Messrs. C. were not holders of any of the bills, and the cotton was unsold. They afterwards took up the bills and sold the cotton, and were admitted to prove for, and received dividends upon, the difference between the amount of the bills and the proceeds of sale of the cotton.

They now sought to increase their claim by the amount of the proceeds of the sale of the cotton:

Held, that, as at the date of their claim, Messrs. C. were not holders of the bills, and had not sold the cotton, they were only entitled to prove for the difference, and not for the gross amount of the bills without deducting the proceeds of the sale of the cotton.

Summons accordingly dismissed.

Adjourned summons.

This was an application by Messrs. Coupland Brothers, of Liverpool, that the amount which they had been admitted to prove as creditors of the banking company might be increased by the sum of 39,035*l.* 5*s.* 2*d.*, being the value of certain securities deducted from the amount of their claim upon the banking company.

Messrs. Coupland's claim was in respect of six bills of exchange for sums amounting to 56,785*l.* 0*s.* 3*d.*, drawn under two letters of credit granted by the banking company in favour of Messrs. Coupland and Co., of Bombay, who were identical with Messrs. Coupland Brothers of Liverpool; one of these letters of credit was granted at the request of Messrs. W. H. Daunt and Co., and the other at the request of Mr. M. J. Wilson.

In Nov. 1865 Daunt and Co. instructed Coupland's Bombay firm through the Liverpool firm to purchase for them a quantity of cotton, and at the same time transmitted to the Bombay firm a letter of credit issued by the banking company, whereby Coupland and Co. were authorised to draw upon the banking company bills of exchange to an amount not exceeding 23,150*l.*, to be drawn at six months' sight, accompanied by corresponding bills of lading, to be given up to the banking company on their acceptance of the drafts.

In pursuance of these instructions Coupland and Co. purchased for Daunt and Co., and shipped to England, 1000 bales of cotton, in respect of which they drew upon the banking company two bills for 11,698*l.* 3*s.* 8*d.* and 11,451*l.* 16*s.* 9*d.* respectively, which were negotiated at Bombay, and remitted to England, and duly accepted by the banking company.

In March 1866 Mr. Wilson gave similar instructions to the Bombay firm for the purchase of cotton, and sent a similar letter of credit on the banking company for 50,000*l.* The cotton was purchased and sent to England, and Coupland and Co. drew upon the banking company four bills of exchange, amounting altogether to 33,635*l.* 0*s.* 3*d.* These bills were also negotiated at Bombay, and remitted to England, but the banking company had stopped payment before they were presented, and on presentation of them the acceptance was refused, and the following answer was given, "Cannot accept; refer to Coupland Brothers as drawers."

On the 27th April 1866, the banking company was ordered to be wound-up, anp the usual advertisement was issued requiring claims to be sent in on or before the 22nd June 1866. On the 8th June 1866, Coupland Brothers sent in the particulars of their claim for the whole amount of the bills in a letter, in which they stated that the proceeds of sale of the cotton would be applied in reduction of the amount of the bills. At that time Coupland Brothers were not holders of the bills, and the cotton was not sold, but they subsequently took up the bills, and the cotton was sold, and produced 39,035*l.* 5*s.* 2*d.*; and on the 23rd April 1867, they sent in to the official liquidators of the banking company an account in which they gave credit for the 39,035*l.* 5*s.* 2*d.*; they were then admitted to prove as creditors for 17,778*l.* 14*s.* 6*d.*, the balance remaining due on the whole amount of the bills, after deducting the proceeds of the sale of the cotton. The first three dividends were accepted by Coupland Brothers on this amount without any question, but they now sought to prove for the whole amount of the bills without deducting the proceeds of sale of the cotton, on the authority of *Re Barned's Banking Company, Johnston's case*, 20 L. T. Rep. N. S. 266. The chief clerk decided against the claim, and the case was adjourned into court.

Jessel, Q. C. and *Westlake*, for the appellants, submitted that this case came within the decision in *Johnston's case*. (*sup.*) They also referred to

Kellock's case, 18 L. T. Rep. N. S. 671; L. Rep. 3 Ch. App. 769.

Sir *R. Baggallay*, Q. C. and *Kekewich*, for the official liquidators, contended that the present case differed materially from *Johnston's* case, inasmuch as at the date of the claim Coupland Brothers were not holders of the bills, and the cotton had not been sold.

Jessell, Q. C. replied.

Lord ROMILLY.—This is a case of great peculiarity, but I ko not think it comes within *Kellock's* case, and the cases which followed it, where the rule as to the administration of assets in Chancery applies, and not the rule as to the administration of assets in bankruptcy. The state of the caseis this: It is true that these gentlemen have a claim for 56,000*l.*, but the cotton was to be deducted from it, and instead of making a claim for the whole 56,000*l.*, if they could have made it, they made a claim in June 1866 before the cotton was sold, in which they only claimed the balance after deducting the cotton. They claimed no doubt 22,000*l.*, which was more than they would be entitled to; but, in fact, at that time neither was the cotton sold, nor were the bills taken up by them, and they were entitled to have, and, I think, properly and justly claimed, the amount which would come to them after payment of the sums derived from the sale of the cotton. This case appears to me perfectly distinct from the

other cases, which were cases where the person had got the cotton and proved for the whole amount of the bills which were then due. I am of opinion, therefore, that the decision of the Chief Clerk is right, and that the official liquidator was right in only allowing the 17,000*l.* odd. Therefore, I must dismiss the summons. I shall give no costs, because it was a very proper case to bring before the court; but the official liquidator must have his costs out of the estate.

Solicitors for the applicants, *Elmslie, Forsyth*, and *Sedgwick*.

Solicitor for the official liquidators, *Freshfields*.

Friday, July 16.

PEARCE *v.* MORRIS.

Mortgage—Acceptance by mortgagee of amount tendered —Right to conveyance and title-deeds.

A., who had contracted with a mortgagor for the purchase of a portion of the mortgaged property, tendered to the mortgagee the full amount of his principal, interest, and costs, which was accepted by the mortgagee, who, however, refused to convey the legal estate, and to deliver up the title-deeds to A.:

Held, that the mortgagee, having accepted A.'s tender, was bound to convey the legal estate and to deliver up the title-deeds to him, and must pay the costs of the suit for not having done so.

This was a suit to compel a mortgagee to convey the legal estate in the mortgaged property, and to deliver up the title-deeds to the plaintiff, who had contracted with the mortgagor for the purchase of a portion of the mortgaged property, and had paid the mortgagee the full amount of his principal, interest, and costs.

By two indentures, dated respectively the 25th March 1867 and the 11th March 1868, Robert A. Ward mortgaged a piece of freehold land, situate at Maidenhead, to John Crowdy, to secure the repayment of two sums of 1000*l.* and 1400*l.*, and by an indenture dated the 2nd April 1868 he further mortgaged the same piece of land to secure the repayment of the sum of 500*l.* to a Mr. Mackay.

On the 25th Jan. 1869 the three mortgages were transferred to the defendant, William Morris, and on the following day he gave notice to the mortgagor that he would proceed to sell the property under the power of sale contained in the mortgage-deeds within a fortnight, unless he was meanwhile paid the full amount of his principal, interest, and costs. The plaintiff, who had some time previously entered into a contract with the mortgagor for the purchase of a portion of the mortgaged property and accepted the title, subject to certain requisitions being complied with, tendered to the defendant on the 29th Jan. 1869 the full amount demanded by him for principal, interest, and costs, which tender was accepted by the defendant. The plaintiff then requested the defendant to execute a conveyance of the legal estate in the property to him, and to deliver up the title-deeds; but the defendant refused to do more than give the plaintiff a receipt for the amount paid, on the ground that he was trustee of the property for the persons entitled to the equity of redemption.

The plaintiff accordingly filed the present bill praying for a declaration that he was entitled to have the legal estate conveyed to him and the title-deeds delivered up.

Southgate, Q. C. and *Villiers*, for the plaintiff, submitted that the mortgagee, having accepted a tender of his principal, interest, and costs, from the plaintiff, was estopped from denying his title to redeem, and was bound to convey the legal estate and hand over the title-deeds to him, notwithstanding the fact that there might be other persons interested in the equity of redemption. They cited

Wicks v. *Scrivens*, 1 J. & H. 215.

Jessel, Q. C. and *Nalder*, for the defendant contended that the plaintiff, not having completed his purchase, was not entitled to a conveyance of the legal estate, and that the court could not make a decree to that effect in the absence of any of the persons interested in the equity of redemption. The acceptance of the tender was not an admission of the plaintiff's title to redeem, as the mortgagee was obliged to accept the tender or to run the risk of losing subsequent interest.

Lord ROMILLY.—I feel no doubt whatever about this case. When a mortgagee refuses to accept payment from a person who offers to pay him the full amount due to him for principal, interest, and costs, he does so, as Mr. Jessel very properly said, at his own risk; he need not accept it from a person who is a mere stranger to the estate; but if the person making the tender happens to be entitled to redeem, the mortgagee loses his subsequent interest if he does not accept the tender. But when a mortgagee accepts money from a person claiming to be entitled to redeem, it does not lie in his mouth to say that that person was not entitled to redeem him, and he cannot raise the question which he might have raised before he accepted the money. When he receives the money he admits that the person who pays it was entitled to redeem him, and, being redeemed, he is bound to convey the legal estate, and to deliver up the title-deeds to the person who redeemed him. Then, as I asked Mr. Jessel in the course of the argument, who is damnified? The mortgagee is not, because he has received everything he is entitled to, nay more, all that he claims to be entitled to. The mortgagors are not injured, because B. has only been substituted for A., and they are entitled to the same account and equity of redemption against B. as they before had against A. But if a person who has been paid off, and who admits that there is nothing due to him, can turn himself into a trustee for the purpose of creating costs (for that is what it amounts to), it becomes a very serious question for every person concerned, and one which this court ought most earnestly to discourage. As an ordinary rule a mortgagee, who is called on to receive his money, is entitled to have six months' notice, which gives him plenty of time to ascertain whether the person who has given him notice to redeem is entitled to redeem him or not. If the mortgagee threatens to sell the property, unless he is redeemed, and a person comes to him offering to redeem, then he is entitled to inquire whether that person is the mortgagor, or the agent of the mortgagor for that purpose, or whether he is in any other capacity entitled to redeem him, as, for instance, a puisne incumbrancer. If the mortgagee does not choose to inquire, he refuses the tender at his own risk; but he is quite safe if he takes the money, gives the estate up and conveys the property. He has nothing more to do with the property; nobody can make him liable for anything; the mortgage is transferred to another person who is liable in respect of it in a suit for redemption by the mortgagor, exactly as the original mortgagee was. I am of opinion, therefore, that Mr. Morris, having accepted the money from the plaintiff, was bound to convey the legal estate to the plaintiff, and must pay the costs of the suit for not having done so. There must be a decree for conveyance and handing over the title-deeds to the plaintiff, and if the parties should differ about the

form of the conveyance I will settle it myself in chambers.

Solicitors for the plaintiff, *Gurney* and *Son* for *H. F. Turner*, Maidenhead.

Solicitors for the defendant, *Lee, Collyer-Bristow, Withers*, and *Russell.*

July 22 and 26.

Re THE AGRICULTURIST CATTLE INSURANCE COMPANY; DIXON'S CASE.

Company—Contributory—Compromise—Cancellation of shares—Power of directors—Lapse of time.

In 1846, *W., an officer of a company, took ten shares in the company in the name of D., in order to qualify him to become a director of the company, which D. had consented to become on W.'s undertaking, that until an Act of Parliament was obtained limiting the liability of the shareholders, he (D.) should not be asked to sign any contract, nor be considered as an ordinary shareholder. No such Act was ever obtained. D.'s name was entered on the list of shareholders, he appointed a proxy to vote for him at a meeting of the company, and he received a dividend on his shares, but he never made any payment in respect of the shares, and, though he received many circulars and applications for calls in which he was treated as a shareholder, he never took any notice of them.*

At length, in 1849, *on W.'s explaining to the directors the circumstances under which the shares had come into D.'s name, and the undertaking upon which he had consented to become a director, they agreed to compromise the matter by cancelling his shares on payment of all calls which had been made on them, and a resolution to that effect was accordingly passed at a meeting of the board.*

1861 *the company was ordered to be wound-up, and in* 1869 *the official manager sought to enforce a call against D. in respect of the shares which had stood in his name.*

On an application by D. to have his name removed from the list of contributories:

Held, that the compromise having been acquiesced in for twenty years could not now be opened; that D. was not properly a member of the company, and that his name must be removed from the list of contributories.

Lord Belhaven's case, 12 *L. T. Rep. N. S.* 595; 3 *De G. J. & S.* 41, *followed.*

This was an application by Mr. Thomas Griffles Dixon to have his name removed from the list of contributories to the Agriculturist Cattle Insurance Company, under the following circumstances.

In the year 1846 Mr. Dixon was requested by his brother-in-law, Mr. Daniel Wilkie, who was the manager of the company for Scotland, to become a member of the board of directors for Scotland, to which he assented, on Mr. Wilkie's verbal assurance and undertaking that until an Act of Parliament was obtained limiting the liability of the shareholders, he should not be asked to sign any contract nor be considered responsible as an ordinary shareholder. Mr. Dixon made no application for shares, but Mr. Wilkie took the shares in his name, and paid a deposit of 10*l.* thereon on the 23rd June 1846, and Mr. Dixon's name was entered on the list of shareholders, but he never signed the deed of settlement, and never paid any calls in respect of the shares which stood in his name.

On the other hand Mr. Dixon on the 4th May 1846 signed a proxy authorising a Mr. Fenton, a shareholder of the company, to vote for him at a meeting of the company to be held in London on the 13th May 1846. In this proxy Mr. Dixon was described as a shareholder in the company. He also received a dividend on his shares amounting to 6s. in Jan. 1847, and gave a receipt for it.

Applications for the payment of calls were made to Mr. Dixon in Feb. and Aug. 1848, and on several other intervening dates, but he took no notice of these applications till August, when he wrote a letter to Mr. Wilkie, reminding him of the undertaking, on which he had consented to become a director. The letter concludes with these words: "I may remind you that you put down my name and paid the deposit yourself, and you have never asked me to repay you the amount, whatever it is. I wish well to the company, and have uniformly insured my stock with it, but I do not think that under the circumstances I can fairly be held a responsible shareholder."

In Oct. 1848 Mr. Dixon received printed circulars giving notice of the annual general meeting of the company, and of a special general meeting to be held on the 13th Nov. at Chippenham, Wilts, at which meeting it was proposed to determine how far it might be practicable and desirable to permit certain shareholders to retire from the company on certain terms. At the meeting at Chippenham an arrangement was entered into by which certain shareholders were allowed to retire from the company on making certain payments, and giving up their shares to the company. [A full account of the Chippenham arrangement will be found in Lord Cairns' judgment in *Houldsworth* v. *Evans*, 19 L. T. Rep. N. S. 211.] Mr. Dixon did not attend the meeting, and did not come within the Chippenham arrangement. Circulars and notices, treating Mr. Dixon as a shareholder, continued to be sent to him from time to time, and he persisted in taking no notice of them till the early part of 1849, when he requested Mr. Wilkie to take the necessary steps to have his name removed from the list of shareholders. Accordingly, on the 2nd March 1849, Mr. Wilkie wrote a letter to the London secretary of the company, stating the circumstances under which Mr. Dixon had become a shareholder, and requesting that his name might be removed from the list. After some correspondence it was in the result agreed that Mr. Dixon's name should be removed upon payment of all the calls which had been made on his shares; and at a meeting of the directors held on the 17th April 1849, it was (amongst other things) resolved that the ten shares of Mr. Thomas G. Dixon be cancelled.

This resolution of the directors was never submitted to any meeting of the shareholders of the company, but in the balance-sheet presented to the general annual meeting of the shareholders on the 23rd Nov. 1849 was included a sum received on account of "shares cancelled," one of the items being "40*l.* received from Mr. Dixon in respect of ten shares." This balance-sheet was audited and the auditors' report was presented to the meeting by the directors and adopted.

Mr. Wilkie died in Dec. 1849. He had paid the 40*l.* in consideration of which Mr. Dixon's shares were cancelled, no payment having ever been made by Mr. Dixon in respect of the shares.

The only clause in the deed of settlement of the company relating to the compromise of claims by the directors is the 164th, which is in the following words:—"That it shall be lawful for the board of directors to pay or discharge any debts or claims owing by or made against the company upon any evidence they shall think proper, and to enter into and make any compromise or composition with respect to any claims made against or owing to the company, and to accept any security, real or personal, for any debt or debts owing to or made by the company, as the board shall think proper; and in case any question or dispute shall arise between

the company and any other person or persons, body or bodies, politic or corporate, either to refer the same to arbitration or to settle it in such manner as the board of directors shall think proper."

The company was ordered to be wound-up on the 28th April 1861.

After the cancellation of his shares, Mr. Dixon heard nothing more from the company till March last, when he received notice that the official manager had taken out a summons for a call against him. Mr. Dixon thereupon took out a cross-summons to have his name removed from the list of contributories, and this summons was adjourned into court.

Sir *Richard Baggallay*, Q. C. and *G. N. Colt*, for Mr. Dixon, contended that he was not liable as a shareholder even in 1849; that at all events in 1849 there was a *bonâ fide* dispute between him and the company as to his liability, and that the compromise which was then made was valid under the 164th section of the company's deed of settlement. They cited

Re The Agriculturist Cattle Insurance Company, Lord Belhaven's case, 3 De G. J. & S. 41; 12 L. T. Rep. N. S. 595.

(from which they contended that the present case was hardly distinguishable.)

Re Canadian Native Oil Company, Fox's case, L. Rep. 5 Eq. 118;

Re The Agriculturist Cattle Insurance Company, Brotherhood's case, 7 L. T. Rep. N. S. 56, 142; 31 Beav. 365.

Moreover the lapse of time (twenty years) during which Mr. Dixon had nothing to do with the company rendered it impossible that his name should be fixed on the list of contributories. On this point they cited

Prendergast v. *Turton*, 1 Y. & C. 98;
Clegg v. *Edmondson*, 8 De G. M. & G. 787;
Tatam v. *Williams*, 3 Hare 347.

Southgate, Q.C. and *Bush*, for the official manager, contended that the present case was quite distinguishable from *Lord Belhaven's case* (*sup.*), for there the compromise was reported to a meeting of the shareholders, and by circular to the general body of the shareholders; but the present case was identical with *Houldsworth's case* in *Houldsworth* v. *Evans*, 19 L. T. Rep. N. S. 211; L. Rep. 3 H. L. 263. They also cited or referred to the following cases:

Spackman v. *Evans*, 19 L. T. Rep. N. S. 151; L. Rep. 3 H. L. 171;

Evans v. *Smallcombe*, 19 L. T. Rep. N. S. 207; L. Rep. 3 H. L. 249;

Re The Vale of Neath and South Wales Brewery Company, ex parte Morgan, 1 M. & G. 225;

Re The Agriculturist Cattle Insurance Company, Stanhope's case, 14 L. T. Rep. N. S. 468; L. Rep. 1 Ch. App. 161.

Lindley, for the executors of Houldsworth, who had been fixed on the list of contributories by the decision of the House of Lords in *Houldsworth* v. *Evans* (*sup.*), supported the official manager.

Lord ROMILLY.—I feel considerable difficulty about this case. There is no doubt what my opinion has always been. I think that a lapse of twenty years is a bar to such a claim as the official liquidator's in this case, except in case of fraud. I sat very reluctantly in the House of Lords on appeal in other cases in this company, and I did so only because another Lord had also had the case before him. There was a difference of opinion. I agreed with Lord St. Leonards, but there being three opinions the other way, judgment was given against my view. Having expressed that view in the House of Lords, I cannot take the other view now. I cannot distinguish *Smallcombe's* and *Brotherhood's* cases from *Houldsworth's*, or in substance from *Spackman's* case, and Lord Cranworth expressed a strong opinion in favour of not putting Spackman on the list. I think I must decide the case very much as if no decision had been given on this question. Mr. Dixon appears to me to have grave grounds for disputing his liability; if he had been kept on the list years ago, he would have had his remedy against Wilkie, but that is now impossible. I will compare this case with the other cases in this company, and will give judgment on Monday.

July 26.—Lord ROMILLY.—In this case I have come to the conclusion that Mr. Dixon's name ought not to have been put on the list of contributories. I will explain the grounds of my decision immediately. The facts are these. The company was formed in 1845. Dixon never executed the deed. That of itself amounts unquestionably to very little, for whatever the effect of it might be at law, in equity it amounts to very little. He consented to act as director in Scotland (I am enumerating all the things that tell most against him), and he did all this at the instance of Daniel Wilkie, and he held the shares at Daniel Wilkie's instance, Daniel Wilkie paying for them. On the 4th May 1846 he executed a proxy for the purpose of voting on these ten shares, and the vote was accordingly taken. On the 26th June Wilkie paid in his name a deposit of 10*l.* on the shares, and in 1847 he received a dividend of a few shillings upon the shares. The consequence of all this is that up to that moment, it is quite clear, he was a shareholder. Though he had not executed the deed, he had consented to take the shares, he had executed the proxy and had received dividends, and his name was returned as in the list of shareholders up to and in the month of Nov. 1848. It was not returned afterwards. Then what took place was this. [His Lordship stated the circumstances relating to the cancellation of the shares.] Now what is the nature of the transaction as it stood at that time? The state of the authorities on the subject is very unsatisfactory; it is such that, the more I look at them the more I feel it impossible to reconcile everyone of them according to the principle which is laid down; I do not think anybody has ever yet succeeded in doing so, or will be able to do so, and you are therefore obliged to deal with each case separately. Upon the whole I think this case comes more near *Lord Belhaven's case* (*sup.*), than any other. I am quite clear the directors had power to compromise questions where there were real questions to be compromised. Now was there a real question to be compromised in this case? Mr. Wilkie, whom I consider to be proved to be the agent of the company, asked this gentleman (Dixon) to become a shareholder, which he consented to do, provided the liability was limited, and provided that certain other things were done. In consequence of this he allowed his name to be retained till the Bill was thrown out of Parliament. Thereupon he called upon Wilkie to cancel his shares, and say he was no longer a member of the company, and he obviously intended to take steps for that purpose. The result was that the directors thought that it was very hard upon him to be kept upon the list, and they acceded to Wilkie's view that if he were kept on the list it would be discreditable to the company, and would shake confidence in Mr. Wilkie's proceedings, as it would appear that they had got Mr. Dixon to be a member of the company on certain false pretences. Thereupon they sanction his withdrawal, and from that time nothing further takes place so far as he is concerned. This has nothing to do with the Chippenham arrangement. It is not in the slightest degree connected with or affected by that. In the mean-

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time a great number of other transactions are entered into by the company; Mr. Dixon has nothing to do with them, he has no power or control over them, but now at the end of twenty years he is called upon to be put on the list of contributories. I do not mean to blame the official liquidator for taking no steps for that purpose before, for I do not exactly know the length of time which has been occupied in the proceedings in the Court of Chancery and the House of Lords, under the winding-up for the purpose of settling what the law was on this subject. No doubt a great many years have been occupied in that manner, and of course the official liquidator is not accountable for the delay in not proceeding against Mr. Dixon during all that period of time. But the evil to Mr. Dixon is exactly the same. He might have taken some steps against Mr. Wilkie if he had known that the whole of the transaction was absolutely irregular and illegal. Upon the whole I do not think that the transaction was absolutely void. The utmost that can be said of it is that it was voidable. The directors had full power to compromise questions; they considered that this was compromising a question. If they improperly exercised their judgment in compromising a question to the injury of the shareholders, then the shareholders and the company might have come to set that aside; but they cannot say that it was absolutely void from the beginning and that no time is a bar. I am of opinion that this compromise having been acquiesced in for twenty years without any step having been taken against Mr. Dixon, the official liquidator cannot open the question now and put him in a situation from which he could easily have extricated himself, if what is being done now had been attempted twenty years ago. Nothing would have been more easy then than for him to have got somebody to take the shares and to have got out of the concern altogether. Therefore, although I cannot say that the question is free from difficulty, or that it does not come very near the dicta in the nine or ten cases which have been reported in this company; indeed, it comes very near the dicta on both sides—I am obliged to judge of it for myself alone as it now stands, and I am of opinion that Mr. Dixon is not properly a member of the company, and that his name ought to be taken off the list of shareholders. I must give Mr. Dixon his costs, as I do not put him on the list, and the official liquidator must have his costs. It is very obvious that if the company had become prosperous, and Mr. Dixon wished to become a member of the company, it would be impossible for him to do so, and no step on earth could have restored him to that position. Therefore it is a one-sided transaction, and there is not an equal degree of fairness in now seeking, twenty years after the transaction. to make him liable for debts which he never contracted.

Solicitors for Mr. Dixon, *Kingsford* and *Dorman*, for *Wilson* and *Farrar*, Cranbrook.

Solicitors for the official manager, *Horn* and *Murray*.

Solicitors for Houldsworth's executors, *J. Elliot Fox*.

Thursday, July 8.

GRIFFITH *v.* THE CAMBRIAN RAILWAY COMPANY.

Land taken by railway company—Unpaid vendor—Decree for specific performance—Act restraining proceedings—Leave to prosecute decree notwithstanding Act.

A., whose land had been taken by a railway company for the purposes of their undertaking, obtained a decree for specific performance against the company. An Act was then passed, which provided that no proceedings against the company should be continued or commenced during the period of five years unless with the leave of the High Court of Chancery.

On a motion by A. for leave to prosecute his decree.

Held, that he must have leave to do so, unless the amount due to him was paid by a given day.

This was a motion under the 36th section of the Cambrian Railways Act 1868 for liberty to prosecute the decree in the suit by proceeding to a sale of certain lands, mentioned in the decree, which had been taken from the plaintiff, for the purposes of their undertaking, by the Aberystwith and Welsh Coast Railway Company, which was now merged in the defendant company.

The plaintiff filed his bill in 1867, and obtained a decree for specific performance against the company and a declaration that he was entitled to have a lien as an unpaid vendor upon the land taken from him by the company, for his unpaid purchase-money, interest, and costs.

By his certificate, dated 15th Feb. 1869, the chief clerk certified that there remained due to the plaintiff, for purchase-money and interest, the sum of 125*l.* 1*s.* 10*d.*; and by a further certificate, dated 21st April, he found that there was due to the plaintiff for costs the sum of 164*l.* 9*s.* 5*d.*, making together the sum of 290*l.* 1*s.* 3*d.* Having in vain made several applications for payment of the amount, the plaintiff at length served notice of the present motion.

The 36th section of the Cambrian Railways Act 1868, under which this motion was made, provides that from and after the passing of the Act, and except as by the Act provided, no actions, suits or other proceedings against the company, or affecting the property of the company, except proceedings against the company as carriers of goods or passengers, or in respect of liabilities contracted after the passing of the Act, shall be continued or commenced during the period of five years, unless with the leave of the High Court of Chancery to be obtained on summons or motion in a summary way, and upon such terms as the court may impose; provided that the costs of any action or suit or other proceedings against the company, or affecting their property, which shall be discontinued pursuant to this Act shall be in the discretion of the court, and, if allowed, may be added to the debt.

Osborne Morgan, Q. C. and *Chute*, for the plaintiff, argued that the plaintiff should be allowed to prosecute his decree, as a similar permission had often been granted by the court under the 87th section of the Companies Act 1862, which was similar to the 36th section of the Cambrian Railways Act. They cited

Re London Cotton Company, 14 L. T. Rep. N. S. 135; L. Rep. 2 Eq. 53;
Wing v. *Tottenham and Hampstead Junction Railway Company*, L. Rep. 3 Ch. App. 740;
Eyton v. *Denbigh, Ruthin, and Corwen Railway Company*, 20 L. T. Rep. N. S. 388; L. Rep. 7 Eq. 439;
Wootton v. *London, Chatham, and Dover Railway Company*, 3 W. Notes 203;

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Symes v. *Cambrian Railway Company*, 3 W. Notes, 284;
Re Imperial Steam and Household Coal Company, 3 W. Notes, 105.

Fry, Q.C. and *Humphreys*, for the company, contended that the cases under the Companies Act 1862 did not apply to the present case, as the object of the two Acts was quite different, that of the Companies Act 1862 being to facilitate the winding-up of companies which had ceased to work, while the object of the Cambrian Railways Act 1868 was to prevent actions for a given time, in order that the company might continue a working company. They cited,

Re Cambrian Railways Company's Scheme, L. Rep. 3 Ch. App. 278.

Lord ROMILLY, without calling for a reply, said that the plaintiff must clearly have liberty to prosecute his decree. The company had taken possession of his property, and he must be paid for it. He would have leave to go on with the decree on or after the third seal in Michaelmas Term, if not paid by that time. The company must pay the costs of the motion.

Solicitors for the plaintiff, *Burne* and *Parker*.

Solicitors for the company, *N. C.* and *C. Milne*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Friday, June 11.

SKIDMORE v. BRADFORD.

Advancement—Obligation—Contract to purchase.

B. agreed to purchase certain property, but having represented to the vendor that the purchase was intended for a nephew, whom he had adopted, the contract was drawn up in the nephew's name. Subsequently the nephew, on the understanding that B. would pay the purchase-money, signed the contract. B. paid part of the purchase-money, but died before the day fixed for the payment of the whole:

Held, that B.'s estate was liable for the payment of the balance.

This was an administration suit. The facts were as follows.

Jacob Bradford, the testator in the cause, wholesale ironmonger at Manchester, had adopted his nephew, Edward Bradford; and brought him up to and given him the management of part of his business.

In Feb. 1867, the testator contracted with one Charles Johnson to purchase a warehouse in Oak-street, Manchester, for the sum of 5000*l.* On the 14th of the same month the testator called upon Johnson, who produced the agreement for the purchase, which purported to be made between Johnson and the testator, and stipulated *inter alia*, that the purchaser was to pay down a deposit of 2000*l.*, and to pay the residue of the purchase-money on the 25th March 1868, when he was to be let into possession, and in case the purchase was not then completed, the purchaser was to pay interest at the rate of 5*l.* per cent. per annum.

The testator, however, objected to having his name inserted in the agreement, and said that as he had made the purchase for the benefit of his nephew, Edward Bradford, he wished his name to be substituted for his own.

This was accordingly done, and the testator then paid Johnson 1000*l.* in part payment of the purchase-money, and said he would get his nephew to sign the agreement. The receipt for the 1000*l.* was, in accordance with the testator's direction, made out in his nephew's name.

Subsequently the nephew signed the agreement.

In March 1867 the testator gave his nephew a further sum of 500*l.*, on account of the deposit and the receipt for this amount, as on the previous occasion was made out in the nephew's name.

In May 1867 the testator died intestate, leaving the balance, 3500*l.*, of the purchase-money unpaid, and making no provision by his will, or otherwise for its payment.

The question now to be decided, on further consideration, was whether the residue of the purchase-money was payable out of the testator's estate.

Charles Hall and *Russell Roberts* for the plaintiff.

Dickinson, Q. C. and *Fischer*, for Edward Bradford, the nephew, submitted that, as the testator had represented that the purchase of the warehouse was intended as an advancement for his nephew, his estate was liable to make good the representation on the faith of which the nephew had been induced to sign the contract. They cited

Crosbie v. *McDoual*, 13 Ves. 148;
Reddington v. *Reddington*, 3 Ridg. P.C., 106;
Hammersley v. *De Biel*, 12 C. & F. 45.

Karslake, Q. C., *C. T. Simpson*; *Greene*, Q. C. and *Haddan*; *Schomberg*, Q. C., *Jackson*, and *T. A. Roberts*, for various parties interested in the testator's estate, opposed the claim of the nephew on the ground that he was a mere volunteer. They cited

Money v. *Jorden*, 5 H. of L. Cas. 185;
Ex parte Pye, 18 Ves. 140, 149.

The VICE-CHANCELLOR.—The case is governed by *Crosbie* v. *McDoual* (*sup.*) If Edward Bradford, the nephew, had been a mere volunteer, there is no principle on which he could come to this court to have the testator's act of bounty completed, and his claim admitted against the testator's assets; but if on the faith of the representations of the testator, he has involved himself in any liability, or has incurred any obligation, he cannot be considered a volunteer, and the testator's assets will be liable to make good the representation on the faith of which he has acted. It has been proved beyond all doubt that the real contracting party was Jacob Bradford; that in making the purchase, his object was to benefit his nephew; that the vendor knew all the circumstances of the purchase; that when the contract was prepared, the testator desired his nephew's name to be inserted therein, and that in consequence of that insertion, the nephew came under a legal obligation to pay the purchase-money. This liability to be sued having been incurred on the faith of the representations of the testator that he would give him the warehouse, brings the case within that portion of the judgment in *Crosbie* v. *McDoual*, where Lord Erskine, in adopting the argument of Sir Samuel Romilly says: "Suppose a man the frequent guest of another in the country, adjoining whose seat is a piece of ground that would add considerably to the beauty and enjoyment of the place, but an enormous price is asked; that the guest attached to the place desires his friend to contract for that piece of ground for him, and says he will pay for it, and the other contracts accordingly and pays far beyond the value; would a court of equity permit the man to recede from his engagement? would not that be considered a fraud in respect of the consideration, an engagement contracted at the request of another, into which without that motive the party contracting would not have entered? The Statute of Frauds has nothing to do with it. . . . The principle of law upon these actions is, that though upon a mere voluntary promise, an

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action at law does not lie, yet if one binds himself to pay, and does pay money in consequence of an obligation undertaken by another, the one has money which in equity and conscience ought to be the money of another; and that is not *nudum pactum.*" Applying this principle to the present case, I am of opinion that the assets of the testator are liable to make good the obligation which has been incurred by Edward Bradford, and that he is entitled to have the balance of the purchase-money paid out of the testator's estate.

Solicitors for the plaintiff, *Chester* and *Urquhart.*

Solicitors for the defendants, *N. C.* and *C. Milne; Randell* and *Smith.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Thursday, July 22.

BURTON *v.* EARL DARNLEY.

Practice—Ward of court concealed—Evidence as to residence of ward—Solicitor of parent—Privilege.

E. B., being made a ward of court on bill filed, and a guardian appointed, the mother resisted the order, and removed E. B. to Spain. The mother subsequently came to England and an order was made for delivery up of the ward in a limited time, and her former solicitor was examined in court as to her residence and other matters, and claimed professional privilege:

Held, that he was bound to answer such questions; and generally, that no solicitor or officer of the court, or other person, can refuse to answer any question, or do, or abstain from doing anything, whereby the court is prevented from discovering the residence of its ward.

This was the renewal of an application that Mrs. Burton, mother of Eliza Laura Emma Burton, should within a time fixed, deliver up the said Eliza Laura Emma Burton. Mrs. Burton, who was left a widow in 1865, her husband, Col. Burton having then died, placed her daughter, who was entitled to a considerable fortune, at school at Bayonne. In Sept. 1867, Admiral Burton, who had been appointed testamentary guardian, filed the present bill to be appointed guardian, and that his ward might be appointed a ward of court; and the Vice-Chancellor made the order as vacation judge. Mrs. Burton refused to obey that order, but the French court, on being applied to, confirmed it. She then removed her daughter to some part of Spain, and from that time their residence could not be discovered. It had recently transpired that Mrs. Burton was in England, and a petition having been presented on the 25th June 1869, an order was made upon Mrs. Burton to deliver up the ward, and was served upon her solicitor, Mr. Alfred Markby, but the order not being obeyed, and her residence not being known, he was ordered to attend, and the matter having stood over, he was now examined *viva voce* by

Cotton, Q. C. (*Fischer* with him) in support of the motion.—Mr. Alfred Markby's evidence was, in substance, that he was the solicitor of Mrs. Burton, but had ceased to be so yesterday. He was aware that she did not obey the order of the court, from which he meant it to be inferred that she had been guilty of contempt; that he communicated the fact to her of the existence of the suit, and that Admiral Burton had been appointed guardian, which appeared by certain letters. But he felt a difficulty as to where the line was to be drawn with respect to disclosing private communications between him and his client; at the same time, having no objection, if he was compelled, to disclose them, and no desire to keep back any information from the court. The question was as to his professional duty, it being clear that a solicitor was not at liberty to disclose confidential communications, whilst he was the solicitor of the party. He believed Mrs. Burton was in England.

The VICE-CHANCELLOR.—Mrs. Burton has set the court at defiance for two years. Mr. Markby is an officer of this court, and I am of opinion that he is bound to answer the questions to enable the court to obtain possession of its ward. On this point no line can be drawn. No officer of this court can aid or abet in concealing the residence of a ward.

Mr. Markby then said that Mrs. Burton was, or lately had been, at 36, Oxford-terrace, Hyde-park; he had addressed a letter to her there; he had ceased to be her solicitor in consequence of a previous arrangement. It was his decided impression that he did not communicate the order made on the petition to her.

Cotton, Q. C. said that the question now was whether there should be an order to commit Mrs. Burton for contempt. She was, in fact, perfectly aware of the whole proceedings. She had ineffectually fought the question in the French court. There could be no doubt that the order ought now to be made, and that she must stand committed.

The VICE-CHANCELLOR.—In this case Eliza Laura Emma Burton, the daughter of Colonel Burton, who died in 1865, up to 1869 resided with her mother, and is now of the age of fourteen. An application was made to me in Sept. 1867, as vacation judge, upon a bill just filed to appoint a guardian, on the representation that she had been placed by her mother in a day school at Bayonne; and this application was on the affidavit of Admiral Burton, the guardian. I made the order till the first day of Michaelmas Term. That was resisted by Mrs. Burton, but the French court to whom she applied gave effect to my order, and it became her duty to deliver up the child to the guardian. Instead of that she set the court at defiance in a manner I never knew before, and possibly never may again, and removed the child to Spain, and every effort was ineffectual in discovering where she was to be found. I may mention that the child was in possession of a very large fortune, and it was of the highest importance that she should be taken care of and properly educated. There being reason to believe that Mrs. Burton had come to England, an order was made that she should appear; and a petition, which was presented on the 25th June last, was served upon Mr. Alfred Markby, her solicitor, to show that he was in communication with her and that letters had passed between them; and on affidavit of service, on the 7th July, I made an order that she should within a time limited deliver up the ward. On the evidence that has been given to-day it must be understood that I give my decision that no solicitor, in consequence of any privilege connected with his client, as in the present case, with respect to Mrs. Burton, and no officer of this court or other person can decline to answer any questions, or be at liberty to conceal any fact, enabling the court to discover the residence of its ward; and this is the result of deliberate consideration on my part. Mr. Markby with great propriety has told us the extent of his communications and the nature of them, although he will not undertake to say that he told Mrs. Burton of the order of the 7th July; but I have no more doubt of its being made than that it was served; and I am satisfied that she is setting the court at defiance, and that she is aware of this

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order. Mr. Markby has now told us her address, and therefore I now make the order for delivery up of the ward.

Solicitors: *Farrer, Ouvry*, and *Co.*

[Mrs. Burton was taken into custody on the next day after the above order was made.]

Thursday, July 22.

RAMSBOTHAM *v.* SENIOR.

Practice—Ward of court—Solicitor's privilege—Concealment by mother—Production of envelopes of letters.

The mother of two wards of court concealed their residence and her own from the trustees and the court, but wrote to her solicitor giving no address:

On summons for the production of such envelopes, order made.

This was a summons taken out to compel Mr. Patterson, the solicitor of Mrs. Senior, the mother of two infant wards, a son and daughter, aged respectively five and six years, to produce certain envelopes of letters containing no address, and received by him from her. It appeared that the children were entitled to 10,000*l.* a year, and their mother to 2000*l.* a year, under the will of the father of the infants; and they having been made wards of court, the mother attended before the Vice-Chancellor in chambers on more than one occasion, and promised to follow the advice which he then gave her, and to keep the wards within the cognisance of the trustees. These promises, however, had not been kept; she had removed the boy from a tutor with whom he was, and with whose conduct the Vice-Chancellor was well satisfied, and had taken both herself and her children out of the knowledge of the court and the trustees, and their place of abode could not be discovered. Mr. Patterson, her solicitor, had, however, received letters from her, although such letters threw no light upon the matter, inasmuch as they contained no address.

Prendergast, Q. C. and *Renshaw*, in support of the summons.

J. Pearson, Q. C. and *Wickens* appeared in opposition to the summons.

The VICE-CHANCELLOR.—The object of this summons is to compel Mr. Patterson, the solicitor of Mrs. Senior, the mother of the infant wards, to produce the envelopes of letters received from her by him, there being not the slightest imputation on his conduct. The children are respectively aged five and six years, and, Mr. Patterson having attended me, I put the question to him whether he knew their residence, and he told me that he did not; and I am satisfied the fact is that this lady, the mother of two children entitled to 10,000*l.* a year under the will of their father, is educating and bringing them up with the greatest impropriety. I have seen her repeatedly in chambers, and given her my advice, which she said she would follow; whereas she has been playing at hide-and-seek with the trustees, which alone renders her liable to be proceeded against, and, in addition, having undertaken to let them know where she was, in defiance of that she absented herself with her children, and all efforts have been in vain to discover where she is. Being entitled to 2000*l.* a year under her husband's will, I have directed the bankers to stop making any payment to her on that account, in hopes, if possible, of forcing her to capitulate. That, however, is not now the question, but whether Mr. Patterson, her solicitor, from whom she has concealed her residence, but to whom she has written, can be compelled to produce the envelopes of those letters, it being possible (not probable) that if they are produced it may turn out that the letters have been posted where she resides, and it may lead to the discovery of her residence. My impression in chambers was, and is now, that no officer of this court nor other person can have any privilege to keep back any information which may lead to such discovery. I don't agree with Mr. Wickens in his view on the subject. I think it would be aiding and abetting in concealing the residence of the ward. Now, with respect to the privilege; I believe I am right in saying the rule is, that the privilege is not that of the solicitor, but of his client, and therefore, if the client has none, the solicitor has none. Now, this is the case of a lady who has been guilty of a contempt of this court in defying its order and taking away children who ought to be under its custody; and I cannot imagine an instance of greater impropriety. She can have no privilege to conceal their residence, in itself a contempt of court of the highest kind. If she has none, how can her solicitor? It is indifferent to him, and he can have no object except to do what is right, and his duty towards the court. This is in fact the bill of the wards themselves, and the principle expressed in most of the cases on the subject leads to an opinion upon which I am more decided than before, that no person, whether solicitor or not, has any privilege in any way to do or abstain from doing that which has the effect of concealing a ward from the court. I do not put the case on the circumstances occurring with respect to Mrs. Senior in particular, for where it is a question of giving up wards of court there is no difference on the question of privilege. The court has a right to say that a child shall not remain anywhere except under the right legal control, and I have the gravest duty to perform as to who should have the dominion. When the mother brings them before me I shall consider whether the girl shall remain with her, or with the guardian, or go to a proper school. As to the boy, it was a great act of contempt to take him away from the person with whom he was placed, for I saw the gentleman, and he gave me the highest opinion of his ability and diligence; and I have invited counsel to tell me if there is anything to be found in the practice of this court or the suggestion of any principle that any person, whether an officer of this court or not, is permitted to conceal the residence of a ward, or to do anything preventing the court which has the custody of the wards from putting them under the proper custody, and this protection thus afforded them is of the highest importance. With respect to Mrs. Senior's moral character there is no fault; but, supposing wards were in the possession of a woman of abandoned character, the court will remove them from such undue influence and put them under proper control. But can it be for the public benefit, and for the preservation of civil rights, that a solicitor should not be at liberty to disclose that which is the privilege of the client when it tends to conceal the residence of a ward? There is a wide distinction between this and the ordinary cases of privilege, and the principle can have no application in such a case as this. I believe that I made a right order in *Burton* v. *Earl Darnley* (*ante*, p. 292), where I directed a solicitor to answer a question, and decided that it was the duty of anyone to do so in such a case, and if he knew anything tending to afford the required information, I should tell him to disclose it. In most cases, no doubt, it may be a question whether he has papers or documents which may be privileged, or which he may be bound to produce; but I intimated in chambers, and I have carefully considered it to-day—and I had occasion during the last week to think much of it—that I

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could find no authority, and none has been supplied me, which concludes the question, but it is left open. I therefore decide that no solicitor can be privileged to refuse to give the court any information which will discover the residence of a ward. There must therefore be an order for production of the envelopes.

Solicitors: *Wharton* and *Fords*; *Paterson, Snow*, and *Burney*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET, and R. T. BOULT, Esqrs., Barristers-at-Law.

Monday, Aug, 2.

Re KEARSLEY'S TRUSTS.

Will—Construction—Vested interest.

A testatrix by her will bequeathed the residue of her personal estate to trustees to invest same and pay the income to her three daughters, M., H. and H., and the survivors, so long as they should continue unmarried, with similar directions on their deaths or marriage to go over for the benefit of the other five daughters. She also provided that in case the last survivor of her daughters should die without having been married, then "immediately after her decease" the residue should be "in trust for all my daughters who shall have been married, in equal shares and proportions; but in case any one or more of my said last-mentioned daughters shall be then dead," as well the original as any other share or shares of her so dying, should be in trust for the children or child of such daughter or each of such daughters respectively in equal shares, if more than one, to be vested at twenty-one:

A child of one of the married daughters, A. G., attained twenty-one, and died unmarried:

Held, that her share went over for the benefit of the other daughters of the testatrix.

This was a petition filed by the personal representatives of Anne Gorst to obtain the construction of the will of a testatrix under which as it was contended, Anne Gorst took a vested interest in a portion of the residue of testatrix's estate, under the following circumstances:

Ann Kearsley, the testatrix, by her will dated 25th Jan. 1838, bequeathed the residue of her personal estate to trustees, upon trust to invest same (with the usual powers to charge, &c.), and pay the income unto equally and amongst her daughters Mary, Harriet, and Henrietta, and the survivors and survivor of them, during such period of their lives as they should continue unmarried. If any of her said daughters who should be unmarried at her death should afterwards marry, her or their life estate was to cease and be in trust for her other unmarried daughters, in equal shares, during such period of their lives as they should continue unmarried. She also made a provision for daughters who should marry after her decease, and directed that in case the last survivor of her said unmarried daughters should die without having been married, then, "immediately after her decease" the residue should be in trust for "all my daughters who shall have been married, in equal shares and proportions; but in case any one or more of my said last mentioned daughters shall be then dead," as well the original as every other share or shares of her or them so dying should be in trust for the children or child, "and of such daughter or each of such daughters respectively, in equal shares, if more than one to be vested, at twenty-one." She afterwards directed, "in case such deceased daughter or daughters respectively shall not have had any child or children, or, having such, all of them shall die under the age of twenty-one years, and without having any issue, him, her, or them surviving," the original and other shares of each such daughter should be upon such trusts for the others or other of the married daughters and children as were then declared concerning the original share or shares of such daughters.

At the time of making her will, the testatrix had eight daughters living, four of whom were unmarried, viz., Mary, Harriet, Henrietta, and Elizabeth; and four married—Anne (the wife of S. Gorst), Catherine (the wife of S. Young), Margaret (the wife of Jno. Gorst), and Charlotte (the wife of Charles Robinson.)

Anne Gorst had one daughter, who attained her age of twenty-one, and died unmarried in 1836.

The testatrix did in 1839.

In Sept. 1865 the surviving daughter, Harriet Kearsley, died, and the fund then fell into possession.

The trustees paid the fund representing the residue of testatrix's personal estate into court, and the question now raised was whether on the death of the testratix the interest which Anne Gorst took under the will became vested, or whether it was devested at her death and went over for the benefit of the other daughters, such of them as had had children.

E. E. Kay, Q. C. and *B. L. Chapman*, for the petitioners, the representatives of Anne Gorst, contended that a vested interest could not be devested except by express words. It could not be said that Anne Gorst had not had a child, although that child had died without having been married, but she had reached her age of twenty-one, and therefore the share of Anne Gorst did not go over.

De Gex, Q. C. *Cutler*, and *Otter* for parties taking adverse interests to Anne Gorst, and

Peck for the trustees, were not called upon by the court.

The VICE-CHANCELLOR said that there could be no doubt as to what the intention of the testatrix was, as expressed by her will. It was perfectly plain. If either of the daughters should have a child, at her death it was to take a vested interest. If, on the other hand, she should have none, the share was to go over for the benefit of the other daughters. Anne Gorst had not a child surviving at the death of the testratrix; she therefore took no interest in the fund; that share consequently went over.

Order and declaration accordingly.

Solicitors, *Iliffe, Roupell*, and *Co.*; *J.* and *R. Cole.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Tuesday, Nov. 2.

Ex parte WM. SMITH.

Criminal information—Libellous article in a newspaper pending an inquiry.

A party having been charged before the coroner with the crime of murder, a newspaper, pending the inquiry, published an article strongly reflecting upon him as a murderer. Having been committed for trial, he was found guilty of manslaughter, and sentenced to nine months' imprisonment with hard labour.

Upon an application by him for a rule for a criminal

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information for such article, the court declined to interfere on the ground that there was no personal malice suggested, and that the article could now exercise no prejudicial influence.

Littler moved on the behalf of William Smith for a rule calling upon Francis Goodlake, the publisher of the *Times* newspaper, to show cause why a criminal information should not be filed against him for a libellous article inserted in that paper of the 29th Sept. last, reflecting in very strong language upon the applicant as the brutal murderer of his wife.

It appeared that in the said month of September the applicant was charged before the coroner of Middlesex, with having at Hounslow been guilty of murder by killing his wife. Whilst the inquiry was pending, the article in question appeared. At the termination of the inquest the jury brought in a verdict of guilty of wilful murder, whereupon the applicant was committed to trial; and, upon such trial before Lush, J. at the Central Criminal Court, the jury found him guilty of manslaughter, and he was sentenced to nine months' imprisonment with hard labour, which term he is now serving.

It was now contended that the article was unjustified by the circumstances and the evidence, and was a serious and injurious reflection upon the accused. [COCKBURN, C.J.—As the facts have been thoroughly sifted at the trial, and he has been acquitted of the murder and found guilty only of manslaughter, it is difficult to see how he has been prejudiced.] He may be greatly prejudiced in this way; many persons may have read the article who had seen no account of the trial.

The COURT were of opinion that as there was no reason to suppose that the writer of the article was influenced by personal malice, and as the article could not now exercise any prejudicial influence, they ought not to interfere by the summary and prerogative process of a criminal information, but leave the party to his ordinary remedies.

Application refused.

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

APPEAL FROM EXCHEQUER.

Friday, May 14.

(Before COCKBURN, C.J., KEATING, LUSH, BRETT, and HAYES, JJ.)

FERRAR v. THE COMMISSIONERS OF SEWERS FOR THE CITY OF LONDON.

Damage by public works—Claim of compensation for—City of London Sewers Act 1848 (11 *&* 12 *Vict. c. clxiii.)—Lands Clauses Consolidation Act* 1845 (8 *&* 9 *Vict. c.* 18) *sects.* 5 *and* 68—*Incorporation of sect.* 68 *of Lands Clauses Consolidation Act in special Act—Construction of incorporating clauses—Right to compensation under.*

By sect. 2 *of the City of London Sewers Act* 1848 (11 *&* 12 *Vict. c. clxiii*) *all the provisions of the Lands Clauses Consolidation Act* 1845 (8 *&* 9 *Vict. c.* 18) *are incorporated with the special Act "except so far as the said provisions are inconsistent with the special Act, or are therein declared not to extend thereto;" and by sect.* 3 *of the special Act it is provided that the provisions of the Lands Clauses Consolidation Act relating to "the purchase and taking of lands otherwise than by agreement" shall not extend to the Act; and it was*

Held, by the Court of Error (Cockburn, C.J. and Keating, Lush, Brett, and Hayes, JJ.) reversing the judgment of the Court of Exchequer, that the 68*th section of the Lands Clauses Consolidation Act* 1845, *although included under the heading "with respect to the purchase and taking of lands otherwise than by agreement" introduced between sects.* 15 *&* 16 *of that Act, is nevertheless expressly excluded and excepted out of the City of London Sewers Act* 1848 (11 *&* 12 *Vict. c. clxiii.*) *by the* 3*rd section of that Act; and that consequently the owner of a house and premises which had been injuriously affected by the public works of the defendants executed under the powers vested in them by the last-mentioned Act, for which no provision for compensation was thereby specially made, was not entitled to compensation from the defendants' under the Lands Clauses Consolidation Act* 1845. (Broadbent *v.* The Imperial Gas-Light Company, 26 *L. J.* 276 *Ch., distinguished.*)

This was an appeal from a judgment of the Court of Exchequer (Kelly, C. B., and Pigott and Cleasby, BB.), delivered in Michaelmas Term last, upon a special case, which involved the construction to be put upon certain sections of the City of London Sewers Act 1848 (11 & 12 Vict. c. clxiii, local and personal), and also of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18). It was originally an action for damages done to the plaintiff's house and premises by certain public works executed by, or under the orders and authority of, the defendants in pursuance and by virtue of the powers vested in them as Commissioners of Sewers by their said Act; and the plaintiff also claimed compensation for the said damage under sect. 68 of the Lands Clauses Consolidation Act 1845.

It appeared, from the facts stated in the special case, that the plaintiff was a licensed victualler, who was possessed of a house and premises, which he occupied as a tavern or hotel, in Liverpool-street, in the City, and that he claimed compensation from the defendants under the City of London Sewers Act 1848, on account of his premises having been "injuriously affected by reason of the defendants, as Commissioners of Sewers of the City of London, having, in the course and progress of their improvements and alterations in the said street, under sect. 120 and the general powers of their Act, caused the ground and soil of the said street to be raised and made level, whereby the pavement in front of the plaintiff's house was raised above its former level, and consequently above the entrance to the said house. The facts connected with the case are fully set out in the report of the case in the court below (19 L. T. Rep. N. S. 485; reported also 38 L. J. 17, Ex.; L. Rep. 4 Ex. 1), so that it is unnecessary further to refer to them here. But the following sections of the general and special Acts of Parliament, referred to and relied on in the arguments of counsel, and the judgment of the Court of Error, may succinctly be stated:

The City of London Sewers Act 1848 (11 & 12 Vict. c. clxiii) ss. 2, 3, and 190 (under which the work in question was done), enacts that:

> For the purpose of enabling the commissioners to be appointed in pursuance of this Act to effect the purchases by this Act authorised, and to carry into execution the real purposes of this Act, the Lands Clauses Consolidation Act 1845, shall be incorporated with and form part of this Act; and the provisions of the said Act shall be applicable to the purposes of this Act, except so far as the said provisions, or any of them, are inconsistent with this Act, or are hereinafter declared not to extend thereto; and in construing the said Act, the commissioners to be appointed in pursuance of this Act shall be deemed the promoters of the undertaking for which such lands are required."

By the 3rd section it is provided:

> That the provisions in the said Lands Clauses Consolidation Act contained *relating to the purchase and taking of lands otherwise than by agreement*, and also the provisions therein contained directing lands not wanted to be sold, and that the lands not sold shall vest in the owners of adjoining lands, and that the lands intended to be sold shall be offered to adjoining owners, and requiring owners to claim their right of pre-emption within six weeks, and also

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with respect to the recovery of forfeitures, penalties, and costs, *shall not extend to this Act or to the purposes thereof.*

By sect. 120 (which authorises the doing of the works in question in this case) it is made

Lawful for the commissioners from time to time to cause all or any of the streets within the city, or any part thereof respectively, to be paved or repaved when and as often, and in such form and manner, and with such materials, as the commissioners shalt think fit, and to cause the ground or soil thereof to be raised or lowered, and the course of the channels running in, into, or through the same, to be turned or altered in such manner as they shall think proper, and all such mains and pipes as now lie, or hereafter shall be laid underground, to be taken up and new laid in such places, manner, and form as they shall judge best."

In this section nothing is said about compensation.

But by sects. 153, 156, 159, 236, and 239 of the Act compensation in certain cases therein specified is provided for, as for instance by sect. 153 it is enacted:

That if any building which shall in any part thereof project beyond the regular line of the street in which the same may be situate, &c., shall at any time be taken down to be rebuilt or altered, it shall be lawful for the commissioners to require the same to be set backwards to such a line and in such manner as the commissioners shall direct, for the improvement of such street the commissioners *making full compensation to the owner of such building for any damage which he may sustain thereby.*

And by sect. 159 the commissioners are empowered to remove existing projections, and are to make compensation for any damage caused by such removal. And by sect. 236 it is enacted that in all cases where the amount of any damages, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, or any damages, costs or expenses are by this act directed to be paid, and the method of ascertaining the amount and enforcing the payment thereof is not provided for, such amount in case of dispute shall be ascertained and determined by any justice of the peace, &c.

The Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), sect. 5, enacts that

Wherever it may be convenient in some cases to incorporate with Acts of Parliament hereafter to be passed some portions only of the provisions of this Act, for the purpose of making any such incorporation it shall be sufficient in any such Act to enact that the clauses of this Act with respect to the matter so proposed to be incorporated (*describing such matter as is described in this Act in the words introductory to the enactment with respect to such matter*), shall be incorporated with such Acts; and thereupon all the clauses and provisions of this Act with respect to the matter so incorporated shall, save so far as they shall be expressly saved or excepted by such Act, form part of such Act.

By sect. 68 it is enacted that

If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in any case shall exceed the sum of 50l., such party may have the same settled either by arbitration, or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid, the amount of compensation so claimed, and the same may be received by him, with costs, by action in any of the Superior Courts.

Under the heading, or introductory words, "with respect to the purchase and taking of land otherwise than by agreement," are included and comprehended all the sections of the Act from sect. 16 to sect. 68, inclusively.

The court below gave judgment in favour of the plaintiff, and held that he was entitled to compensation (see *ante*, vol. 19 L. T. Rep. N. S., p. 485), and the defendant appealed to the Court of Exchequer Chamber, and the question, whether or not the plaintiff was entitled to compensation from the defendants, now came on to be argued.

Joseph Brown, Q. C. (with whom was *J. O. Griffits*), appeared for the defendants, and submitted that the plaintiff was not entitled to compensation. It was clear, he contended, that compensation was not intended by the Legislature to be given in the present case, since it was expressly provided for in certain cases by various sections of the City of London Sewers Act, as for instance, by, amongst others, the 153rd, 156th, 159th, 236th, and 239th, which showed that, where it was intended to be given, it was expressly provided for. The present case, therefore, was either an *intentional* omission on the part of the Legislature, or a *casus omissus* through oversight. The defendants were a public body too, acting for the public good, and not a private body acting for their own or any individual's benefit or advantage. Unless, therefore, they can be shown to have acted illegally, unjustly, or oppressively, they could not be made liable. [Cockburn, C. J.—I do not think we can assume that the Legislature intended to give power to the defendants to injure individuals, and yet to give the latter no compensation.] The sections above referred to show the cases in which compensation is to be awarded. *The Governor, &c., of The British Cast Plate Glass Manufacturers* v. *Meredith*, 4 T. R. 794, and *Boulton* v. *Crowther*, 2 B. & C. 703, show that the Legislature may well have given these powers to the commissioners in certain cases without qualifying them by any liability to make compensation. The general heading "With respect to the purchase and taking of lands otherwise than by agreement," inserted between sects. 15 and 16 of the Lands Clauses Consolidation Act 1845, applied to and controlled all the sections from 16 to 68 inclusive, and all these sections would be, by virtue of sect. 5 of the same Act, incorporated by using the words of the said heading, and in the same way they were all excluded or excepted by the use of the same form in sect. 3 of the City of London Sewers Act 1848. That the operation of sect. 68 was intended to be excluded was shown by the various sections giving another mode of compensation. [Cockburn, C. J.—If sect. 68 is not to be taken as giving compensation to persons whose lands are "injuriously affected," what other clause in the Act is there which provides compensation? It is so extraordinary an omission that it would almost seem that it was assumed and understood that it gave compensation.] Sect. 68 only points out the mode of obtaining or assessing compensation, and does not give the right to it, as it is in all railway Acts the compensation itself is given by the Railway Clauses Act, and the mode of compensation is pointed out by sect. 68 of the Lands Clauses Consolidation Act. So that even if sect. 68 be not excepted in the present case, still it relates to procedure only, and has no further operation.

Keane, Q. C. (with whom was *T. Barnard*), for the plaintiff or respondent, *contra.*—As in the court below so here the first question was whether sect. 68

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of the Lands Clauses Consolidation Act 1845 was or not incorporated in the City of London Sewers Act 1848 by sect. 2 of the latter Act, and it was contended on the part of the plaintiff that it was. It had been argued by the other side that if it were to be held as incorporated it was so only as relating to procedure; but if that were so, yet being incorporated for that purpose only, the right to compensation would follow necessarily and by implication. The case of *Broadbent* v. *The Imperial Gas Light Company*, 26 L. J. 276, Chan., was applicable here. There it was held by the Lord Chancellor (Lord Cranworth) and Crompton and Willes, JJ., that sect. 68, although included under the heading or division of the clauses relating to the "purchase and taking of lands otherwise than by agreement," was not excepted by the particular section of the special Act which incorporated the Lands Clauses Consolidation Act, "except so much as related exclusively to the purchase and taking of land by compulsion." *Leader* v. *Moxon*, 3 Wils. 461; 2 Black. 924, was also in favour of the plaintiff's view of the statute.

Brown, Q. C. in reply.—There was an excess of authority by the commissioners in *Leader* v. *Moxon*, and the decision in *Broadbent's* case turned on the peculiar wording of the Gas Act, and the introduction of the word "exclusively" in the excepting clause of the section of the Special Act (17 & 18 Vict. c. lv.) which incorporated the Lands Clauses Consolidation Act (see the judgment of Willes, J.) [LUSH, J.—The title to compensation there had been already given.] I rely not only on the peculiar words of the 3rd section of our Special Act, but also on this that if sect. 68 had been incorporated all the various other sections providing compensation would have been superfluous. (He referred also to sect. 6 of the Markets and Fairs Clauses Act, 10 & 11 Vict. c. 14, and sect. 6 of the Harbours, Docks, and Piers Act, 10 & 11 Vict. c. 27.) The learned Baron below seems to have acted on the view that the commissioners had acted oppressively. But if the Legislature has not by express enactment given compensation in a case like the present the court cannot make the enactment for them.

COCKBURN, C. J.—We are all of opinion that in this case the judgment of the court below must be reversed. The case is a claim on the part of the plaintiff for compensation by reason of his house and premises having been "injuriously affected" by certain works done by or under the authority of the defendants as Commissioners of Sewers, in altering the level of one of the streets of the metropolis. Now, looking at the Act under the powers of which the defendants have done the acts complained of (the 11 & 12 Vict. c. clxiii.), it appears that power is given to them to do the works in question, but that no provisiion is thereby made for the granting or giving compensation to anyone whose property may thereby be "injuriously affected," as the plaintiff's premises have been in the present instance. But then it has been contended on the part of the plaintiff that the Lands Clauses Consolidation Act is incorporated by sect. 2 of the special Act; and that by sect. 68 of the former Act, although it only relates to and points out the mode of procedure to be adopted by a person entitled to compensation, in order to obtain the same, yet nevertheless it must be taken by implication, seeing that it is the only clause in the Act relating to land "injuriously affected," that a right to compensation is thereby given in cases where land has been "injuriously affected" by anything done under that Act itself, or any special Act incorporating it. There can be little doubt that, if we were to decide that sect. 68 is incorporated in the special Act, then compensation might be implied; but unless we were so to decide, we need not express any opinion with respect to the validity of the argument for the plaintiff on that point. We are, however, all of opinion that sect. 68 is not so incorporated. Now, sect. 2 of the special Act expressly incorporates the Lands Clauses Consolidation Act, yet by the 3rd section of the special Act it is expressly enacted "that the provisions in the Lands Clauses Consolidation Act relating to the purchase and taking of lands otherwise than by agreement" shall not extend to the Special Act or to the purposes thereof. Now, the meaning of that exception is plain enough and turns on the Lands Clauses Consolidation Act itself, by the 5th section of which it is provided that, in order to prevent the necessity of inserting *seriatim* in the special Act all the various clauses of the Lands Clauses Consolidation Act which it might be desired to incorporate therewith, it should suffice either for incorporating or excluding the various sections following and contained under any particular heading in the Lands Clauses Consolidation Act, to do so by referring to the heading or introductory words preceding the series of questions about to be incorporated or excluded. Now, we find that between sects. 15 and 16 of the Lands Clauses Consolidation Act there is introduced the following heading, namely, "With respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows:" and that there is no other title or heading introduced into the Act until after sect. 68, and then comes a fresh heading. It is, I think, therefore, impossible to say that sect. 68 is not to be taken as included under the heading immediately preceding sect. 16, and which runs thus: "With respect to the purchase and taking of lands, otherwise than by agreement, be it enacted as follows." Taking that, and the fact of a fresh heading occurring after sect. 68, it seems to me clear that it is included with all the other sections subsequent to sect. 15 under the heading introduced between sects. 15 and 16, and equally clear that it is excluded from the special Act by the 3rd section of that Act (11 & 12 Vict. c. clxiii.) But, besides that, it has been pointed out by Mr. Brown, on the part of the defendants, throwing considerable light, I think, upon the matter, that whereas compensation is given in a particular set of cases by sect. 159 of the special Act, it is there expressly declared that the compensation to be given shall be ascertained and awarded through the medium of the Lands Clauses Consolidation Act, under its 68th section. Now, if that section had not been expressly excluded by sect. 3, there would clearly have been no necessity for the introduction of this provision in sect. 159 of the special Act. Then, the case of *Broadbent* v. *The Imperial Gas light Company* (*ubi sup.*) was said by the learned counsel who argued the case for the plaintiff to be an authority in his favour, and against the view which we are now taking of the statute. I think, however, that upon looking closely into it that case is clearly distinguishable, for in that case the local Gas Act incorporated the Lands Clauses Consolidation Act except so much only of it as related *exclusively* to the purchase and taking of land by compulsion, and to the recovery of forfeitures, penalties, and costs. Excluding, therefore, these two specified things, it left altogether untouched that portion of the Act relating to compensation in respect of lands which were "injuriously affected," and consequently sect. 68 and the other sections of the Lands Clauses Consolidation Act were not recited, but remained untouched by the exception in the special Act in that case, a circumstance which, in my judgment, serves to render it clearly distinguishable from the present case. The result of the matter then is that

we cannot hold sect. 68 to be incorporated in the special Act when, in express terms, it appears to be excluded; and even if we were prepared to hold that, if it were incorporated, it would give a right, by implication or inference, to compensation in such a case as the present, yet since it is expressly excluded from the special Act, we cannot hold that the plaintiff is entitled to compensation. The judgment of the court below must therefore be reversed.

KEATING, LUSH, BRETT, and HAYES, JJ. concurred.

Judgment reversed.

Attorney for the plaintiff, *Brown* and *Godwin.*

Attorney for the defendants, *A. J. Baylis*, Churchcourt chambers, Old Jewry, E.C.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

May 1 *and June* 29.

(Before Lord PENZANCE.)

BLACK v. JOBLING.

*Will not forthcoming—Codicil admitted to proof—Revocation—*1 *Vict. c.* 26, *s.* 20.

A testator made a will and codicil which he retained in his own custody, and he subsequently executed a second testamentary paper which he described as a second codicil, and which he handed to his grandson, a legatee under it. At his death the will and the first codicil could not be found, whereupon the second codicil was propounded.

The court held that as the second codicil had not been revoked by any of the modes indicated by the statute, it was entitled to probate as a separate and independent paper.

Ebenezer Black, a farmer, late of Grindon, in the county of Northumberland, died May 8th, 1868, having in Feb. 1865 duly made and executed a will, and in Oct. 1866 a codicil. This codicil varied the will by substituting an annuity of 100*l.* for a bequest of fifty shares in the Hartlepool Docks and Railway Company to his daughter Ann Jobling. It also directed his trustees to sell his interest in the farm of Fenham-hill, and to hold the moneys arising from the sale in trust for the five children of the same Ann Jobling. On the 25th May 1867 he executed a deed of gift of the farm at Fenham-hill in favour of his daughter and her children in the following terms:

I, Ebenezer Black, in the township of Grindon, in the parish of Norham, and also the occupier of the farm of Fenham-hill, in the county of Northumberland, on a lease of seven years unexpired, at the yearly rent of 700*l.*, paying all rates and taxes, do give and devise all the property of the stocks, crops, and implements of husbandry on the said farm of Fenham-hill aforesaid to my daughter Ann Jobling and her children under the covenants and conditions as stated in the lease for their benefit respectively, my grandson Thomas Jobling to have the management of the farm as steward, and keep regular accounts from year to year, and also to pay all servants' wages, rents, taxes, and cesses from the produce of the farm during the continuance of the lease, and for so doing the said Thomas Jobling is to have 15*l.* a year, and after the expiration of the lease the whole of the stock, crops, and implements of husbandry will be sold and converted into money, and equally divided, share and share alike, amongst my five grandchildren, having already made a provision in my will in favour of my said daughter Ann Jobling by giving her an annuity of 100*l.* a year during her life. As witness my hand the 25th day of May 1867. EBENEZER BLACK.

Witness to the signing hereof,
ADAM WHITE,
Writing clerk, Berwick.

On the 19th Oct. 1867 he executed the following testamentary paper:

Grindon, 19th Oct. 1867.

I, Ebenezer Black, farmer, Grindon, parish of Norham, and county of Northumberland, having already bequeathed to my five grandchildren, issue of my daughter Ann Jobling, to wit, Mary, Thomas, Jane, William, and Ann Jobling, the lease, stock, and profits, with everything upon and relating to the farm of Fenham Hall, they paying all rents, taxes, and whatever charges may come against the said farm of Fenham-hill, in addition to which I now bequeath to each of the above named children of my daughter Ann, the sum of three hundred pounds sterling money, when they attain the age of twenty-one years, out of capital, to be paid to them individually by my executors.

EBENEZER BLACK.

Signed by the testator as a codicil to his last will and testament, in the presence of us, who, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

THOMAS HOOD MITCHELL.
ANDREW ELLIOTT.

This paper was given to the defendant, the testator's grandson, and remained in his possession, the testator himself retaining the custody of the will of 1865 and the codicil of 1866. At his death these two papers could not be found, and the defendant thereupon propounded the testamentary paper of Oct. 1867. The plaintiff pleaded that the paper was not executed in accordance with the provisions of 1 Vict. c. 26; that, if well executed, it was intended as a second codicil to his last will and testament; and that the testator had destroyed the said will and first codicil with the intention to revoke them, and the second codicil likewise.

The case was tried before Lord Penzance.

Dr. *Deane* (*Pritchard* with him) for the plaintiff.

Staveley Hill (*Tristram* with him) for the defendant.

T. H. Mitchell proved the due execution of the paper. He stated that on the day it bore date the testator called at the Berwick Union Workhouse, of which witness was the master, and asked him to write a "codicil to his will," observing that his capital was increasing, and that he had 1100*l.* which he wished to give to the family of his daughter, and that he "had already provided a little for them by a farm and the stock upon it." The witness then wrote out the paper, copying the attestation clause from a printed form, and when it was executed the testator took it with him, saying that he should put it aside with his will and other papers.

Thomas Jobling, the defendant, deposed that in Dec. 1867, the deceased gave him the paper, and said that it was something for the family, and that he did not wish his son, James Black (the plaintiff), to know of it.

Dr. *Deane* argued that when he executed the second codicil of 1867, the testator had his will present to his mind, and meant it to be an addition to his will. It must, therefore, stand or fall with the will.

Staveley Hill submitted that the first codicil was practically anulled by the deed of gift, and the evidence showed that the testator intended the paper of 1867 to be independant of the will entirely. It was therefore entitled to probate as a separate and substantial instrument.

Cur. adv. vult.

June 29.—Lord PENZANCE.—In this case the deceased died, having made several wills, but upon his death no will was found. There was, however, in the hands of a legatee an instrument made by the testator, and called a codicil of the 19th Oct. 1867. The codicil recited that the testator had already "bequeathed," as he called it, to his grandchildren everything upon and relating to a certain farm; and it then goes on to say, "in addition to which I now bequeath to each of the above named children of my daughter Ann the sum of 300*l.* sterling when they attain the age of twenty-one years, out of my capital, to be paid to them individually by my executors." And the question in the case is whether that paper can be admitted to probate.

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The codicil, I should say, speaks of his having "bequeathed his farm." It is in evidence that he had previously disposed of it by deed of gift; but the person who drew the codicil, and who was called as a witness, could not say whether or not the deceased was at the time speaking of the deed of gift which he made in May 1867, and which was produced to the court. The ground relied upon against the codicil was that a codicil stood or fell with the will. No doubt that was a general proposition which obtained in the Prerogative Court, but it was subject to certain exceptions. I took the trouble to ascertain what under the old law were the exceptions, but the result of the cases does not appear to me to be by any means satisfactory. The earliest case is the case of *Barrow* v. *Barrow*, 2 Lee, 235. There the testator made a will and a codicil, the whole effect of the codicil being to give the residue of his property to his wife. He afterwards burned the will, saying it was useless, Mr. Wood (the gentleman who drew the codicil) having made his will for him. And there the court held that it was clear the codicil was not destroyed by the burning of the will, but was a substantial instrument or testamentary schedule. The codicil gave the residue, and no one could say what was the residue unless he had read the will which disposed of the other portions of the property, but the court, nevertheless, held that it was not destroyed by the burning of the will, but was entitled to probate as a substantive testamentary instrument. The next is the case of *Medleycott* v. *Assheton* (2 Add. 231), which was decided in 1824. There the will was made in April 1820, and in Dec. 1820 the testatrix wrote a codicil, giving 100*l.* each to the two trustees named in her will, and dividing some trinkets among her family. In Jan. 1824, she looked over the papers in her writing desk, several of which she burnt, and a few days afterwards wrote to her attorney desiring him to destroy her will. The court held that it was altogether a question of intention, and that the legal presumption that the codicil fell with the will might be rebutted by showing that the testatrix intended the codicil to operate notwithstanding the revocation of the will, and as the circumstances were not sufficient to establish such an intention the codicil was held invalid. The next was the case of *Tagart* v. *Hooper* (1 Cart. 289), wich was decided in 1836. The paper was found in the writing-desk of the deceased, and it commenced thus: "This is a codicil to my last will, and to be taken as a part thereof." The court, in pronouncing for the paper, held that in all cases where a codicil had been considered void by the destruction of the will there were circumstances which showed that the codicil was dependent upon the will. That put the burden of proof the other way. In the other cases it was laid down that the presumption was that the codicil was revoked where the will was revoked, but in this it was held that where the codicil was so revoked there were circumstances which showed that it was dependent on the will. These are all the cases on the point before the passing of the statute, and certainly their consideration leaves upon the mind no very definite idea of what is meant by "dependent on the will." In one sense, any codicil that makes any disposition of property at all must be considered to be dependent on the will which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dissevered from the motives which induced the disposition of the rest. It is difficult, if not impossible, to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of must be something of a more limited character. And the meaning of the cases may be that a codicil is independent of the will, unless it is of such a character that the giving validity and effect to it without the will to which it was intended to be attached would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the court in adopting it. But all these cases occurred before the Wills Act. Now the 20th section of that Act is most distinct and positive in its terms. It says, "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (marriage), or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator." And I should have had no hesitation in holding that the intention of the section was to do away with all implied revocations, and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the Act. The first of these is, *In the Goods of Halliwell*, 4 Notes of Cas. 400. There the codicil was dated Sept. 5th 1845, and commenced thus: "This is a codicil to the will of one R. H., and which I desire to be added to my will," and it related solely to accounts between himself and his partner, containing no bequest or appointment. The testator died on the 7th Sept. 1845, and he expressly declared, shortly before the making of the codicil, that he had made a will, and that it was then in existence. In that case the court said that, supposing the will to have been destroyed by the deceased, the codicil would, upon the general principle, fall with it, but held that there was an exception in favour of the paper, inasmuch as it seemed to have been made for a particular purpose, and admitted it to proof. Then comes the case of *Clogstoun* v. *Wallcott*, 5 Notes of Cas. 623, in which the will was made in 1840, and the codicils in 1842. In April 1846 the testator destroyed the will, and in doing so expressed anxiety about the codicils, observing to his brother, "It will not affect the codicils, will it?" In that case for the first time the Wills Act was cited, and the way the learned judge referred to it was as follows: "Under the old law the effect of destroying a will was, by presumption, to defeat the operations of the codicils to that will; but by the present law there must be an intention to destroy. Here, however, the deceased did not mean to destroy the codicils, which remain entire, but, on the contrary, he expected at the time and declared afterwards that the parties interested in the codicils would have the benefit of the legacies he had given them. I am of opinion that the court is bound to pronounce for the validity of the two codicils and I decree probate of them to the brother, who is executor according to the tenour in the first codicil." Since this court was established a case occurred (*Greenwood* v. *Cohen*, 2 Sw. & Tr. 364) which was heard in 1860, and in that case Sir Cresswell Cresswell said, "I think it has been established by the cases cited at the bar, that previous to the passing of the 1 Vict. c. 26, a codicil was *primâ facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute. The question then is entirely one of the intention of the deceased. Where a will and codicil have been in existence, and the will is afterwards

revoked, it must be shown, by the party applying for probate of the codicil alone, that it was intended by the deceased that it should operate separately from the will, otherwise it will be presumed that, as the will is destroyed, the codicil is also revoked." Now, in reviewing these decisions, I cannot perceive that the effect of the statute has been fully considered by the court. Sir Cresswell Cresswell seems to have thought that it had been decided that the statute made no difference, and passed it by as having been so; and Sir Herbert Jenner Fust dismissed the point without any reasoning whatever, merely affirming that the statute had made it necessary that there should be an affirmative intention to revoke. But the statute says nothing of the kind, and unless it makes an actual revocation necessary, it does not interfere with the existing law at all. In this unsatisfactory state of the decisions, I think I shall do best in such a case as the present by adhering to the statute, and by holding that as this codicil has never been revoked in any of the modes indicated by the statute as the only modes by which a codicil is to be revoked, it remains of full force and effect, and is entitled to proof.

Attorney for plaintiff, *Adam Burn*.

Attorneys for defendant, *Smith, Fawdon*, and *Low*.

June 1 *and* 22.

In the Goods of A. HICKS.

Will—Revocation by memorandum—Administration—Practice.

A testator cancelled his will by obliterating his signature and appended to it a memorandum to this effect: "This my last will is cancelled, and as yet I have no other."

The court granted administration with the memorandum annexed.

Algernon Hicks died April 26, 1869, leaving a will duly executed on Aug. 4, 1864. Subsequent to the execution he had struck his pen through his signature, and through several of the bequests, and he had appended to the will the following memorandum, which was duly attested:

April 14, 1868.

Mem. This my last will is hereby cancelled, and as yet I have no other.

A. HICKS.

(Witnesses) ANN CARTER, Cook.
MARY COLES, Housemaid.

Dr. *Tristram* moved on behalf of the widow of the deceased for a grant of administration with the memorandum annexed. He cited

Brenchley v. *Still*, 2 Roberts. 182;
In the Goods of Hubbard, L. Rep. 1 Prob. & M. 153.

Lord PENZANCE.—You are entitled to the grant of administration because the will is clearly revoked, but I doubt whether the grant ought to include the memorandum.

Cur. adv. vult.

June 22.—Lord PENZANCE.—The question in this case was whether a paper signed by the deceased, and which in terms revoked a will under which it was written, was or was not properly executed. The court, upon the whole, came to the conclusion that it was, and was prepared accordingly to let the administration go. But then the question arose whether the administration should go with this paper annexed as being of a testamentary character, or whether it should go without the paper annexed? Now, the section of the statute (1 Vict. c. 26, s. 20) which deals with the revocation of wills, says that "no will or codicil or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same," &c. The language of the statute, therefore, implies that a will may be revoked either by a subsequent will, or by a codicil executed as a will, or by something which is neither a will nor a codicil, namely, "some writing declaring an intention to revoke" the will. I had serious doubts whether this paper ought not to be looked upon merely as "some writing," and consequently, neither a will nor a codicil, so as properly to be made the subject for probate or administration with the will annexed. A case was, however, cited (*Brenchley* v. *Still*, 2 Roberts 162) in which a paper not quite similar to this, inasmuch as the writer began by calling it a codicil, but which in substance was the same as this, because it did nothing and effected nothing except the revocation of a previous will, that case was cited, and there the learned judge thought that probate ought to go of the paper. In deference to that authority, I think that in this case also the proper course will be to allow the grant to go with the paper annexed.

Dr. *Tristram*.—Will the grant include the revoked will?

Lord PENZANCE.—No; in *Brenchley* v. *Still*, the previous papers that were revoked were not annexed.

Attorney: *Norcutt*.

Tuesday, July 6.

IN THE GOODS OF D. JENKINS.

Testamentary suit—Minor—Guardian ad litem—Practice.

Where the mother had been appointed by will guardian of her child, a minor, the court refused to appoint the paternal uncle guardian ad litem for the purpose of disputing the will until the mother had been cited.

David Jenkins died Nov. 28, 1867, and by his will dated Nov. 26, he appointed his wife sole executrix of his will, and guardian of his only child, a minor aged eight years.

The will was proved on Dec. 14, 1867, and

Bayford now moved the court to appoint John Jenkins, the paternal uncle of the minor, his guardian *ad litem* for the purpose of calling in probate of the will, and testing its validity. He relied on Sidney Smith's Chancery Practice, 7th edit., vol. 1, pp. 271, 273.

Lord PENZANCE.—Will he give security for costs?

Bayford.—He will be liable for them.

Lord PENZANCE.—This may be merely a vexatious suit. I don't think I ought to grant the application behind the mother's back. You must first cite her to show cause why the uncle should not be appointed guardian.

Proctor, *W. G. Jennings*.

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NISI PRIUS.

SURREY SUMMER ASSIZES.—Croydon.

Thursday, Aug. 12.

(Before Kelly, C. B.)

Walker v. The South Eastern Railway Company. (a)

Smith v. The Same.

Liability of railway companies for misconduct of their servants upon their premises.

A railway company, whose rules authorise their officers to take into custody persons committing assaults, or taking part in affrays upon their premises, are liable for arrests by their officers, upon their premises made without reasonable cause. And if the company's solicitors afterwards conduct a prosecution, maliciously and falsely instituted by their officers, against the parties arrested, without (so far as appears), reasonable inquiry into the facts; the company are also liable for the malicious prosecution, and the depositions before the magistrate upon which he commits the prisoners for trial, afford the company excuse.

These were actions for assault, false imprisonment, and malicious prosecution, the actions having arisen out of the same transaction, and being tried, by consent, together. To the counts for assault and false imprisonment, the company pleaded a justification on the ground of assaults alleged to have been committed by the plaintiffs upon their officers. To the other counts for malicious prosecution, the company pleaded not guilty.

M. Chambers and *Baker Greene*, for the plaintiffs.

Ballantine, Serjt., *Joyce*, and *E. Clarke*, for the company.

On the 30th June 1867, the plaintiff Walker went by the company's line from London to Gravesend and back. He went as second class passenger, and at Gravesend, on his return journey, third class passengers were put into the carriage with him, upon which he remonstrated, and an altercation ensued between him and the company's officers. When he reached the London station, an altercation took place between the company's servants and another passenger, in which plaintiff took part.

Upon this the inspector turned upon him, and accused him of having caused a disturbance at Gravesend, and one of the company's servants roughly pushed him beyond the barrier, and then thrust him outside the yard, and kicked him as he went out. Another altercation then arose between the company's officers and the other plaintiff Smith, who also was treated with great violence, and in the end, as he resisted, he was given into custody; and the plaintiff being observed not far off, he also was given into custody, and both parties, although they offered to give their addresses, were taken to the station house and locked up. Upon their being brought before the magistrate, he remanded them, more than once, for further inquiry, and in the result he committed them both for trial, on the charge of violently assaulting the company's officers. At the trial, at the Surrey Sessions, the jury stopped the case, and they were both acquitted. They then brought these actions.

It was now admitted on the part of the company that all the acts complained of were committed by their officers upon their premises. It was likewise admitted that the company's officers were authorised by the rules to take into custody persons committing assaults or taking part in affrays; but they were also directed to exercise the authority with care and caution, and not in cases of persons whose addresses were known. It was also admitted that the conduct of the company's men had been wholly unwarrantable, and not only so, but outrageous. And although it appeared that they had been struck in the affray, this was after the acts of outrageous violence on their part. Finally, it was admitted that the company's solicitors had conducted the prosecutions, and, so far as appeared, they had done so without any examination of the case. The depositions taken before the magistrate, being put in by the plaintiffs, were relied upon by the company as proof of reasonable cause, but they were taken after the case had been taken up by the company's solicitors; and moreover, the company's officers, who had committed the acts of violence and made the depositions, were not now called as witnesses to sustain the case they had then set up.

Walker's case had been tried before Martin, B., who thought the company only liable for the original arrest, and not for the subsequent acts; and the jury having given a verdict for 170*l.*, a new trial had been granted; the verdict being on that view deemed excessive.

Ballantine, Serjt., for the company, submitted that the company were not liable even for the arrest or assault, still less for the subsequent violence, as it was unauthorised, and in violation of the rules:

Limpus v. *The General Omnibus Company*, 32 L. J. 34, Ex.

Kelly, C. B., however, thought otherwise; the arrest and assault having been committed by the company's servants upon their premises, and while engaged in the performance of their duties as the company's servants.

Ballantine, Serjt. then submitted that the company were not liable for the acts of wilful tort committed by their servants; at all events, not for malicious acts.

Kelly, C. B., however, observed that though this might have been a question a quarter of a century ago, it could hardly be so now, as it had been held that a company or corporate body could be liable for libel: (*Whitfield* v. *The South-Eastern Railway Company*, E. B. & E. 115; *Welton* v. *Woodcock*, 27 L. J., Ex.)

Ballantine, Serjt. urged that upon the depositions there appeared reasonable cause for the prosecution; or, at all events, that they afforded an excuse to the company for pursuing the prosecution, but

Kelly, C. B. observed that the depositions were taken after the company's solicitors had taken up the prosecution, presumably with the company's authority, and without, as it appeared, any inquiry. Moreover, he was of opinion that there was no reasonable cause.

At the close of the case,

Kelly, C. B. said:—The case divided itself into three stages or portions: the original assault upon the plaintiffs; the giving them into custody on the charge of assault; and the subsequent prosecution. Although, however, these were distinct portions of the transaction, he considered that the company were liable for the whole; nor did he see any distinction between the previous acts of the officers and the subsequent prosecution, because the company had adopted it. With regard to the original assault, it was the duty of a company to provide themselves with proper officers and servants; and as they were entrusted with power to appoint police constables for the preservation of order throughout their premises (*Mahoney* v. *Besley*, 4 F. & F. 544), they were bound to take care that these officers conducted themselves with propriety, and did not

(a) Reported by W. F. Finlason, Esq., Barrister-at-Law.

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commit wanton acts of violence upon their passengers upon their premises. For what had been done in this case either as to the assault or the arrest, it was admitted that there was no justification. As to the prosecution, he was of opinion that there was no reasonable cause for it, as the case for the company's servants (which they were not here to support) was shown to be false. That being so, the case was made out, and on that count, as he had already said, he considered the company liable on this as on the other counts. It was admitted that their solicitors had conducted the prosecution, and, as far as appeared, without any inquiry into the facts. The depositions were after the prosecution had been taken up, and afforded no excuse to the company. The case, therefore, became one of damages.

Verdict for each plaintiff for substantial damages; the jury giving 50l. in each case for each head of complaint, and the costs and expenses incurred in the defence.

KELLY, C. B. gave leave to move, as his opinion had been contrary to that of Martin, B. on the former trial.

KENT SUMMER ASSIZES.—MAIDSTONE.

(Before KELLY, C.B.)

BANBURY v. DUCKWORTH. (a)

Slander—Privileged communication.

An observation by a prosecutor concerning a person offered as bail that he believed he was mixed up in the fraud:

Held, privileged, if spoken honestly.

Slander. The words laid (with reference to a fraudulent bankruptcy) were that the defendant believed the plaintiff was mixed up in the fraud.

Plea, the general issue.

M. Chambers and *Joyce* for the plaintiff.

Parry, Serjt. and *G. Tayler* for the defendant.

The defendant had been assignee of a bankrupt, against whom a prosecution had been directed by the Court of Bankruptcy for fraudulently making away with part of his property, and the plaintiff had offered himself as bail. Thereupon the defendant (as the plaintiff's evidence went) said of the plaintiff that he was a party to the fraud. This, however, he denied, and the words he admitted were that he believed, from what he had heard, that the plaintiff was mixed up in the fraud. The words were spoken to a party to whom such a statement as that might reasonably be made.

KELLY, C.B. to the jury.—The question is whether the words spoken were those alleged by the plaintiff, or admitted by the defendant; and, in the latter case, whether they were spoken in the honest belief that they were true, or maliciously, and knowing that they were untrue, and with the intention of injuring the plaintiff.

The jury found that the words spoken were those admitted by the defendant; that is, that he believed the plaintiff to be mixed up in the fraud, and that he spoke the words honestly believing them to be true.

KELLY, C. B. directed a verdict for the defendant.

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

Scotland.

SHERIFF COURT OF LANARKSHIRE.

Feb. 4 and May 19.

GIBSON AND ANOTHER v. HILLSTROM AND OTHERS.

Charter-party—"As near thereunto as she may safely get"—Capacity of harbour—Offer to lighten ship—Obligation on ship—Demurrage—Custom.

The ship F. was chartered to carry a full cargo from Alexandria to a safe port in the United Kingdom, or on the continent between Havre and Hamburgh, "or as near thereunto as she may safely get, and lay afloat at all times of tide, and deliver the same, and so end the voyage," fifty running days to be allowed for loading and discharging, and ten days on demurrage if required, at 6l. per day. The ship received orders to proceed to Glasgow, and she arrived at the Tail of the Bank of Greenock on the 25th Dec. 1863. There was not, at all states of the tide, water enough in Glasgow harbour to let the ship lie afloat, and the pursuer required the consignees to take delivery at Greenock. They refused, but lightened the ship, and required the pursuer to proceed to Glasgow. This he did under protest on the 21st Jan. 1864:

Held, that the defenders were liable for the demurrage resulting from the delay, inasmuch as the pursuer was not bound to lighten his ship in order to proceed to Glasgow.

By the custom of the port ships were used to lighten at the Tail of the Bank and then discharge, but the pursuer was a foreigner commanding a foreign vessel, and the reference to the custom of the port in the charter-party was deleted before signature:

Held, that the pursuer was not affected by such custom.

Schilizzi *v.* Derry *and* Parker *v.* Winlow *discussed and distinguished.*

This was a claim by shipowners against the indorsees of a bill of lading for 129*l.* 12*s.* 6*d.*, for demurrage consequent on the failure of the latter, the defenders, to take delivery of the cargo according to the terms of the bill of lading and charter-party.

The Sheriff-substitute before whom the cause was first heard found the following to be the facts: That by charter-party, dated 15th Aug. 1863, entered into at Alexandria between the principal pursuer, as master of the ship *Frey*, and Messrs. Naegeli, Koller, and company, as charterers thereof, the said vessel was chartered to carry a full and complete cargo of beans and wheat, on a voyage from Alexandria to a safe port in the United Kingdom, or on the continent, between Havre and Hamburg, calling at Queenstown or Falmouth, at the master's option, for orders, which it was agreed should be given by return of post from London, in reply to the master's letters to the charterers' agent, otherwise the lay-days to count, "or as near thereunto as she may safely get, and lay afloat at all times of tide, and deliver the same, and so end the voyage." That in the printed form of the said charter-party the words "according to the custom of the port," after the words "deliver the same" above quoted were deleted before signature. That by the said charter-party it was further stipulated, that payment of the freight should be due and made on true and right delivery of the cargo, and that fifty running days, Sundays excepted, should be allowed the charterers for loading the ship at the said port of Alexandria, and discharging at the port of discharge, and ten days on demurrage, if required, at six pounds per day. That the defenders were consignees of the said cargo, and endorsees

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or holders of the bill of lading therefor; that the said ship left Alexandria on the 27th Aug. 1863, twelve lay-days having been consumed in lading, and that she arrived in Falmouth on the 13th Nov. thereafter; and that the principal pursuer, having on the same day intimated his said arrival by letter to the charterers' agent in London, received orders from the said agent on the 10th of the following December to proceed to Glasgow, which he did accordingly; that the ship arrived at the Tail of the Bank off Greenock on the 25th day of the said month, and that the defenders required him to proceed with the cargo to Glasgow for discharge; but that he refused to do so, except on payment of a sum above freight, which sum the defenders declined to allow, and that the reason of the pursuer's said refusal was that there was not sufficient water in the harbour of Glasgow to allow the said ship to lie afloat there with her cargo at all times of tide; that the pursuer required the defenders to take delivery of the said cargo at the Tail of the Bank, but that the defenders refused to do so; that shortly after the arrival of the vessel at the Tail of the Bank, the defenders had the cargo of the said vessel lightened by removal at that place of 1000 bolls of grain, and thereupon required the pursuer to take the said vessel to Glasgow, reserving all questions between the parties. That the draught of the said vessel with her cargo at the Tail of the Bank was 17 feet 9 inches in salt water, which is equivalent to 18 feet 1 inch in fresh water, and that the greatest depth of the harbour of Glasgow at low water was then from 16 feet to 16½ feet. Therefore that the pursuer was justified in refusing to take the said vessel to Glasgow harbour with her full cargo. That by the custom of the port of Glasgow vessels drawing more than about sixteen feet water arriving at the Tail of the Bank with cargoes similar to that of the *Frey* are in use to be lightened by the discharge there of a sufficient portion of their cargoes to enable them to lie in Glasgow harbour at low water without grounding, and are in use after such lightenings to proceed to Glasgow harbour for discharging the remainder of their cargoes; but that the said vessel belongs to Finland, and that the pursuer is a native of Finland, and that it is not proved either that he was aware of the said custom of the said port, or that a similar custom prevails generally in other river ports. Therefore, and in respect that the parties agreed to delete from the charter-party the words "according to the custom of the port," as hereinbefore stated, that the pursuer was not bound, on account of the said custom, to lighten the said vessel as before stated at the Tail of the Bank, and to bring her up to Glasgow for discharge of the rest of the cargo; that vessels are sometimes but rarely discharged at the Tail of the Bank, and that it was not impracticable to have discharged the cargo of the said vessel there; that it was not proved that the defenders required the pursuer to proceed to any other place within the terms of the charter-party where the vessel could lay afloat at all states of the tide and there discharge the cargo; that, in these circumstances, the delay caused in the discharge of the said vessel beyond the lay-days stipulated in the charter-party was occasioned by the fault of the defenders, in requiring the pursuer to lighten the said vessel at the Tail of the Bank, and proceed to Glasgow for completing the discharge, as hereinbefore set forth, and that they are therefore liable to the pursuer for demurrage in respect of the said delay. That the time of demurrage was at least fifteen days, and that the defenders are liable therefore in the sum of 90*l.*, being at the rate of 6*l.* per day—being the rate stipulated in the said charter-party: That the other charges specified in the schedule to the summons, amounting to 39*l.* 12*s.* 6*d.*, were incurred and paid by the pursuer on account of the said ship, in taking her from the Tail of the Bank to Glasgow, and that in the circumstances above stated, the defenders are liable therefor in respect that the pursuer took the said vessel to Glasgow at the defenders request, not having been bound to do so. And to this finding he appended the following note:—The question in this case is—whether, on the one hand, the defendants were justified in requiring the pursuers either to proceed to Glasgow harbour with the *Frey* with her full cargo, or to lighten her at the Tail of the Bank, so that she could float in Glasgow harbour at all states of the tide, and then to proceed to Glasgow to complete the discharge? or whether the pursuer, on the other hand, was justified in refusing to take either of these courses? It is proved by the evidence of the harbour-master, that the greatest depth at low water in Glasgow harbour at the time was 16 to 16½ft., and that even this depth was limited to a small portion of the harbour. It is also proved that the *Frey* drew 17ft. 9in. in salt water, which is equal to 4in. more, or 18ft. 1in. in fresh. Consequently she could not therefore lie afloat in Glasgow harbour in all states of the tide. The pursuer depones that on a former voyage the vessel grounded at low water in Glasgow harbour, and suffered some damage in consequence, which may account for his determined refusal to go there again with a full cargo. It is further proved that the *Frey* could not have gone to Glasgow harbour with full tide, and have been, before low water, lightened of a sufficient part of her cargo to be able to float in the harbour at low water. It is thus clear, and the defenders did not seriously dispute, that under the charter-party, as narrated in the interlocutor, the pursuer was not bound to take the *Frey* to Glasgow with her full cargo. The next question is, whether he was bound to lighten her at the Tail of the Bank where she lay, and then proceed with her to Glasgow harbour? If the solution of this question depended on the custom of the port, the defenders would succeed; for it is proved by the witnesses, Clark, Taylor, Bald, Perossi, Ritchie (harbour master), Robertson, and Jackson, that vessels are in use thus first to lighten and then discharge. But there is no proof that the custom was known to the pursuer, who, as a foreigner, and commanding a foreign vessel, may well be presumed to have been ignorant of it. Neither is it proved that a similar custom prevails in regard to river ports generally, although it appears to exist in some. In this state of the evidence, the Sheriff-substitute is satisfied that the pursuers were not bound by the custom of the port of Glasgow, and that the question must be decided without regard to that custom: (*Sweeting* v. *Pearse*, 7 Jur. (English) N. S. 800; and *Kirchener* v. *Venus*, 12 Moore's Priv. Co. Cas. 362, compared with *Brereton* v. *Chapman*, 1831, 7 Bing. 559, noticed afterwards.) The fact that the clause in the charter-party regarding the custom of the port, was deleted before signature, greatly strengthens this view; showing, as it does, that the pursuer purposely excluded the consideration of such local and partial customs as affecting the contract: (Maclachlan on Merchant Shipping, p. 333-4.) The question thus comes to be—whether, independently of the custom referred to, the pursuer was bound to lighten his vessel at the Tail of the Bank, and proceed with the rest of his cargo to Glasgow, to complete the discharge? There is no direct precedent on this question, and the authorities quoted at the bar do not throw much light on it. The case of *Whitwell* v. *Harrison*, 2 W. H. & G., 127, cited by the pursuer, arose on a policy of insurance on a vessel to her discharging

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port, and until she had moored at anchor twenty-four hours in safety. The vessel was chartered to Wallasay Pool, in the Mersey, "or as near thereto as she could safely get, and there discharge her cargo." She came abreast of the pool, but could not enter on account of her draught of water. The discharge of the cargo therefore began outside, and the crew were there discharged, as if the vessel had arrived at her destination. It appeared that the master intended only to lighten the vessel; but the discharging went on, and if no accident had occurred, and there had not been sufficient water for the vessel in the pool, her whole cargo would have been discharged outside. After she had been moored for twenty-four hours outside, she fell over, and was damaged. It was held that the owners could not recover under the policy. The ground of the decision was, that the whole dealings of the master with the vessel, the cargo, and the crew, had been the same as if she had arrived at the port of discharge; and that these patent facts should not fail in their legal consequence, because the master intended merely to lighten his vessel outside, and complete the discharge in the "pool." Neither the decision, nor the opinions expressed by the judges in it, bear out the proposition, for which the pursuer quoted it, namely, that the discharge of a cargo cannot be divided, and that whenever it is begun, that place becomes the port of discharge; and consequently, that any removal after that to complete the discharge elsewhere, would not be covered by the insurances. Nor is the pursuer's case aided by *Brown* v. *Johnston*, 1 C. & M. 440, quoted for him, where it was held that the lay-days commence from the time when the vessel is placed in the hands of the dock company's officer for discharge, although the actual discharge could not begin till some days later, owing to the crowded state of the harbour. On the other hand in the case of *Brereton* v. *Chapman*, 7 Bing. 559, founded on by the defenders, the question arose on a charter-party from Hamburgh to Wells, "or as near thereto as she could safely get." She arrived at the entrance of the port, and drawing too much cargo to be able to proceed to the port full, she discharged some of her cargo, and then proceeded to the port to complete the discharge. By the custom of that port, the lay days do not commence till the vessel arrives at the quay. It was held that they began to run only from the vessel's arrival there, being the usual port of discharge. The opinions of the judges, as reported, do not refer to the custom of the port; but it can hardly be doubted that that was an important element in the case, and sufficient to distinguish it from the present. This case, however, meets the pursuers' argument that the discharge cannot be divided, but must be held to commence, as to the whole cargo, at the place where the vessel is merely lightened by a partial discharge. It would also show that if the *Frey* had lightened at the Tail of the Bank, and then proceeded to Glasgow to discharge the rest of the cargo, the lay days would have counted from her arrival at the latter place. But that is a very different thing from holding, as the defenders contend, that a vessel which is not bound by the special custom of the port so to lighten, is bound to do so at common law. The cases of *Schilizzi* v. *Derry*, 4 El. & Bl. 873; and *Bastifill* v. *Lloyd*, 31 L. J. 413, Ex., on which the defenders founded, merely decided that where a charter-party requires the vessel to go to a certain port, or as near thereto as she can safely get; and when, on her arrival outside the port, there are merely temporary impediments to her proceeding to it, the existence of these "does not excuse non-performance of the contract." (See Pollock, C. B. in *Bastifill* v. *Lloyd*.) In the one case, the impediment was the low water at the mouth of the Danube preventing the vessel from getting up to her port; and in the other, she could not get up to her port at once, from having arrived during the neap tides. These temporary obstacles were regarded as of the same class as bad winds or stormy weather, and as being within the risks of the voyage, which must fall on the owners. In the present case, the obstacle was permanent in its own nature, with respect to the discharge of the cargo as a whole. The cases of *Schilizzi* v. *Derry*, and *Bastifill* v. *Lloyd*, do not at all indicate that, where an impediment to the vessel with her full cargo reaching the harbour is, in its own nature permanent, the master is bound to overcome it by discharging part of the cargo outside the harbour, and then to proceed to the harbour with the remainder. In the case of *Schilizzi* v. *Derry* (*sup.*) Lord Campbell, C. J., is reported to have observed, that the meaning of the charter-party to go to certain ports, "or as near thereto as she may safely get," must have been "that the vessel is to get within the ambit of the port, if she cannot reach the actual harbour." But here it is not proved that the vessel could have lain afloat in any part of the river within the ambit of the port of Glasgow; and, at all events, the defenders did not require her to do so, so as to bring the case within the principle of *Parker* v. *Winlow*, 7 El. & Bl. 942. The defenders attempted to prove that they required the master to go to the port of Greenock for discharge. But their only witness on that point (Clark the defender) is contradicted by that of the pursuer; and the fact is therefore not proved. Besides, it is not pretended that the port of Greenock is within the ambit of the port of Glasgow, and there is no authority for holding that the charterer can arbitrarily require the master to go to a place beyond the "ambit of the port of discharge," and there discharge. If he had gone into Greenock, and discharged there, he might have imperilled the insurances by the deviation. There being thus no precedent on the question, it must be decided on principle, with reference to the construction of the charter-party. In this point of view, it is important to observe—(1st) That the Tail of the Bank was a place where the cargo could have been discharged, although perhaps with some difficulty, for a considerable part of it (1000 bolls) was discharged there; and (2nd) that cargoes of grain, similar to that in question, have been in some instances, fully discharged there. (Evidence of defender Clark.) The words of the charter-party required the vessel to go to a "safe port," within certain limits, "or as near thereunto as she may safely get and lay afloat at all times of tide, and deliver the same, and so end the voyage." Granting that, under the dictum of Lord Campbell, she should have gone to a safe place of that description within the ambit of the port if there had been one, still, there being none, what does the charter-party indicate as the alternative in case of inability to lie afloat at the port to which she was ordered? The Sheriff-substitute is of opinion that the charter-party was complied with by the master going for discharge to a place where the vessel could lie afloat, and where the discharge was practicable, such place being as near to the port as she could reach in accordance with the proviso as to her lying afloat. It is not a good objection to this that the place is an open roadstead, for that is the case at many ports; as, for example, the Cape of Good Hope, Port Elizabeth, St. Denis: (See on this, *Cockey* v. *Atkinson*, 2 B. & Ald. 460.) The defenders did not pretend, and there is nothing to show, that the *Frey* might have got nearer to Glasgow than the Tail of the Bank, in accordance with the proviso referred to. From this point of view, the case of *Whitwell* v. *Harrison*, above quoted, is an authority in the pursuers'

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favour, for it proceeds on the footing that the discharge under a charter-party nearly similar, might have been completed outside the port, when the vessel could not get into it with her full cargo. Again, the opposite view involves great indefiniteness in the obligation which would lie on the vessel. It depended on circumstances beyond the master's control, whether he could have got a berth at Glasgow with 16½ft. at low water, or one with a good deal less, and, consequently, he could not anticipate the amount of lightening that might have been required. If he had lightened enough only for a berth of the former class, and had been ordered into one of the latter, his insurances would have been imperilled, at least for the usual twenty-four hours after arrival, for the vessel would not have been within the condition of the charter-party. Nay, more. He might have been ordered from Plymouth to a port with so little water at low tide that he would have had to put out as much as half his cargo, or even more. before getting into harbour. Yet, according to the defenders' argument, he would have been obliged to do so. The Sheriff-substitute considers that the charter-party does not lay on the vessel obligations so indefinite, and that, on the contrary, its proper meaning (the custom of the port being excluded) is, that she required to be brought to the nearest place where she could lie afloat at all states of the tide, and where discharge was practicable, and that this was done when she was anchored at the Tail of the Bank. He is further of opinion that the master was justified, under the charter-party, in refusing to lighten the vessel there, and then proceed to Glasgow to complete the discharge, and that the defenders were not justified in requiring him to do so. The circumstance mentioned by the master, that he could not take in a full cargo at Glasgow, owing to the draught of his vessel, is not of much moment. Still, what effect it has is in the pursuer's favour, for it helps to explain and justify his refusal to go to that harbour. It is of no moment, according to the view thus explained, whether he would have agreed to go to Glasgow on payment of an extra allowance, either to himself or to the owners, for he was entitled to refuse to go there except on his own terms. On the other hand, the refusal of the defenders to pay him an extra sum of 25*l.* or 35*l.* (pursuer's evidence), which was not much, considering the extra risk incurred, is an unfortunate feature of their case, for it places them in the position of parties staking their case on the law, as to the obligation to lighten the vessel, being in their favour. In the whole circumstances, as thus explained, the Sheriff-substitute considers that the detention of the vessel has arisen from the defenders' fault, and that they are liable to compensate the pursuers therefore. The parties were agreed that the detention beyond the lay-days was at least fifteen days—thus:

	Days.
Spent at Alexandria in loading (excluding Sundays)	12
From 17th Nov., when the vessel might have received orders at Falmouth (where she arrived on 13th Nov.) to 10th Dec., when she was ordered to Glasgow (excluding Sundays)	20
From 25th Dec., when she reached the Tail of the Bank, to 5th Feb., when the discharge was completed (Sundays excepted)	36
	68
Deducting lay-days allowed	50
Leaves days of detention	18

being beyond the fifteen concluded for, which, at 6*l.* per day, as in the charter-party, is 90*l.* The defenders pleaded that, as the charter-party stipulated for only ten days' demurrage at 6*l.*, the five days beyond that time are not to be held as demurrage, but detention beyond the demurrage contemplated by the parties, and as such, falling to be dealt with as damages. For the allowance on that head, they contended the master has not a title to sue, founding on *Brownker* v. *Scott*, 4 Taunt. 1,—where it was so held in the Court of Common Pleas; but it does not appear whether in regard to a British or foreign vessel. The Sheriff-substitute has not been able to find any Scotch authorrity countenancing this view in regard to the master of a foreign vessel, who, on the contrary, is held, when in this country, to represent the owners generally with regard to the voyage: (Bell's Com. 384; see also Sm. Merc. Law, 119.) He has therefore repelled this plea.

On appeal to the Sheriff the decision was affirmed, the Sheriff finding that the conclusions deducible in law from the facts were those at which the Sheriff-substitute had arrived.

May 19.—The SHERIFF has had very great hesitation with this case, which involves a new and important question, as to which, in the absence of any guiding precedent, it is extremely difficult to come to a decided and satisfactory conclusion. On the one hand, it seems a hardship to hold, that if a vessel chartered to Glasgow draws upwards of 16ft. of water, she is not bound, in virtue of the floating clause in her charter-party, to come nearer that port than the Tail of the Bank, which is twenty-two miles lower down the river. On the other hand, when the express provisions of the contract are, that the ship shall only be bound to proceed to a safe port, "or so near thereunto as she may safely get, and lay afloat at all times of tide, and deliver the cargo," it is difficult to hold that there is any obligation on the master to take his vessel beyond the point where she can so lie afloat and discharge. The defenders have not raised any subsidiary question by contending that the *Frey* might have been brought to some intermediate place between the Tail of the Bank and the harbour of Glasgow; nor have they denied that with her full cargo she drew so much water that she could not have lain in that harbour without taking the ground. The real difficulty is, whether the master was not bound to accept the defenders' offer to take out so much of the cargo at the Tail of the Bank as would have reduced her draught to a depth with which she could have always floated at Glasgow. This difficulty is not to be solved by an appeal to the custom of the port; for, in the first place, although an agreement to be bound by the custom of the port originally stood in the charter-party, it was withdrawn before signature by mutual consent; in the next place, no uniform custom of port has been proved, but, on the contrary, what is proved is, that although some captains consent to lighten at the Tail of the Bank and then go on to Glasgow, others refuse, and their consent requires to be purchased; and, in the third place, even if the usage had been uniform, the pursuer was not cognisant of it, and cannot be presumed to have had it in view at the time of making the contract, as he did not then even know that the ship was to go to Glasgow, whilst it is settled law, as was expressly laid down in *Kirchener* v. *Venus*, 12 Moo. P. C. 362, that "evidence of the usage of a particular place, to add to or in any manner to affect the construction of a written contract is admitted only on the principle that the parties who made the contract were both cognisant of that usage, and are presumed to have made the agreement in reference to it." The true solution, therefore, seems to depend on the answer to be

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given to the question—Was the voyage ended when the *Frey* had got as near to her port of discharge (Glasgow) as she could get, and lie afloat with her full cargo on board at all states of the tide? The defenders maintain that the voyage was not ended, but was only to be interrupted for a day or two till the lightening took place. The pursuer contends that he was not bound to consent to a partial discharge at two different places, and that, under the terms of the charter-party, he was under no obligation, whether lightened or not, to go to any harbour where the *Frey* could not lie afloat with her full cargo, and receive a return freight producing the same draught. There is no decision in the books precisely in point, but it has been held in several English cases, as noticed by the Sheriff-substitute in his carefully considered note, that where there is a temporary obstruction to geting into the port of discharge, though it should occasion a delay of several weeks, the voyage is not ended, and the vessel must wait till the obstruction ceases or is removed. Now, should not the converse of the rule hold equally good, viz., that if, as here, there is not a temporary but a permanent impossibility of getting to the port of discharge with the cargo on board, and lying afloat there, the voyage is ended, and the condition of the charter-party fulfilled as soon as the ship arrives at a place as near the port as she can safely get, and lie afloat? The case of *Whitwell* v. *Harrison*, 2 W. H. & G. 127, seems to give an affirmative answer to the above question. The discharging port there was Wallasay Pool, in the Mersey, "or as near thereto as she could safely get, and there discharge her cargo;" and the vessel not being able to enter the port on account of her draught, the master proceeded to discharge outside, and damage having been sustained by the ship by her falling over in the course of the discharge, the court held that no recourse could be had by the owners, under a policy of insurance of the vessel, to her discharging port. This decision went upon the principle that the legitimate end of the voyage was where the discharge took place outside. It is true that the Tail of the Bank, is not a very usual, and perhaps not a very safe place of discharge; but cargoes *are* discharged there occasionally, and it is the nearest place to the harbour of Glasgow for a ship with a cargo like that of the *Frey*, without going into another port altogether. At the same time, the sheriff cannot help feeling that it would be much more convenient for the charterer, and probably better for all interested, that the master of a ship destined for the harbour of Glasgow, which is now a large and commodious one, should be bound, if her draught was beyond 16 feet, to consent to lightening at the Tail of the Bank, and then go up the river to her port. In the uncertainty, however, as to the mutual obligation of parties which presently exists, and in the face of the latitude allowed by the terms of the charter-party, effect, it is thought, cannot be given to the defenders' pleas. The evil may be remedied by the introduction into all future contracts of an express provision that when the draught exceeds a certain depth, the course now contended for as the most expedient, shall be followed. Two minor points were made at the debate by the defenders—first, that the offer, by way of compromise, to which the pursuer ultimately acceded, though made by the defenders on 4th Jan. 1864, was not accepted till 21st Jan.; and that it was this delay on the part of the pursuer that created the demurrage. But there are two answers to this—first, that the offer latterly accepted by the defenders was not quite the same as that made on the 4th of the month; and secondly, that if the pursuer was justified in refusing to go to Glasgow at all, the time taken up in negotiating about it cannot be imputed against him. The second point was, that demurrage effeired to only ten days, and that the claim for the other five days' detention was a claim for damage which was not competent to the pursuer. The answer to this also is twofold—first, that the master of a foreign vessel, when in this country, is competent to sue for every claim open to the owners, the more especially when, as the charter-party shows, it was with the master that the defendants contracted; and secondly, that demurrage and damage is here one and the same thing, the more especially as the defenders were in reality entitled to only forty lay-days instead of fifty, as allowed them by mistake.

Defenders' and appellants' agents, *J.* and *R. D. Ross*, W.S.

Persuers' and respondents' agent, *Henry Buchan*, S. S. C.

Irish Election Petitions.

Reported by JOHN CUNNINGHAM, Esq., Barrister-at-Law.

YOUGHAL ELECTION PETITION.

(Before O'BRIEN, J.)

Feb. 19, 20, 22, 23, 24, 25, 26, 27, *March* 1 *and* 2.

*Bribery—Offers of money—Watchers—Colourable employment—Lavish expenditure—Money given to a mob—Largesse and alms to poor persons—Excessive payments to agents—*3 *Geo.* 4, *c.* 18 (*Irish*)—*Treating—*35 *Geo.* 3—*Whether unrepealed as to Ireland—Treating before dissolution or issue of writ—Definition of "candidate"*—17 *&* 18 *Vict. c.* 102, *s.* 38, *and* 21 *&* 22 *Vict. c.* 87, *s.* 3—*Preliminary objection—Amendment—Particulars—Costs.*

An offer of money or of a loan to an elector, even by an agent or warm supporter of a candidate, and even in a conversation in which the person making it canvassed the elector for his vote, does not constitute an act of bribery unless it is made in consequence of the pendency of the election, and solely with the intention of inducing the elector to vote.

Therefore, where A., who was a warm supporter of a candidate, and acted in the town as agent to a brewer, went to B., an elector and publican, and asked him for his vote, and the latter said he could not give it, as being under an obligation to his landlord's agent for arrears of rent, and A. offered to advance the money to pay it off; but it appeared that it was customary with A. to advance money to B. every year on the part of the brewer, and both A. and B. swore that the offer had no reference to the vote of the latter; it was

Held, that this did not amount to an act of bribery.

Where it was stated by the witnesses of the respondent that apprehensions of violence from the opposite side were entertained, the court held this a justification for the distribution of sums of money to electors for the alleged purpose of hiring and paying "watchers."

There is nothing per se corrupt in giving orders to electors to supply from their shops goods to be distributed among non-electors and poor persons, even though such orders are given on a very considerable scale, and to electors only.

Semble, the declaration of an elector to whom such orders were given, that he was not influenced thereby, is sufficient to rebut any presumption arising from the circumstances.

Lavish expenditure by a candidate, though very much to be reprehended, is not of itself sufficient to avoid an election. It must be made to appear that some of the money was spent in contravention of the law.

Money given to poor persons in the streets or among the

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mob, and admitted to be so given in order to acquire popularity for a candidate, and thus influence the election, is not a corrupt practice :

Semble, same as to drink given to non-electors and with the same object.

The 3 Geo. 4, c. 18 (Irish), limiting the number of attorneys' agents, &c., and the fees payable to each, is impliedly repealed by the Acts limiting the number of polling days and increasing the number of polling places.

The word "corruptly" in sect. 4 of 17 & 18 Vict. c. 102, governs the whole of the section.

The word "corruptly" does not imply anything wicked or immoral, but only that persons do something knowing it is contrary to law.

The giving of drink with an intention to influence voters thereby is corrupt treating i.e., the intention to influence is that which renders the thing done "corruptly."

Semble, the 35 Geo. 3, though repealed as regards England, is not repealed as regards Ireland, and therefore that Act, concurrently with the Corrupt Practices Prevention Acts, governs questions of treating in petitions tried in Ireland.

The 3rd section of 21 & 22 Vict. c. 87, repealing the portion of sect. 38 of 17 & 18 Vict. c. 102, which defines a "candidate at an election," enacts that that expression "shall include all persons elected to serve in Parliament at such election, and all persons nominated as candidates at such election, or who shall have declared themselves candidates on or after the day of the issuing of the writ for such election, or after the dissolution or vacancy in consequence of which such writ shall have been issued."

Quære, whether, under this definition a person who had declared himself a candidate before the issue of the writ and dissolution, and committed acts of corrupt treating during such time only, and not after, comes within the 4th section of the Corrupt Practices Prevention Act 1854, i.e., whether a person who is not a candidate at the time he commits acts of corrupt treating, and afterwards becomes one, is liable for those acts.

Semble, that the proper tribunal and time for trying an objection to the status of a petitioner is the Court of Common Pleas, and a reasonable time before the day fixed for the trial of the petition.

The court, however, admitted evidence to show the petitioner had no status rather than imperil the legality and regularity of the trial by rejecting it.

There is no analogy in this respect between the court of an election committee and that of a judge trying a petition, because in the former case there was no tribunal for such preliminary questions, whereas now there is, viz., the Court of Common Pleas.

Quære, whether under sect. 29 of 31 & 32 Vict. c. 125, and rule 60, a judge has power to amend the petition or particulars, so as to let in proof of illegal practices, which could not be proved under the allegations of the petition in its existing form.

The costs are entirely within the discretion of the court; and as, under certain circumstances, an unsuccessful petitioner may not be ordered to pay a successful respondent's costs, or, in other words, the respondent may be made to pay his own costs, so, conversely, an unsuccessful respondent may not, under certain circumstances, be ordered to pay the costs of the petitioner, or, in other words, the successful petitioner may be left to pay his own costs.

This was a petition by John Wellington Brazier, an elector, complaining of the undue return of Christopher Weguelin, Esq., on the ground of bribery, treating, and other corrupt and illegal practices, and praying that the election of the said Christopher Weguelin be declared null and void; but it did not claim the seat for Sir Joseph McKenna, the unsuccessful candidate.

Heron, Q. C., *Exham*, Q. C., *J. Cunningham* (English Bar), and *W. Greene*, appeared for the petitioner

Butt, Q. C., *O'Hagan*, Q. C., and *Cleary* for the respondent.

The petition contained fourteen paragraphs. The first stated that "the petitioner is an elector who voted at the last election." The other paragraphs set forth charges of bribery, treating, and other corrupt practices in various forms.

In the bill of particulars, delivered pursuant to the order of the court, were the following notices among others: "Take notice, that under the general charge of illegal and corrupt practices, or matters voiding the election, the petitioner will further rely on this: That before, during, or after the said election the said respondent, by himself, his friends, or agents, &c., directly or indirectly, gave money fees, and retaining fees to attorneys, agents, &c., for doing something of, and concerning matters relating to such election, over and above the sums set forth to be paid in the schedule to the Act in that case made and provided, to agents, &c., by reason of the giving of which sums of money fees, and retaining fees as last aforesaid, said respondent became disqualified as a candidate, or to be returned, and the said election was void." Then followed the particulars.

There was also a notice to the effect that amongst other corrupt practices the petitioner would rely on the fact that committee-rooms were hired from certain voters on behalf of the sitting member at a time when the sitting member had hired, or arranged to hire, the committee-rooms returned in the election expenses account, and that these cases would be relied on either as cases of bribery or of corrupt practices to unseat the sitting member.

There were other paragraphs stating that a number of persons were bribed in the following manner:—Books were given to them for the colourable purpose of entering therein the names of "watchers" to be hired by them, and that money was paid to the said voters for the colourable purpose of paying such watchers, but really to be kept by them, or used for their own benefit.

It was also stated in the particulars that orders on an extensive scale were given by the respondent and his agents to various electors to supply boots, shoes, bread, flour, and other things to various persons at the expense of the respondent; and that such orders were given for the purpose of corruptly influencing, or gaining the votes of the said electors.

Heron, Q. C. was about to open the case for the petitioners, when

O'Hagan, Q. C. interposed, and said: I have a preliminary objection to take to the *status* of the petitioner. The objection is founded on the 26 & 27 Vict. c. 29, s. 8, which provides (*inter alia*), that "where any person who has voted at any election is found by any committee to have been guilty of bribery or treating at such election, his vote shall be void, and may, upon a scrutiny, be struck off the list of voters, &c." We propose to prove that the petitioner, Mr. Brazier, was guilty of bribery; that he was bribed himself, and attempted to bribe others. And as this court holds the place of a committee of the House of Commons, if we establish these allegations the court must treat the petitioner's vote as a nullity, and hold that he has no *status* which entitles him to petition. [O'BRIEN, J.—Is not this a matter which ought to have been

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settled before another tribunal?] Before the passing of the late Act, when petitions were tried before committees, preliminary objections to the petitioner's *status* were taken before the petition was gone into. [O'BRIEN, J.—Then there was no other tribunal for the settlement of such questions. I think this was a matter more properly for the consideration of the Court of Common Pleas.] There was, I understand, an application made to the Court of Common Pleas to take the petition off the file, on the grounds alleged, but it was refused, and the preliminary objection was reserved by it. That court has nothing to do with the matter, and this court, holding as it does the position of a committee of the House of Commons, has the same power to deal with it. [O'BRIEN, J.—The order dismissing the application ought to be produced, in order that I may see on what terms it was dismissed. I shall reserve the objection until it is produced.]

Butt, Q. C., at a subsequent stage.—I shall, with the permission of your Lordship, re-open the question of the right of the petitioner to maintain the petition at all, and shall commence by handing to the court the order made by the Court of Common Pleas referred to on a former occasion. [O'BRIEN, J.—It appears by the order that the application, when made to the Court of Common Pleas, was refused with costs, but without prejudice to the applicant's raising at the trial any question that might be advised as to the petitioner's *locus standi*.] I wish to refer the court to the mode of procedure adopted in like cases by the committee of the House of Commons when trying election petitions. The practice where any objection was made to the right of the petitioner to have the petition heard, was to inquire into and decide on the merits of it before the committee went into evidence in support of the petition itself. That being so, this court ought to hear the preliminary objection now. The objection is, that the petitioner's vote was a nullity because he was a paid agent, because he bribed and was bribed. The Court of Common Pleas dismissed the application on the ground that it was not a matter that should have been brought before it. The allegations made in support of it were denied, and the court would not try a disputed fact on affidavit. It was left for the judge, who tried the petition, to determine as to the truth of the allegations. [O'BRIEN, J.—I do not think that the Act contemplated that a preliminary objection of this sort should be gone into on the trial. Supposing I allow evidence in support of your allegations to be gone into, and they are established, what am I to report to the Speaker?] That there was no petition. [O'BRIEN, J.—The section defining my duties provides, that at the conclusion of the petition the judge trying it shall determine whether the member returned at the election complained of, or any other, and what person was duly elected, or whether the election was void, and shall certify his determination to the Speaker. I have the trial now before me, and what am I to do?] Your Lordship is in the same position as a committee of the House of Commons. [O'BRIEN, J.—I am acting here under an Act of Parliament, which binds me at the end of the trial to certify to the Speaker whether or no the election was void, and whether there had been corrupt practices. To do this I must hear the case. I am now in this position—the trial has been appointed; the petition sent down to me to try; the parties and their witnesses all ready; and I am now asked to try whether there is to be a trial at all.] Supposing a petition is presented by a person who was disqualified, would your Lordship be bound to hear it? [O'BRIEN, J.—There is some mode of hearing the objection; the Court of Common Pleas has the fullest jurisdiction over these proceedings; and assuming that the facts warranted inquiry, I do not see why it was not in the power of the Court of Common Pleas to try it.] The court would never try a matter of the kind on affidavit. Willes, J. has decided that an objection to the status of the petitioner was a matter for the judge on the trial. [O'BRIEN, J.—The objection is no part of what I am to try. It is not included in what I have to report.] You should report the sitting member duly elected, as there would be no evidence against him in the event of the allegations being established. I assert that the petition is a nullity; and I ask where is the question whether it is or not to be tried, if not here? Perhaps a case of this kind was not contemplated by the Act of Parliament, but until rules are framed to meet it, the practice of the Election Committees must guide the proceedings in election petitions.

O'BRIEN, J.—I am very unwilling to bind the parties by my opinion on a point of law like that now advanced. I shall decide to hear the evidence in support of the petition without prejudice to such evidence as may be adduced in support of the objection.

Heron, Q. C. during his opening statement, having referred to the return made by the respondent's election expenses agent, which only showed the sum of 2*l.*, said he would be able to show that the respondent's expenditure amounted to nearly 7000*l.*; and called the attention of the court to the decision of Martin, B. in the *Bradford Petition* (reported 19 L. T. Rep. N. S. 718.) There the constituency was 21,000., and the expenditure was shown to amount to 7200*l.*, and on this Martin, B. said that it was impossible for any election to stand in the face of such an expenditure of money as this, and the petition accordingly succeeded.

The evidence sufficiently appears in the judgment:

March 2.—O'BRIEN, J. (having discussed several cases of alleged bribery) said:—These several charges of bribery, to which I have particularly referred, are the only cases among the seventy-eight mentioned in the bill of particulars as to which any evidence has been given; and I have referred to those cases at some length, not merely for the sake of showing the grounds upon which I have come to the conclusion that none of them has been established, but also for the purpose of expressing my strong disapprobation of the manner in which this bill of particulars has been framed. It appears that 127 voters polled for Mr. Weguelin at the election, and 106 for Sir J. McKenna. There are charges of bribery in seventy-eight cases, as to voters, of whom the far greater number voted for Mr. Weguelin. When the case was opened by Mr. Heron, as a case in which substitution was not prayed, it struck me (what the result has proved), that there was great doubt whether these cases were inserted upon any sufficient grounds. The object of a bill of particulars is to give the opposite party reasonable information as to the case that will be made against him; to give him an opportunity of inquiry, and to enable him, if he can, to contradict or explain the facts charged against him; but the system adopted here would defeat that object. The petitioner might almost as well in this case have included in the bill of particulars the 127 parties who voted for Mr. Weguelin, and I cannot avoid saying that, in my opinion, this bill of particulars was either framed "as a blind" (to use an expression attributed to Mr. Justice Willes on a late occasion), and for the purpose of baffling inquiry, by render-

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ing the cases to be inquired into so numerous, that proper inquiry could not be made, or else (if not prepared with that intention) that it was framed with a reckless disregard and indifference to its accuracy and without the slightest consideration whether the charges in it were true or not, or whether those acting for petitioner had any reasonable ground or reliable information as to their truth. Besides, in the present case, the respondent himself is charged with personal bribery in all those cases except two or three. He was examined by petitioner as a witness, but he was not asked a single question by petitioner's counsel as to those charges. Other gentlemen were also charged with personal bribery. Several of them were examined during the trial; but, with a few exceptions, not a single question was asked of them by petitioner's counsel as to those charges; and Mr. Butt, as respondent's counsel, had of course to ask them to negative charges that were made upon paper, but which neither the counsel nor the witnesses for petitioner ventured to support. I think that some regulations should be made with regard to such bills of particulars, and I have made these observations to express my disapprobation of the practice resorted to on this occasion, and to show that it should be discountenanced in every possible way, and should be regarded as a matter, which (whatever the result of the petition may be), should materially affect the question of costs. If a party has a case, and comes forward and succeeds on it, that is no reason why he should lead the proceedings with gross charges against individuals without any ground or reliable information upon which to sustain them. In the present case Mr. Barnett, although not served with a subpœna as a witness, stated that he came here with every document he could get to vindicate his character, because he heard that he was charged in the bill of particulars with having bribed several persons. The next part of the case is as to the employment of watchers. In the course of the trial, I expressed my opinion that it was upon the evidence sufficiently shown that the general arrangement for the appointment of watchers was made *bona fide*, and was considered necessary by the parties who made it for the purposes which they stated, namely, for their protection. I understood that Mr. Heron, petitioner's leading counsel, did not dissent from that view, but acquiesced in it. The matter was referred to by me upon the examination of a witness who was asked as to a conversation with the Rev. Mr. Foley. Mr. Heron, on the part of the petitioner, objected to that question, and I stated that the only object of such evidence appeared to be to show the *bona fide* character of the arrangement made for the employment of watchers, which I said was in my opinion sufficiently shown upon the evidence. When I stated what my impression was, Mr. Heron acquiesced in it, and the question was not pressed; but on the following day after Mr. Heron's departure, Mr. Exham dissented from my view of Mr. Heron's acquiesence, and I then stated I did not wish to bind counsel by what had been stated in the course of discussion, and not taken down as admission. A considerable amount of evidence was, however, given on this matter, which in my opinion clearly showed that Mr. Heron was justified in not disputing the correctness of the conclusion at which I stated I had arrived. It appeared from that evidence that Mr. Weguelin in the beginning of his candidature was encountered by the decided opposition of the Roman Catholic clergy of this town, who had in very strong language attempted to discountenance any opposition to Sir Joseph McKenna, and had in like manner addressed their congregations on various occasions to that effect. Mr. Kennedy (an active supporter of Mr. Weguelin), swore that in a conversation with Mr. Hodnett, the conducting agent of Sir Joseph McKenna, early in August, Mr. Hodnett said in his office that the Rev. Canon Murphy, with the mob, would sweep the opposition to Sir Joseph McKenna out of the town. The Rev. Canon Murphy was examined; he denied (and I believe his denial) that he ever had said or done anything that would have warranted Mr. Hodnett to make that statement; and Mr. Hodnett also on his examination said that Canon Murphy had never said anything that would warrant such a statement. But I refer to this matter, not for the purpose of considering whether such a statement was in fact made by Canon Murphy, but to show the impression which Hodnett conveyed to Kennedy, and the apprehension that might naturally be supposed to have been created in the minds of Mr. Weguelin's supporters by what Mr. Hodnett said. Mr. Hodnett was examined to contradict Kennedy's evidence. On his direct examination he gave a qualified denial of having said so, but on his cross-examination he said that he would not positively say that he did not make such a statement to Mr. Kennedy, as he said many things during the election agitation; but he was sure he did not make that statement to Kennedy in his office, or except among groups of people to keep up their spirits. It appears, however, that Mr. Kennedy understood the statement in the terms in which it was made. Mr. O'Shea, another supporter of Mr. Weguelin, also swore that after the declaration of the 4th June, in which so many pledged themselves to oppose Sir Joseph McKenna, he was constantly beset by the mob in the streets, shouted at, and hissed at, when passing at various times from that till the time of the election. Mr. Eastaway, another supporter of Mr. Weguelin, swore that before the watchers were appointed, he had heard the threats of the mob that his house would pay for it as it had done in 1852, if he did not vote with the clergy. Donovan, another supporter of Mr. Weguelin, stated that before he got his watcher's book his house was attacked, his wife dragged by the mob into the street, and that he had been attacked and struck by Sir Joseph McKenna's mob in the street at night, and that on one occasion they said they would have his life. Subsequent to these occurrences, and on the 18th Nov., within a week or eight days of the election, an arrangement was made at Mr. Barry's office by several of the principal supporters of Mr. Weguelin, that watchers should be appointed for the protection of Mr. Weguelin's friends and supporters. It was then arranged that, in order to secure the election of proper watchers, and prevent the indiscriminate appointment of persons who might act, and take money on both sides, various voters who required protection, or who were considered proper persons to make the selection, should get books or papers for the purpose of entering in them the names of the men they employed. A large discretion must have been necessarily left to the parties who got the books as to the number of men they would employ. After that arrangement was made, events happened which showed that the precautions were not by any means superfluous. Mr. Eastaway swore that on the night before the polling his shop was attacked and entered by the mob, headed by Mr. O'Connor, the son-in-law of Sir Joseph McKenna. Eastaway stated what took place on that occasion. Mr. O'Connor was in court, and was not examined to contradict him. Mr. Fleming and Mr. O'Shea also stated that on another occasion (whether before or after the arrangement of watchers I do not now recollect) Mr. O'Shea was thrown down and knocked about by Sir Joseph McKenna's mob, opposite Sir Joseph McKenna's committee-room; and several

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witnesses also deposed to the fact that a country mob in the interest of Sir Joseph McKenna entered the town at the election; and that in their opinion the appointment of watchers was requisite for their protection. Mr. Exham very properly relied upon the evidence of Mr. Dennehey, the resident magistrate, who deposed to the peaceful state of the town during and previous to the election. I attach implicit credit to anything Mr. Dennehey stated from his own knowledge of the state of the town during that period; but outrages such as I have stated, being sudden and of short duration, might take place and cause serious injury before the police would come up; and, with respect to the attack upon Eastaway's house, Mr. Eastaway stated that the mob had nearly all gone away before the police made their appearance. Mr. Dennehey also stated his opinion that the mobs were so well matched against each other as to prevent them from fighting. Supposing, therefore, that this arrangement was made *bonâ fide* (as I have no doubt it was), and that it was a reasonable precaution, the question is whether it was in any instance carried out colourably, and as a cloak for bribery or undue influence. Several witnesses were examined as to the appointment and employment of these watchers for their protection, and as to the names and the numbers of those employed, and the amount paid them. Without going into their evidence in detail, I think it enough to say that in my opinion no case of any such colourable appointment was established. The rate of payment was not excessive, being 3s. a day or night. It appears that the number of men was about 350 or more, and the amount paid was about 300*l.* I may observe that at the late trial of the *Limerick* election petition before Baron Fitzgerald, it appeared that a very large number of men were employed for a somewhat similar purpose, and that though they were only employed during two days, about 250*l.* was paid for them. Mr. Exham, in his reply yesterday, endeavoured to establish a case of colourable payment of money, under the pretext of watching, on account of a discrepancy of a few shillings between the statements of Patrick Ahern and of Cronican. It is possible that Ahern may not have got the full amount he claimed, but he swore positively as to the number of men he employed, and that the amount due to them was equal to the money that he claimed. Having disposed of this question as to the watchers, I now come to the charge of distribution of money in the streets to the poor. None of this money was given to any voters, but it was alleged that this was bribery under the third paragraph of the 2nd section of the Corrupt Practices Act of 1854, which declares every person to be guilty of bribery who should "directly or indirectly, by himself or any other person on his behalf, make any such gift, loan, &c., as therein mentioned, to or for any person, in order to induce such persons to procure or endeavour to procure the return of any person to serve in Parliament, or the vote of any voter," &c. There was certainly a very large sum of money given (I would say most improvidently given), to the poor people in the streets; it was really no charity, whatever it was intended for, because its effects were not those that would be produced by well-administered charity. Mr. Weguelin himself expressed his own disapprobation of it in strong terms. It appeared that about 130*l.* was given by Mr. Barry in this way, 160*l.* by Mr. Mooney, and some 50*l.*, I think, by Mr. Barnett. That money was distributed to an extent which, considering the way it was given, was quite inexcusable. The sums were distributed in sixpences and shillings, and I think sometimes in two-shilling and half-crown pieces. But what is the ground upon which it is alleged that the giving of this money was bribery, or that it was given to induce the persons who got it to procure Mr. Weguelin's return, or the vote of any elector? When I asked the petitioner's counsel this question, the only ground which his ingenuity suggested for connecting the return of Mr. Weguelin to Parliament with the giving of this money to poor non-electors, so as to bring the case within this bribery section, was, that it was given in the contemplation that the people who got the money would spend the amount in drink and thereby increase the profits of the publicans with whom they drank, and would in that indirect manner influence the votes of those publicans, and endeavour to procure the return of Mr Weguelin. Until Mr. Exham stated that, I was at a loss how to connect this giving of money with an act of bribery. His suggestion is very ingenious, but I think it is enough to read the words of the Act of Parliament to see that such a proceeding as this was not contemplated as being within its provisions. Petitioner's counsel also relied on the orders for food, drink, boots, shoes, and other articles of clothing to be supplied to the poor non-electors; and Mr Exham endeavoured also to establish that these orders were given with a view to induce the shopkeepers by whom those goods were supplied to vote for Mr Weguelin, on account of the profits they derived from such orders. Numbers of those shopkeepers were, however, examined, and stated that their profits on the goods were very inconsiderable. The parties who gave the orders were also examined, and they swore they gave them without the slightest reference to any advantage to be gained by the shopkeepers, or to their votes, though it appeared that all the orders were given to shopkeepers who had promised to support Mr Weguelin. With regard to the profit of the shopkeepers, one of them said that on the sale of 80*l.* or 90*l.* worth of goods his profit was not 30*s.*; others said they sold them at lower prices than they usually charged. It appeared that in one shop boots of rather an expensive description were supplied; but the shopkeeper's daughter, who was examined, accounted for it by saying that when the order was given her stock was nearly exhausted, and she could only give what she had; and, with respect to some patent leather boots which were so much commented upon, it appeared that they were bought for Mr Weguelin himself. With reference to the orders for food given to the poor non-electors, Mr Exham stated that he could not bring them within the 4th section against treating. But if he could not bring them within that section, how could they be brought within the section against bribery? If the purpose for which those orders for food were given was such as to bring the case within the 3rd paragraph of the bribery section, it would follow that it would be equally within the 4th section against treating. I shall next consider the charge of excessive payments made to respondent's agents. Mr Exham applied at the close of petitioner's evidence for liberty to amend the petition by charging that those over payments rendered the election void under the 1 & 2 Geo. 4, c. 58, s. 6. I refused that application on the various grounds I then stated, and I stated also that if it was necessary to decide the point I should be inclined to hold that this Act of Geo. 4 has been impliedly repealed. With regard to counties, by the subsequent Acts to which I referred, the Reform Act (2 & 3 Will. 4), reduced the number of polling days from fifteen to five; and the subsequent Act of 1850 (13 & 14 Vict. c. 68), further reduced the number of polling days to two in counties and one in cities, towns, and boroughs; and another subsequent Act (25 & 26 Vict. c. 62) further reduced the polling days in counties to one day. Now the very

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division of polling places in counties made by those latter Acts would necessitate the employment of more than one conducting agent, which alone was allowed by the Act of Geo. 4. In a county it could not be contended as reasonable or just that a candidate should be prohibited from having more than one such agent. Take the county in which we are, in which there are so many polling places, and where polling lasts but one day only, could it be contended that in this county a candidate should employ only one conducting agent, or should pay his other agents or inspectors only the sums prescribed for one day by the Act of Geo. 4? If he did so, he would not get persons upon whose judgment or intelligence he could rely. Supposing, however, that this provision of the Act of Geo. 4 is still in force, the petitioner cannot rely on those over-payments as of itself vitiating the election, because he did not make that case by his petition. But Mr. Exham further contended that these over-payments were acts of bribery within the 3rd paragraph of the bribery section of the Act of 1854. Considering, however, the very penal consequences attached to bribery, and that if these over-payments to agents were to be considered as acts of bribery, they would be acts of personal bribery by the candidate who paid those agents, I cannot come to the conclusion that they should be considered as such, or that it was the intention of the Legislature to make those over-payments acts of bribery. Such an intention should, I think, have been expressed in clear and unambiguous terms. A supposed case was put by Mr. Exham of extravagant sums (say 1000*l.*) being paid to two or three influential solicitors in a town, ostensibly for their services as agents, but really for the purposes of securing their support and influence with the voters. Every case must, however, be judged of by its own circumstances; and if such extravagant sums were paid to influential parties in a town, sums exceeding, and out of all proportion, the amount of any fair remuneration for their legitimate services, then indeed it would be a question whether the money was *bonâ fide* paid for such services, or was not really paid for the purpose prohibited by this third paragraph. When that case arises it will be requisite to deal with it; but for the present I state my opinion that on the question raised in this case, and having regard to the facts which appeared upon the evidence as to the agents who were appointed, I do not think that these over-payments can be relied on as acts of bribery. It appears that the only agent who was a resident or voter of this town is Mr. Barry, who was virtually Mr. Weguelin's conducting agent, and who did not vote at the election. Mr. Mooney's first acquaintance with Youghal was on a visit some months before the election. Neither he nor Rice or Mackay had votes; and it is to be observed as to the payment to Mr Rice, that it included his attendance at the revision, which was a matter that required intelligence and labour to carry out. I now come to a question upon which I have felt some difficulty, namely, the charge of treating; and I shall first notice the argument of Mr. Exham, that the old Act of the 35 Geo. 3, c. 29, s. 19, is still in force as regards boroughs. The provisions of that section are (amongst other things) that no person to be thereafter elected to serve in Parliament for any county, city, town, or borough, shall, after the teste of the writ, or after a vacancy shall have happened, give or allow to any elector, directly or indirectly, any meat, drink, or entertainment; or shall at any time thereafter give or allow any meat, drink, &c., to any voter in order to be elected, or for being elected; and that the election of any person so giving or allowing any meat, drink, &c., should be void. Mr. Clarke, whose book has been cited, expresses his opinion that, under the 19th section, the qualifying words, "in order to be elected," &c., governed only the latter part. Without saying that I concur in that conclusion, the consequences of not holding would be very serious if that section was still in force. Supposing a candidate's brother, or other near relation, who had a vote, came and dined with him before the teste of the writ and the election, the candidate would be liable under that section, as the first part of it prohibits the giving of meat or drink to any voter, without reference to the purpose or design for which it was given; and the candidate would in such case be disqualified from being elected. It appears that this old Act of Geo. 3, so far as relates to counties of cities and counties of towns, was repealed by the 4 Geo. 4, c. 55; but the 79th section of that latter Act contained a provision in terms the same as the 19th section of the former Act, except that it applied only to counties of cities and counties of towns. That 79th section was itself expressly repealed by the Corrupt Practices Act of 1854, which does not repeal or notice the Act of the 35 Geo. 3, which was then unrepealed, as to boroughs in Ireland, though it does repeal the English Act of Will. 3, which contains provisions similar to those of the 19th section of 35 Geo. 3; and Mr. Exham contends that accordingly this 19th section is still in force as to boroughs. It would, however, require some reason to establish that the Legislature intended that a different state of the law should exist in Ireland from that which exists in England, and also intended that there should in Ireland be a difference in the law of treating as regards boroughs from that which exists as to counties of cities and counties of towns. Mr. O'Hagan (respondent's counsel) also relied on the preamble of the Corrupt Practices Act of 1854, as showing the intention of the Legislature to have (as regards corrupt practices) the same law for all elections. That preamble states the insufficiency of the laws then in force for preventing corrupt practices in the election of members; and that it was expedient to consolidate and amend such laws. Then the 4th section deals with some of the acts which are legislated against by the 19th section of 35 Geo. 3, and provides that they shall constitute the offence of "treating," if they are done "corruptly." The 23rd section of the Act of 1854 may also be referred to. It is clear that, so far as the 19th section of the 35 Geo. 3 was to remain in force, there would be no doubt that the giving of food, meat, or drink upon the day of polling would be illegal. But this 23rd section of the Act of 1854 states that doubts had arisen as to "whether the giving of refreshments to voters on the day of nomination or the day of polling be or be not acccording to law." Probably whoever prepared this Act had not in his contemplation the Act of 35 Geo. 3. But I fully concur in the principle so clearly relied on by Mr. O'Hagan, namely, that an Act of Parliament, though not expressly repealed, is impliedly repealed by a subsequent Act, the provisions of which are inconsistent with the previous Act, and I think on that ground I should hold that the 19th section of the 35 Geo. 3 is no longer in force, even as to boroughs in Ireland. The part of the case as to the charge of treating, with respect to which I feel the difficulty I have stated, is that which rests upon the 4th section of the Act of 1854. Mr. Butt, in the first instance, contended that, having regard to the Act of 1858 (21 & 22 Vict. c. 87, s. 3), which altered the definition that had been given by the Act of 1854 of the words "candidate at an election," Mr. Weguelin was not responsible for any act of treating committed before the dissolution, consequent upon which the writ for holding this election was issued. That Act of 1864,

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sect. 38, says that the words "candidate at an election" shall include "all persons elected to serve in Parliament at such election, and also all persons nominated as candidates, or who shall have declared themselves candidates at or before such election." If that definition of the words "candidate at an election" was still in force, there would be no doubt whatever that the sitting member would be answerable for any acts of treating committed by him or his agents after the time when he declared himself a candidate, though long before the election. But Mr. Butt (and I believe he may have the credit of having first suggested this point) refers to the 21 & 22 Vict. c. 87, the 3rd section of which expressly repeals so much of sect. 38 of the Act of 1854, as defined the words "candidate at an election," and declares that in the construction of the said Act of 1854, as amended by said latter Act, "the words 'candidate at an election' and the words 'candidate at any election' shall include all persons elected to serve in Parliament at such election, and all persons nominated as candidates at such election, or who shall have declared themselves candidates, on or after the day of the issuing of the writ for such election, or after the dissolution or vacancy in consequence of which such writ shall have been issued." The following definition of the word "candidate" is given in the 3rd section of the interpretation clause of the Act of last session, viz., "Candidate shall mean any person elected to serve in Parliament at an election, and any person who has been nominated at or declared himself a candidate at an election." Mr. Butt contends that the 4th section in the Act of 1854, which defines the offence of treating, should be read with the definition of the words "candidate at an election," given by the subsequent Act of 1858; and that if a person was not (within the meaning of that definition) a candidate at the time he treated, he therefore was not responsible for it under said 4th section, and that no action could be brought against him for the penalty of 50*l.* imposed by that section except for acts done after he became such candidate; and he further contends that if such person was sued for the penalty, after he declared himself a candidate, for acts of treating committed by him before he became a candidate, it is clear that as he was not liable to the penalty at the time of committing those acts he could not subsequently become liable thereto on the ground of his subsequently becoming a candidate. Though this is a very ingenious argument, I am not prepared to pronounce any opinion upon it. I think the construction for which Mr. Butt contends would lead to consequences that would in a manner nullify one of the manifest objects of the Act, by holding that, down to the time of dissolution, acts of treating might be committed with impunity. If so, the mischief intended to be avoided by the Legislature might take place, and the candidate absolved from all responsibility, provided he stopped at the dissolution. If, on the other hand, treating by the candidate before the dissolution was, by reason of the subsequent statute, exempted from the operation of the Act of 1854, which is a penal Act, then Mr. Butt has a right to contend that these statutes should be strictly construed. I have stated that he may have the credit of raising this point, because I find that in some of the recent election trials in England acts of treating were proved and successfully relied on, though they took place before the dissolution. In the *Windsor* case (the first that was tried), a transaction took place in the month of August, which was relied on as an act of treating, namely, that of the sitting member presiding at and providing wine for a dinner that was given by some society. Willes, J. held that it was not an act of treating, because the society was a social and not a political one; but the fact of its having occurred before the dissolution was not relied on. Under these circumstances I will not here decide that Mr. Weguelin is not responsible for acts of treating committed previous to the dissolution. The question has been very ably argued by Mr. Butt, and I stated in the early part of the trial that I would, if necessary, reserve the question for the consideration of the Court of Common Pleas, under the 12th section of the Act of last session. What I have already stated implies that I have come to the conclusion upon the question of treating, that acts took place which might be considered as treating, subject to the construction of the words, "candidate at an election," in that 4th section; but there is upon this point another question of difficulty as to the meaning of the word "corruptly" in that section. It has been urged for the respondent that if an Act of Parliament attaches a penalty to an act, "if done corruptly," this would imply that the doing of the act was not *per se* corrupt, and that there should be some other element in the case to warrant the conclusion that the party, by doing the act, became liable to the penalty. This 4th section uses, in the beginning of it, the word "corruptly." It provides that "every candidate at an election shall be deemed guilty of the offence of treating who shall 'corruptly' by himself, or by or with any person, or by any other ways or means on his behalf, at any time, either before, during, or after any election, directly or indirectly give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay, wholly or in part, any expenses incurred for any meat, drink, entertainment, or provision, to or for any person in order to be elected, or for being elected, or for the purpose of corruptly influencing such person or any other person to give or refrain from giving his vote at such election, or on account of such person having voted," &c., &c. The question then is, what is the meaning of this word "corruptly"? and whether, having regard to the various authorities upon this point, the proof that has been given here of what took place at the Devonshire Arms showed that the drink there supplied was given "corruptly." At the recent trial of the *Bradford Petition* (No. 1), it was held that the opening of a number of public-houses for the purpose of indiscriminately supplying drink to voters and non-voters, warranted the conclusion of corruption. But before I consider the various authorities as to the effect and meaning of that word "corruptly," I will refer to what took place at the Devonshire Arms Hotel, which had been taken for Mr. Weguelin in July. Mr. Heron, in his opening statement, commented at considerable length upon the bill furnished by that hotel. During the early part of this trial it was the case of petitioner's counsel that almost all of the great quantity of drink of various descriptions charged in that bill was consumed at the entertainments in the upper rooms of the hotel in which Mr. Weguelin and his friends and agents were stopping from time to time. But I could not reconcile that supposition with the evidence given as to the number and description of persons who dined in or frequented those upper rooms. Miss Murphy, the daughter of the hotel keeper (who was himself unable, from illness, to attend as a witness) swore on her first examination that she took down the orders for such drink as they were given to her by the two waitresses who attended in those upper rooms (one of whom was produced here, and the other was not now in her service). It appeared from the evidence of the waitress who was examined, that she used to bring such orders to the bar, and take upstairs what was so ordered; and Miss Murphy stated that she used to put down

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on a slate, and enter from that in her book, either in the evening or the next morning, the amount of drink so ordered, and which (as I understood from her first evidence) was carried upstairs to some of the rooms occupied by Mr. Weguelin's friends or agents. I examined the hotel book more particularly, and was struck with the fact that this excessive supply of drink occurred on some particular days. I accordingly had Miss Murphy recalled, and on her further examination it appeared (what had not before transpired, though I do not think she had in the slightest degree intended any concealment or misleading on her first examination) that a great quantity (two thirds, at all events) was consumed, not in the rooms upstairs or upon orders given, but under the following circumstances: It appeared that on fourteen or fifteen evenings during the few months preceding the election there were meetings of Mr. Weguelin's supporters at Dill's committee-rooms, and that on those occasions the gentlemen and persons of the better class who attended those meetings used to come to the hotel when the meetings were over and go upstairs; that they were followed to this hotel by a crowd, several of whom attended the meetings, and this crowd forced their way on some occasions into the hotel, and insisted upon getting drink, and that she had to give them drink in order to get rid of them, and had sometimes to send for the police to clear the house, and that the drink supplied to them was put down by her to Mr. Weguelin, and constituted so large a proportion of the amount. She also stated that neither Mr. Barry nor Mr. Mooney, nor any others of the committee, ever told her to give such drink, and that she never informed them of the amount so given. That would, according to her evidence, account for about two-thirds of the drink; but the remaining one-third was very considerable in quantity, and it appears that the greater portion of it was consumed in the rooms upstairs. A great deal of evidence has been given as to the number and class of persons who frequented those upper rooms, their position in life, and their decided feelings in favour of Mr. Weguelin. It also, however, appeared that on three several occasions when Mr. Weguelin entered this town, namely, on the 29th July, the 5th September, and the 26th October, drink to a considerable amount was consumed in the coffee-room by the persons who took part in such processions and accompanied them to the hotel, several of those persons being voters. It certainly appears that some persons who drank from time to time in the coffee-room on those occasions, used to treat each other and pay for their drink themselves; but a considerable part of the drink consumed on those three occasions was not paid for, but was charged in the hotel book to Mr. Weguelin. The name of Robert Murphy, son of the hotel keeper, was mentioned yesterday by Mr. Exham, and his non-production was commented upon. As I had not known that he took any part in the management of the hotel, the necessity of calling for his production had not occurred to me; but when Mr. Exham observed upon his not having been examined, I thought it right, under the power given to me by the Act, to have him called and examined; and he stated that he recollected a number of committee meetings on which occasions several of the humbler classes followed from the committee rooms the gentlemen who went upstairs. From the manner in which Murphy gave his evidence, his memory does not appear to be very good, as he seemed to forget things that one might reasonably think he would have remembered; but at all events he did not give his evidence in a manner that would induce me to think he was adverse to Mr. Weguelin, or that he would exagerrate in the slightest degree anything that would tend to that gentleman's disadvantage. He stated that on several of those occasions when the crowd came over from the committee-rooms, it consisted of voters as well as of non-voters; that about sixty or eighty persons used to attend the committee-rooms, and that out of those sixty or eighty persons, several of them would come to the hotel when the meetings were over; that some of the voters would go upstairs and have drink there; and that several of the poorer class of voters used to come into the hotel and stand at the bar. Taking his evidence with that of Miss Murphy, that those presenting themselves at the bar and asking for drink would get it without her knowing whether they were voters or not, the manifest conclusion is, that on those various occasions several voters got drink at the bar. So far even as relates to the entertainment upstairs, this arrangement was a very improvident one for Mr. Weguelin. It has been held in England in several cases that acts much less positive have been considered as treating. The candidature of Mr. Weguelin was announced on the 29th July. The opposition which he encountered then, and the feeling that was sought to be got up against him, were relied on by Mr. Butt as suggesting the reason why he should leave persons here to act for him. To that alone there would be no objection, but if it is contended that the motive of giving these constant entertainments in the rooms upstairs was to promote his popularity and to counteract the influence of the opposition, it would go very far towards establishing a case of treating. It may be that the feeling against Mr. Weguelin, which was caused by the Roman Catholic clergy and others, rendered it advisable for him to leave some of his friends behind to act for him in his absence; and that this may more or less account for the giving of charity, which, as I have already stated, did not in my opinion amount to bribery, though given for the purpose of increasing his general popularity. But with respect to the entertainments in the rooms upstairs, it is to be observed that Mr. Weguelin did not himself reside in that hotel after the 14th Aug. He stopped with Mr. Mooney from the 5th to the 12th Sept. on his second visit to Youghal, and he took a house for himself at his third visit on the 26th Oct. Mr. Barrett did not stop long at the hotel, and Mr. Rice and Mr. Mackey were there but occasionally, so that it is difficult to regard those entertainments in the rooms upstairs as what would naturally occur from persons calling in the evening to see Mr. Weguelin or his friends, and being asked, as a matter of courtesy, to partake of drink. Considering, however, all the evidence given as to the character and positions in life of the persons who partook of those entertainments upstairs, that several of them were not voters, and that such of them as were voters were, with few exceptions, the avowed supporters of Mr. Weguelin, and the opponents of Sir Joseph McKenna, having pledged themselves to Mr. Weguelin from the period of his arrival, there are grounds for contending that, if the proceedings at the "Devonshire Arms" were confined to those entertainments upstairs, they would not amount to treating. But, even in that case, it would require much further consideration before I came to such a conclusion, having regard to the decisions in England, not in one particular case, but in several, and to the opinion of the judges, that arrangements of that sort, where people might come without invitation, and partake of drink at the expense of the candidate, might be regarded as acts of treating from the number of times the drink was supplied, and the apparent object with which it was given. But I am relieved from the necessity of considering the effect of these entertainments upstairs from what took place in

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the coffee-room and at the bar of the hotel. It appears that on the occasions of the three demonstrations on the 29th July, the 5th Sept., and the 26th Oct., and of the fourteen or fifteen meetings at Dill's committee-rooms, several of the people who attended the processions and meetings used to go into the coffee-room or to the bar to get drink. There is no evidence to show that there was any limit put upon them; on the contrary, the evidence shows that any of those who attended the processions or meetings might have gone to the coffee-room or bar and ordered drink; and though there is no ground for saying that Miss Murphy gave any quantity sufficient to produce intoxication, there is certainly general evidence that several voters were seen drinking in the coffee-room without paying for it; and we have the further evidence of Robert Murphy, which leaves no doubt upon my mind of the fact, that on the occasion of those committee meetings several voters of the humbler class came from the committee-rooms and got drink at the bar. He certainly declined to say whether any of the persons whom he actually saw drinking on those occasions were voters; but we have the evidence of Miss Murphy, that drink was supplied on those occasions to anybody who came to the bar and asked for it. Independently, then, of the law of the case, no one on this evidence can hesitate to come to the conclusion that, upon those several occasions, voters of the humbler class, with respect to whom the mischief of treating would be most likely to be produced, were supplied with drink; and then the question is, Was that drink given "corruptly" within the meaning of the 4th sectionof the Act of 1854? It was, as I have already remarked, urged in the course of the trials, that where an act is made penal, if done "corruptly," is is to be implied that the act *per se* is not necessarily corrupt. Mr. Exham, however, has referred to several authorities (some of which I had myself considered before), which show what construction the judges in England have put upon the word "corruptly," used in this 4th section as to treating. In the *Windsor case*, 19 L. T. Rep. N. S. 613, which was the first petition tried, there was a dinner of the society of Odd Fellows in the month of August, at which tha sitting member attended, and ordered for it a quantity of champagne, which was paid for by him and two of his supporters. Willes, J. held that this did not constitute treating, as the society was a non-political one, although it did include several electors. But he says (p. 614), "I am impressed with the objectionable character, to say the least of it, of any transaction by which an intending candidate may seek to ingratiate himself with electors, whether of his own side in politics or not, by profuse expenditure for luxuries. I must express the opinion, for I entertain it, that this is a questionable proceeding, and that it would be well if such proceedings were refrained from in future; the more so because no one but a man possessed of wealth could afford to expend 27*l.* in a single evening on drink for other people." That case was followed by the *Bewdley* case, which was tried before Blackburn, J., 19 L. T. Rep. N. S. 676; when alluding to to the word "corruptly," he says (page 678), "The interpretation of this word as explained, and in my opinion rightly explained, by Willes, J., is not 'wickedly' or 'immorally' or anything of the sort, but embraces such conduct as it was evidently the intention of the Legislature to discountenance; where it is shown that even the smallest quantity of meat or drink is supplied, that is of course admissible as evidence of treating, but more than that would be required to make out a corrupt intention." Again, he says: "The evidence shows that nearly twenty public-houses were habitually kept open, and that whoever chose to present himself was supplied with drinks. Where that is done it would be a perfect mockery to suppose that it was done without any corrupt intention." In the present case the Devonshire Arms hotel was the only place where drink was supplied under circumstances that would amount to treating, as it did not appear that the drink consumed by voters in the public-houses was paid for or ordered by Mr. Weguelin or his agents. But, considering the extent of drink given at the hotel, and the frequent occasions on which it was given, I think that the foregoing observations of Mr. Justice Blackburn bear materially on the present case. I may also refer to the *Bradford case* (No. 1), 19 L. T. Rep. N. S. 719. It appeared that 115 public-houses were opened in that town, in which refreshments were supplied to all persons, whether voters or not, and that all voters who went there were made nominal members of the committee, but had nothing to do; and Martin, B. says (p. 721), "The learned counsel for the respondent has said that those refreshments were supplied to people who had done work, but the evidence is directly to the contrary; the evidence is to the effect that voters were admitted to those committee-rooms, the farce was gone through of putting down their names as committee-men, and refreshments were supplied to them whether voters or non-voters." Martin, B. also, in the second *Bradford* case, when giving an explanation of the grounds upon which he decided the previous petition, No. 1, against Mr. Ripley on the ground of treating, says (p. 726), "The case against Mr. Ripley was that he had opened public-houses in the sense in which that is commonly and generally understood, that they were public-houses selected by him or by his agents, that rooms were allotted in these houses where people went every night if they liked; that a messenger was put at the door, or some person for preventing others from coming there than persons in some way connected with the house, and the people who went nightly to these houses went there to get drink, only limited by this, that it was to be given in reason, and that it was not to be given in excess." Mr. Exham also referred me to the *Lichfield* case, which I have looked at, but I do not think it bears much upon this question; but he also referred to the *Westminster* case as showing what, in the transactions that there took place, were the grounds upon which Martin, B. held that they did not amount to treating. I have, however, already stated that I will reserve for the consideration of the Court of Common Pleas the question as to the meaning of the words "candidate" "at an election;" and if, upon further consideration as to the meaning and effect of the word "corruptly," having regard to the evidence in this case, I should be of opinion that there is any question of law respecting it which might properly be reserved for that court, before I decide that the giving of the drink at the hotels amounted to treating, I would also reserve it, as I think it desirable that if there be any such question it should be settled by some decision of the court instead of relying on observations that may be explained by the facts of the particular cases in which they were made. What I have stated, of course, implies that, as regards the charges of treating, my judgment now on the result of the election is not final. As, however, the parties are here, I thought it would be a useless expense to postpone giving my judgment on the other parts of this case for the purpose of waiting for the decision of the Court of Common Pleas. The 12th section of the Act empowers me to reserve any question of law for the consideration of the court, and to suspend my certificate to the Speaker until the decision of the court upon the questions reserved shall be ascertained. I have

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expressed what appears to me to be the contention of both parties for and against the construction of the words "candidate at an election," relied on by Mr. Butt. Further than that, I am not to be understood as expressing any opinion upon the subject; my opinion would be of little value, as the case is to go before another tribunal. There are, however, some other matters on which I have to observe. A great deal of time was consumed with evidence as to the amount of the expenditure of Mr. Weguelin, which certainly was excessive; there are several items in that expenditure which I cannot avoid saying should not have been charged against him by those whom he employed. He states himself that he has already paid 4200*l.*; Mr. Exham says the amount is something more, and there are further sums to be paid, taking into consideration the claims of Mr. Mooney, and the hotel bill, which would at all events come to some hundreds more; but even if the amount does not exceed 5000*l.* such an expenditure cannot be regarded otherwise than as excessive. I think, however, that much time was uselessly occupied in this matter, as great candour and willingness were displayed by Mr. Weguelin himself, Captain Weguelin, Mr. Barnett, and the other persons through whose hands money passed, in accounting for its expenditure; every document and voucher in their possession that was called for appears to have been produced, and produced readily. I have been told that this great amount of expenditure should influence my decision upon the question before me, and induce me to conclude that a portion of that expenditure was caused by bribery, but I do not assent to that argument. I have been referred to what a very able judge (Keogh, J.) said in Dublin as to the amount of expenditure, and also to what has been said with regard to the amount of expenditure in other cases; but where (as in this case) the expenditure has been accounted for, and where, however improvident that expenditure may have been, it has been proved by those through whose hands the money passed that none of it was spent in bribery, then the extravagant expenditure affords no foundation whatever for the charge that any portion of this money was spent in bribery, or was expended in any other manner than what was proved by the witnesses, whose evidence on the subject I see no reason to doubt. I have been also asked to report to the Speaker that corrupt practices extensively prevailed in Youghal during this election. That I decidedly will not do; I think I should be doing an act of gross injustice to the people of this town if I were to make any such report; I see no ground for holding that there was any corrupt practice at this election except as to the drinks given at the Devonshire Arms. I confess I was surprised at the application, particularly when it is to be considered, as I have already remarked, that seventy-eight cases of bribery were charged, and that not one of them was substantiated. The 11th section, paragraph 14, requires me also to report if any corrupt practices have been committed with the knowledge and consent of any candidate. Of course, if I ultimately decide that, upon the evidence and the true construction of the words "candidate at an election," these proceedings at the Devonshire Arms amounted to treating, I shall report that such treating was with the knowledge and consent of Mr. Weguelin himself. The manifest inference from the entire evidence is that he knew of those entertainments from time to time, and indeed he did not deny his knowledge of them. I may observe that, as regards the consequences to Mr. Weguelin, it is immaterial whether, as such treating was committed by himself or his agents, I should report that it was with or without his knowledge and consent. That same section also requires me to report whether any candidate at an election has been guilty of corrupt practices. With regard to that there is some evidence before me that drink and other matters had been supplied by some of the supporters of Sir Joseph McKenna; but I am not aware at present that there is on the evidence any sufficient ground for me to report that such drink, &c., had been supplied either by Sir Joseph McKenna or with his knowledge or consent, or by his agents; I shall, however, further consider that matter. There now remains one question as to which I shall express my present opinion, namely, as regards the costs. The award of costs is discretionary with the judge. Mr. Exham pressed very fairly a principle upon which I have acted myself, namely, that the fact of the defeat of a petition would not necessarily be followed by the petitioner paying the costs. On the other hand, I think that, in the event of the success of a petition, it does not necessarily follow that the petitioner should get his costs. There have been repeated instances in the House of Commons proceedings before Parliamentary committees where, although the member was unseated for bribery or for treating, he was not condemned to pay the costs. I have already referred to circumstances which, I think, furnish grounds for the exercise of that discretion, by disallowing costs to the petitioner in this case, even in the event of the petition ultimately succeeding by the decision of the Court of Common Pleas. And, on the other hand, I think that, should the petition ultimately fail, by the decision of the Court of Common Pleas, there are reasons for disallowing costs to the respondent. With regard to the ground for disallowing costs to the petitioner, it is clear, upon the evidence, that, so far as he himself is concerned, the question of costs is one of perfect indifference to him; that he is not responsible for the costs that are incurred; and that, in point of fact, as far as costs are concerned, the question may be considered as if this was the petition of Sir Joseph McKenna. I perfectly agree with Mr. Exham that, in deciding whether the election is void or not, by reason of corrupt practices, I should not have regard to the fact of Sir Joseph McKenna being the substantial petitioner, or to the indemnity for costs. Mr. Exham properly urged that the rights of the public are involved in inquiries of this nature, and that, no matter who brings the petition forward, still, if it be a *bona fide* petition, it is the duty of the judge to consider whether the law has been violated or not. But, with regard to the costs, I am at perfect liberty to take into account the fact that Sir Joseph McKenna is alone the party who would be interested in getting the costs; and when I call to mind the conduct that has been pursued, not merely by the mob, but by his own son-in-law in taking part with them, as I have already observed; and when I consider the petition itself, the bill of particulars, and the great length to which this trial has been protracted by inquiries in support of charges which have failed, I think there are good grounds for exercising my discretion as to the costs, by refusing petitioner his costs, even if the petition should succeed. My present impression is, that in any event of the petition, I shall let each party pay their own costs. That is my present impression, but I shall further consider the matter before I make any order on the subject, and if I see reason to change my opinion, I shall be at liberty to do so.

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COMMON PLEAS (IRELAND).

Saturday, April 10.

(Before MONAHAN, C. J., KEOGH, MORRIS, and LAWSON, JJ.)

YOUGHAL ELECTION PETITION.

Treating before issue of writ—Corrupt Practices Prevention Act 1854, *s.* 4—*Candidate—Definition of—* 17 *&* 18 *Vict. c.* 102, *s.* 38, *and* 21 *&* 22 *Vict. c.* 87, *s.* 3.

The 3*rd section of* 21 *&* 22 *Vict. c.* 87, *repealing the portion of sect.* 38 *of* 17 *&* 18 *Vict. c.* 102, *which relates to the definition of "a candidate at an election," provides that that expression "shall include all persons elected to serve in Parliament at such election, and all persons nominated as candidates at such election, or who shall have declared themselves candidates on or after the day of the issuing of the writ for such election, or after the dissolution or vacancy in consequence of which such writ shall have been issued:"*

Held, by the full court, that, under this section, acts of corrupt treating by the agents of the sitting member before the issue of the writ, and after he had publicly assumed the character of a candidate for the representation of the borough, constituted the offence of corrupt treating within the meaning of the 4*th section of the Corrupt Practices Prevention Act* 1854, *and avoided the election; and that it is not necessary that a person should be clothed with the character of a candidate according to the definition in the Act* (21 *&* 22 *Vict. c.* 87 *s.* 3) *at the time of the treating in order to be liable for it, should he afterwards come within the definition of a candidate as by being elected, &c.*

The maxim Reddenda singula singulis does not apply in such cases.

This was a special case stated by O'Brien J., for the consideration of the Court of Common Pleas on the question whether the sitting member was liable for acts of corrupt treating committed by his agents before the issue of the writ.

The special case was as follows:

THE PARLIAMENTARY ELECTIONS ACT 1868.

In the matter of the election petition for the borough of Youghal, between John Wellington Brazier (petitioner), and Christopher Weguelin (respondent.)

Case for the determination of the Common Pleas.

I hereby certify that the above petition (to which I refer) came on for trial before me at Youghal on the 19th Feb. last; that the said trial continued for several days, and that on the conclusion of the said trial on the 2nd March last it appeared to me requisite that before finally determining as to the validity of the election and return complained of by said petition I should, under the 12th section of said Act, reserve certain questions of law for the consideration of the Court of Common Pleas, and that I should accordingly postpone granting the certificate directed by said Act until the determination of such questions by said court.

The dissolution of the last Parliament (in consequence of which the writ issued for holding the election complained of by the said petition) took place on the 19th Nov. last. It was proved at the trial before me that the respondent arrived in said borough of Youghal on the 29th July last, and that at and previous thereto it was expected that such dissolution would take place within some few months. It was also proved at said trial that said respondent on his said arrival in Youghal declared he was a candidate for the representation in Parliament of the said borough of Youghal, and would stand as such at the election to be held for said borough consequent on such expected dissolution. And it was also proved that said election (being that complained of by said petition) was held on the 19th and 21st Nov. last, when said respondent was retured by the returning officer as having been duly elected for the said borough. And it was also proved that said respondent at various times from his said arrival in Youghal until said dissolution, canvassed various electors of said borough for their votes at such election continuously from time to time and declared his intention of seeking at such election to be returned a member of Parliament for said borough.

It was also proved on said trial before me that after respondent's said arrival in Youghal, and on various occasions between the 31st July last and the said 11th Nov. last, the said respondent had by his agents and other persons on his behalf, corruptly caused drink to be given and provided to and for various voters and electors of said borough and other persons, in order to be elected a member of Parliament for said borough at said then expected election. It was, however, contended before me by respondent's counsel that, inasmuch as the giving and providing said drink was previous to the said 11th Nov. last (the day of the said dissolution), then that same did not constitute the offence of treating, and that respondent's said election was not rendered void. It was, on the other hand, contended by petitioner's counsel that, although the giving and providing of said drink as aforesaid was previous to said dissolution, yet that same constituted the offence of treating, and was a corrupt practice within the meaning of the Corrupt Practices Prevention Act and of the Parliamentary Elections Act 1868, or of some of them, and that respondent's said election was rendered void by such treating.

I therefore request the opinion and determination of the Court of Common Pleas upon the following questions, viz.:

First, whether the corruptly causing of such drink to be given and provided as aforesaid previous to the said dissolution constituted the offence of treating, and whether the same was a corrupt practice within the meaning of the Corrupt Practices Prevention Acts, and of said Parliamentary Elections Act 1868, or of any of them?

Secondly, whether the respondent's said election was rendered void by such treating?

JAMES O'BRIEN.

April 5, 1869.

Heron, Q. C., on the part of the petitioner, contended that corrupt treating before the issue of the writ avoided the election. This was not a case of simple treating, but of corrupt treating, with a view to be elected. Mr. Weguelin was held to having been by his agents and others guilty of corruptly causing drink to be given with a view to be elected, and that he was on divers occasions during a considerable interval of time so guilty. This was sufficient by the common law of Parliament to avoid an election apart from the statute.

Butt, Q. C., *contra.*—The 4th section of the Corrupt Practices Prevention Act 1854, which, defines the offence of treating makes the description of the person committing it just as much a part of it as the description of the offence. The description of the person charged is as essential as the definition of the offence. This being so, it was important to consider whether at the time the alleged offence was

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committed the respondent was a "candidate at an election." A candidate is defined to be a person elected to serve in Parliament at such election, or nominated at such election, or who shall have declared himself a candidate after the issue of the writ or dissolution. The declaration could not be extended back further than the time the writ was delivered to the sheriff. Therefore before that time the respondent did not come under either of these definitions. He may have declared himself a candidate before the issue of the writ, but that did not make him a candidate within the meaning of the 4th section amenable to its provisions. Supposing the Mutiny Act contained a clause that an officer playing billiards should forfeit his commission, and that he was subsequently brought up before a court martial on a charge of playing billiards before he had got his commission, what would be his answer to the charge? Simply that he was not an officer when he played the billiards. The statute in question says that every *candidate* who shall do certain things shall be guilty of treating. Where was the justice of charging the respondent under this with acts done by him before he was a candidate any more than in charging an officer with something which he was only prohibited from doing as an officer? As to the argument founded on the words "before the election" in the section, it must be borne in mind that the definition of a "candidate at an election" was changed since then, and that while the old definition stood a person may have been a candidate before the election, and liable for acts done as such before the issue of the writ; but the new definition by which a person cannot become a candidate before issue of the writ, impliedly repeals such portion of that section as speaks of treating before the election, *i. e.*, before the issue of the writ.

MONAHAN, C. J., (without calling on Heron, Q.C., for a reply).—The question for us is a simple one. We would not dispose of the case now, if there was much difficulty; but the Act of Parliament is very clear unless the lawyers are able to make a difficulty out of it. The Corrupt Practices Prevention Act enacts in terms that every candidate at an election who shall corruptly by himself or by any other person or persons on his behalf corruptly (that is the governing word) at any time either before, during, or after an election directly or indirectly give, or procure, or be accessory to giving or procuring of meat, drink, or entertainment, to any electors in order to be elected, or for being elected, or for the purpose of corruptly influencing such persons, shall be deemed guilty of the offence of treating, and shall forfeit the sum of 50*l.*, and so forth. In that Act of Parliament there is a section defining who is to be a "candidate," and that particular section is repealed by the 3rd section of 21 & 22 Vict. c. 87, which enacts that so much of the 38th section of the previous Act as defines a "candidate" shall be repealed, and that in substitution of it candidate shall include all persons elected to serve in Parliament at such election, and all persons nominated as candidates at such election, or who shall declare themselves candidates on or after the issuing of the writ, provided that nothing therein contained shall impose any liability on any person nominated without his consent, &c. The definition of "candidate," therefore, includes "all persons elected to serve in Parliament," and if you substitute that definition for the word candidate in the 4th section, you will have "Any person elected at such election who shall, by himself or any other person on his behalf, at any time, either directly or indirectly, give entertainment, he shall be guilty of treating." There the case is clear. We have not a shadow of doubt that the principle of rendering *singula singulis* does not apply in a case of this description. We think the true and fair construction of the Act is, that every man who is elected to serve in Parliament for any city, borough, or county, or any place returning a member of Parliament, who shall, before, during, or after an election, be guilty of giving or providing entertainment corruptly for the purpose of being elected, commits an offence within the meaning of the Corrupt Practices Prevention Act. We must certify that to the learned judge, leaving him to draw his own conclusion. Of course we must add that the election was void.

Heron, Q. C.—As to costs; will your Lordships make any order?

MONAHAN, C. J.—No; we will merely answer the questions that were left to us.

Agent for the petitioner, *Edward Green Foley.*

Agent for the respondent, *Lawrence Mooney.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Monday, July 26.

(Before Lord Justice GIFFARD.)

Re THE CHINA STEAMSHIP AND LABUAN COAL COMPANY (LIMITED);

DRUMMOND'S CASE.

Company—Winding-up—Contributory—Memorandum of association—Subscription thereof—Obligation to take shares created thereby—Subsequent application for and allotment of fully paid up shares—Whether the obligation is thereby satisfied—The Companies Act 1862, *sect.* 23—*Official liquidator—Costs.*

In Feb. 1865, *an arrangement was made that a company to be formed under the name of C. Company, should take over the business and assets of two previously existing companies, the L. Company and the J. Company.*

For the purpose of carrying out this arrangement as regarded the L. Company, that company resolved to wind-up voluntarily, and an affidavit dated the 2nd Feb. 1865, *was made between the L. Company and the C. Company, which provided that the C. Company should purchase the business and all the property of the L. company at a certain price, which was to be paid, three-fourths by the delivery to the L. Company (who were called the vendors) of* 20*l. shares in the C. Company, upon which* 10*l. or* 20*l. should be deemed to be paid-up, or partly in shares with* 10*l. paid, and partly in shares with* 20*l. paid, at the option of the vendors, and the other one-fourth in debentures of the C. Company. On the* 13*th Feb.* 1865, *a prospectus of the L. Company was issued. This prospectus contained a statement that* 7500 *shares in the L. Company, partly fully paid up, and partly with* 10*l. per share paid up, would be reserved for applicants who were shareholders in the L. Company and the J. Company. D. was a shareholder in the L. Company. On the* 22*nd Feb.* 1865, *he subscribed the memorandum of association of the C. Company for twenty-five shares, and he was afterwards appointed one of the directors of that company. He signed a letter of application in the ordinary form for shares in the C. Company, paying a deposit of* 1*l. per share. There were allotted to him* 478 *shares in the C. Company as fully paid up, and one share as with* 10*l. paid up, and his deposit was returned to him. The number of shares so allotted to him corresponded to*

his interest in the assets of the L. Company. The C. Company was in course of time ordered to be wound-up. The liquidator sought to make D. a contributory in respect of the twenty-five shares for which he had subscribed the memorandum of association, in addition to the other shares which had been allotted to him, and the Master of the Rolls held that this must be done.

On appeal, held (reversing the Master of the Rolls), that the obligation to take shares in the C. Company which D. had incurred by subscribing the memorandum of association, was satisfied by the allotment to him of the other shares, because he had paid for those shares by giving up to the C. Company his interest in the assets of the L. Company.

Held, therefore, that D. could not be made a contributory in respect of the twenty-five shares.

Observations upon Evans's case (*infra*), *and* Migotti's case (*infra*).

Where an official liquidator does not furnish the court with the necessary documents he will be allowed no costs.

This was an appeal by the Hon. Francis Charles Drummond, from a decision of the Master of the Rolls, that he must be included in the list of contributories of the above company in respect of twenty-five shares for which he had subscribed the memorandum of association.

The China Steamship and Labuan Coal Company (Limited) was incorporated in Feb. 1865, under the Companies Act 1862, for the purpose of acquiring the business and the assets of two other companies which had previously carried on business under the names of the Labuan Coal Company (Limited) and the China and Japan River and Coast Steam Navigation Company (Limited). The Labuan Coal Company passed resolutions to wind-up voluntarily, and Mr. Drummond was chosen one of the liquidators. On the 2nd Feb. 1865, an agreement in the following terms was entered into between the Labuan Coal Company and the China Steamship Company.

Agreement made the 2nd Feb. 1865 between the Labuan Coal Company (Limited) (hereinafter called the vendors), of the one part, and the China Steamship and Labuan Coal Company (Limited) (hereinafter called the purchasers), of the other part. Whereas the vendors are possessed of certain properties in the island of Labuan and Borneo, consisting of leases or grants of coal mines, plant, and coals, and other materials, with various rights and privileges. And whereas the purchasers are a company being established for the purpose of carrying on trade in China and the East Indian seas. And whereas the said purchasers have agreed with the said vendors for the purchase of their capital, business, assets, and effects at or for the price of 108,750*l.* Now these presents witness that as and from the 31st Dec. 1864, the purchasers shall be entitled to all the property, plant, materials, leases, rights, privileges, and all other property of whatsoever kind, and whether real or personal, now belonging to the vendors, and the vendors shall, until all the arrangements for sale and transfer thereof are completed, carry on and continue the works and operations of their company for and on behalf of the purchasers. The said purchase-money of 108,750*l.* shall be paid by the said purchasers to the vendors as follows, viz., three-fourths thereof by the delivery to the said vendors of 20*l.* shares in the said China Steamship and Labuan Coal Company (Limited), upon which the sum of 10*l.* or the sum of 20*l.* shall be deemed to be paid up, or partly in shares with 10*l.* paid, and partly in shares with 20*l.* paid, at the option of the vendors, but so that the total sum so paid in shares shall amount to three-fourths of the said 108,750*l.*; and the balance of the said purchase-money of 108,750*l.* shall be paid by the delivery to the said vendors of debentures of the said China Steamship and Labuan Coal Company (Limited), payable seven years from the 1st Jan. 1865, and bearing interest at the rate of 6 per cent. per annum. The purchasers shall in such manner and at such time as may be arranged between the parties hereto in addition to the said purchase-money, pay and liquidate all liabilities of the vendors (including expense of liquidation), not exceeding the sum of 43,000*l.* The vendors shall take all necessary steps for procuring the consent of their shareholders to this agreement, and also for having the affairs of the Labuan Company voluntarily wound-up in accordance with the provisions of their articles of association, and, upon such confirmation by the shareholders, shall execute to the purchasers all such further and other deeds and assurances as may be required.

This agreement was afterwards duly approved by the shareholders of the Labuan Coal Company. On the 13th Feb. 1865 there was issued and circulated a prospectus of the China Steamship Company. This prospectus contained various statements respecting the company, among which were the following:

The allotment of shares will be made on the following basis, viz.—7500 shares, partly fully paid-up, and partly with 10*l.* paid-up, will be reserved for allotment to the applicants who are shareholders in the existing companies (that is, in the Labuan Coal Company and the China and Japan Coast and River Steam Navigation Company) of these 6000 have already been applied for, and the deposits paid to the company's bankers. 7000 shares with 4*l.* paid will be allotted to shareholders in the Crédit Foncier and Mobilier of England (Limited) 6000 shares with 4*l.* paid will be allotted to the general public, as also such shares (if any) as may not be applied for on the paid-up form or by the above. Application will also be received for 5000 fully paid-up shares on which dividends for the whole amount paid-up will be declared.

1500 shares will be reserved for allotment in Bombay, application for which will be received by Messrs. D. Sassoon and Co., at Bombay.

On the 22nd Feb. 1865 Mr. Drummond subscribed the memorandum of association of the China Steamship Company for twenty-five shares, which were not stated to be either wholly or partly paid-up. He afterwards sent in a written application for shares, paying at the same time to the company's bankers a deposit of 1*l.* per share, as was required by the prospectus. There were afterwards allotted to him 479 shares, 478 as fully paid-up, and one as with 10*l.* paid thereon. This number of shares was the number to which Mr. Drummond was entitled in proportion to his interest in the capital and assets of the Labuan Coal Company. The deposit which he had paid on application was repaid to him. No application was made in Bombay for the 1500 shares mentioned in the prospectus as having been reserved for applicants there, and no allotment was made of those shares. The capital of the company was divided into 27,000 shares, and out of these only 24,614 were allotted.

The China Steamship Company carried on business for a time, but was ultimately ordered to be wound-up. The Master of the Rolls upon the application of the liquidator, placed Mr. Drummond upon the list of contributories in respect of twenty-five shares upon which nothing had been paid, being the twenty-five shares for which he had subscribed the memorandum of association.

From this decision Mr. Drummond appealed.

Mr. James Tait, who was the secretary of the China Steamship Company, made an affidavit, in which he deposed as follows:

Those applicants who were members of the Labuan Coal Company (Limited) or of the China and Japan Coast and River Steam Navigation Company (Limited), did not actually pay in cash the sums which became due upon the shares allotted to them, but the sums so due were credited to them as paid in the following manner: The China Steamship Company were bound to pay to the liquidator of each of the two said companies a certain sum, and the liquidator was bound to distribute that sum among the shareholders of the company of which he was liquidator, according to the number of shares held by them respectively in the company, and that sum so distributed was equal to, and would have been, applied in discharge of the amounts due from all the members of such company in payment of the deposit, and of the sum of 9*l.* or the sum of 19*l.*, as the case might be, on the shares in the China Steamship Company taken by such shareholders, so that in fact each applicant for shares in the China Steamship Company would have been entitled to receive on the one hand, through his liquidator, from the China Steamship Company precisely the same sum as he would have been bound to pay on the shares allotted to him. Under these circumstances, it was not thought necessary to make the actual payment in cash on each side, but the matter was settled on account, and the liability of each applicant to pay the amount so due as aforesaid upon the shares alloted to him was discharged by the amount which he had to pay being credited to him instead of being paid to the liquidator for him.

Jessel, Q. C. and *Speed*, on behalf of the appellant, contended that though he had, by subscribing the memorandum of association for twenty-five shares, incurred an obligation to take twenty-five shares in the company, yet he had fulfilled that obligation by becoming the registered holder of 479 shares, which he had paid for by means of his interest in the property of the Labuan Coal Company, which became the property of the China Steamship Company. They distinguished

Evans's case, L. Rep. 2 Ch. App. 427; 16 L. T. Rep. N. S. 253;

Migotti's case, L. Rep. 4 Eq. 238; 16 L. T. Rep. N. S. 271.

Roxburgh, Q. C. and *Wickens*, on behalf of the liquidator, argued that the agreement between the Labuan Coal Company and the China Steamship Company was entirely distinct from the agreement to take twenty-five shares in the China Steamship Company, which arose by means of the appellant's subscribing the memorandum of association, and the latter agreement could not be satisfied by anything done in pursuance of the former. The case was really governed by the authorities cited on the other side; and that an allotment of paid-up shares would not satisfy the obligation arising from subscribing the memorandum of association was further shown by

De Beville's case, L. Rep. 7 Eq. 11;

Pell's case, L. Rep. 8 Eq. 222; *infra*, p. 320.

Without calling for a reply,

Lord Justice GIFFARD said:—I will not trouble you, Mr. Jessel, to reply in this case. There are many facts before me in this case which were not before the Master of the Rolls; and I cannot help thinking if the Master of the Rolls had had the facts before him he would have come to a conclusion different from that at which he has arrived. With regard to the cases applicable to this case there are four. *Evans's* case is the first. That was a very simple case indeed, and its effect is accurately stated in the marginal note L. Rep. 2 Ch. 427. In that case "E. signed the memorandum of association of a company as the holder of ten shares, and acted for a short time as a director of the company. Other directors were then appointed, and E. never afterwards had anything to do with the company. No shares were ever allotted to him, and his name was never on the register. All the shares in the company were allotted to other persons, but the allotment of some was not final, and they were not taken up. Held that E.'s name ought to have been on the register, and that he was a contributory in respect of ten shares." That decision is simply this: a man by signing a memorandum of association does contract to become a shareholder, and if he takes no shares he will be held liable in respect of that contract if there are shares in existence which can be attributable to him. That is the whole of *Evans's* case, neither more nor less. Then there is *Migotti's* case, which is most accurately decided. *Migotti's* case, again in the marginal note, is this: "The subscribers of the memorandum of association of a company, under the Companies Act of 1862 are by the 23rd section of the Act bound to take as many shares as they have subscribed for, whether or not the shares are actually allotted to them, and this obligation is not satisfied by the allotment at a subsequent period of nominally fully paid-up shares." We shall see presently what that means. "Therefore, where M. subscribed the memorandum of a company for five shares, and eight months afterwards five fully paid up shares, which the company had agreed to allot to C., as part of the purchase-money for property sold to them by C., were by C.'s direction allotted to M., and the company was wound-up: Held, that M. was a contributory in respect of five shares, upon which nothing had been paid." I take that case to decide this, and to decide this and nothing else, that Migotti by signing a memorandum of association contracted, as between himself and the company, to take ten shares, and that, taking the five paid-up shares which did not belong to the company, but which did belong to Carter, was, in reality, taking the shares from Carter and not from the company, and therefore that he had never fulfilled that contract with the company which he had entered into by signing the memorandum of association.

Then we go to *De Beville's* case. I will only read one passage from the judgment, which appears to me to be perfectly accurate, and to be applicable, or, at least, certainly not inapplicable, to the present case. That passage is this: The Master of the Rolls says, "A person cannot sign the memorandum of association for shares generally, and afterwards say that some or all of them are paid-up shares, unless"—what?—"money or money's worth was actually paid by him, or on his behalf, for those particular shares, and also if he sign the memorandum of association in respect of shares there stated to be paid-up shares, while they are not really paid-up, he will, in my opinion, be liable to pay the amount due on the shares." That, again, is plain enough. That is to say, if a man contracts to take shares, he must pay for them, to use a homely phrase, in meal or in malt. He must either pay in money or in money's worth. If he pays in one or the other, that will be a satisfaction. Then, the fourth case is the last case which was quoted, the facts in which are very shortly stated, but that seems to me to follow entirely the proposition laid down by the Master of the Rolls in *Pell's* case. That case appears to me to be this: Mr. George Pell signed the memorandum, I think, for 1350 shares. Then it is stated "by clause 86 of the articles of association an agreement was ratified and declared to be binding on the company, by which Pell sold to the company the goodwill and stock in trade of certain businesses carried on by him, and it was agreed that as part of the consideration to be paid to him, the company were to issue to Pell or his nominees 1500 shares of the nominal value of 20*l.* each, which shares should be credited in the books of the company as fully paid-up in part payment of the purchase-money." What the Master of the Rolls held, was that Mr. Pell "must be put on the list for all the shares," and to that he added he "was entitled to an inquiry as to what was the value of the property handed over by him to the company, and to be allowed such value, but no more, towards payment of his shares," and as we know it has been decided there can be no set-off. Therefore that again has been a decision of the Master of the Rolls entirely on the footing of *De Beville's* case, and amounts simply to this which I take to be the true proposition of law: A man who signs the memorandum of association agrees to become a shareholder, and as long as there are shares that can be allotted to him he must fulfil that obligation.

Now let us see what the facts of the present case are, and see whether they are the same as in *Migotti's* case. The facts of the present case are these. [His Lordship stated the facts.]

In that state of things I cannot see any distinction whatever between Drummond's position and the position of a person who, after having signed this memorandum of association without saying anything more, had agreed to take 479 shares, and had paid up money in respect of those 479 shares. If a man comes to an agreement with a company to take twenty-five shares, and positively

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takes 479, saying nothing more, and pays up the money in respect of them, it would be impossible in that state of things to say that he had not satisfied the contract to take the twenty-five shares.

The whole of that view of the case is entirely fortified by the statement of facts which has been agreed to. Amongst other things in that statement of facts, I find, first of all, at the end, "The directors state that they consider that they would not be justified in issuing to persons in England any of the shares thus in accordance with the prospectus reserved for Bombay, and for the members of the two old companies respectively, as that would have been a breach of faith towards those who had subscribed upon the faith of the statements made in the prospectus, and would have depreciated the value of the shares reserved to be allotted in England." That is quite consistent with the prospectus, because there was there a distinct stipulation that that number of shares should be reserved for persons in Bombay. Then the statement in the prospectus is that 7500, some fully, that is, with 20*l.* paid-up, and some with 10*l.* paid-up, were reserved for allotment to the shareholders in the two old companies, and that 1500 shares were reserved for allotment in Bombay. This left 18,000 shares only for allotment in England. All these 18,000 shares and 20 more were allotted on or about the 25th Feb. 1865, and the company commenced business. At this time the shares were at a premium, but before the month of May 1865 they were at a discount. Afterwards, that is to say, on the 10th May 1865, and not before, it was ascertained that the 7500 shares reserved for allotment to the shareholders in the two old companies would not be required by them; 6594 of such shares, however, were taken by them." So that literally, when Mr. Drummond really took these shares, he could not consistently with the duties which he had undertaken to perform have got any other shares. For these reasons I am of opinion that the order made by the Master of the Rolls must be reversed, and Mr. Drummond must have the costs below, but there will be no costs of the appeal.

In the course of the argument of the appeal, it appeared that the official liquidator had not in court all the documents necessary for the use of the judge, and a good deal of delay was caused by the absence of those documents. With refereece to this, at the conclusion of the judgment,

Lord Justice GIFFARD said.—Now this case is over, I must take leave to say in the very next case which I have before me, where the official liquidator appears without the proper papers in court, I shall insert in the order that he have no costs whatever. If it is known on future occasions that that rule really will be acted upon, it may be that the papers will be here. If it so happened that business was pressing, there would have been a considerable waste of time.

Solicitors for the official liquidator, *Mackenzie* and *Trinder*.

Solicitors for Mr. Drummond, *Meyrick*, *Gedge*, and *Loaden*.

ROLLS COURT.

Reported by HENRY PRAT, Esq., Barrister-at-Law.

Tuesday, July 13.

Re HEYFORD COMPANY (LIMITED); PELL'S CASE.

Company—Contributory—Signing memorandum—Allotment of shares to vendor—Paid-up shares.

P. subscribed the memorandum of association of a company for certain shares. In the articles of association an agreement was set forth by which P. was to transfer certain property to the company, and was to accept fully paid-up shares in part payment of the purchase-money. He transferred the property, and the shares were allotted to him, but no payment was made by him in respect of the shares.

On an application by the official liquidator of the company:

Held, that P. must be fixed on the list in respect of the shares, but that he would only have to pay the balance found due from him after deducting the value of the property transferred by him to the company.

Adjourned summons.

This was an application by the official liquidator of the Heyford Company (Limited), that the name of George Pell should be fixed on the list of contributories of the company in respect of 1350 shares of 20*l.* each, under the following circumstances:—

The company was registered on the 26th Aug. 1865, with a capital of 120,000*l.* in 6000 20*l.* shares, and Pell signed signed the memorandum for 1350 shares.

The articles of association, which were registered at the same time as the memorandum, set forth (in the 86th clause) an agreement between Pell and the company, dated the 1st Aug. 1865; by this agreement Pell agreed to sell to the company the goodwill and stock-in-trade of a certain business carried on by him, and it was agreed that, in part payment of the purchase-money, the company should issue to Pell or his nominees 1350 20*l.* shares, such shares to be credited in the books of the company as fully paid up, and Pell should accept the same. Of these shares 1350 stood in Pell's name, and the rest in the name of his nominees.

Pell had transferred the goodwill and stock-in-trade of his business to the company, but he had not been credited in the company's books with full, or any, payment in respect of the shares.

The company was ordered to be wound-up in Dec. 1866.

Roxburgh, Q. C., for the official liquidator, submitted that Pell's name should be fixed on the list of contributories for the 1350 shares for which he had signed the memorandum of association. The memorandum contained no statement that the shares were to be treated as fully paid-up, and as Pell had subscribed the memorandum for the shares simply and without any qualification, he must be placed on the list. He cited

Re South Blackpool Hotel Company, Migotti's case, 16 L. T. Rep. N. S. 271; L. Rep. 4 Eq. 238;

Re South of France Company, Baron De Beville's case, L. Rep. 7 Eq. 11.

Westlake, for Pell, contended that by the statement in the articles of association the public had notice that he had taken a large number of shares which were to be credited to him as fully paid-up, and he could not therefore, now be held liable for them, especially as the property which he had transferred to the company was worth more than the shares.

Lord ROMILLY.—I think he must be put upon

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the list in respect of these shares; but whether they are paid-up or not is a question of account. He will only have to pay the balance which may be found due from him after deducting the value of the property transferred by him to the company.

Solicitors for the official liquidator, *Denton* and *Hall*.

Solicitors for Mr. Pell, *Elmslie*, *Forsyth*, and *Sedgwick*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Wednesday, July 14.

HAMMONDS v. BARRETT.

Post-nuptial settlement—Provision against husband's bankruptcy—Rights of creditors.

By a post-nuptial settlement 990*l.* *the property of the husband, and* 4000*l.* *the property of the wife's brother, was settled upon trust for the wife for life, with remainder for the husband for life or until bankruptcy or alienation, and then, or after his decease, upon the children of the marriage. The wife died in* 1862, *leaving children. In* 1867 *the husband was adjudicated bankrupt, and in* 1868 *he died:*

Held, that the settlement was valid as against creditors, and that the husband's life estate determined on his bankruptcy.

The principal object of this suit was to obtain a declaration of the rights of certain persons under a settlement dated the 4th July 1862. The facts were as follows:—

In March 1844 Samuel Barrett married Isabel, the daughter of William Clark. There was no settlement made upon the marriage. Subsequently William Clark bequeathed a legacy of 2000*l.* to his daughter Isabel, and appointed his son Marmaduke Clark, his sole executor. William Clark died in Nov. 1861, and upon his death Marmaduke Clark paid the legacy of 2000*l.* to Barrett as the person entitled to it in right of his wife. Out of that sum Barrett invested 990*l.* in the purchase of stock in the Madras Railway Company.

After the death of the testator Marmaduke Clark, being desirous of making a further provision for his sister and her family, agreed with Barrett, that he would settle 4000*l.* upon them, if he, Barrett, would also settle the 990*l.* Madras stock, and all other acquired property with the same object.

Accordingly, the settlement in question was executed, whereby, after reciting the above arrangement, and that in pursuance of it the 990*l.* Madras Stock, and the 4000*l.*, had been transferred into the joint names of Barrett and the plaintiff as trustees of the settlement, it was declared—"that in consideration of the premises and of the said sum of 4000*l.* so given by the said Marmaduke Clark as aforesaid, to or for the benefit of the said Isabel Barrett, and also for settling a portion of the said legacy of 2000*l.*, and for divers other good causes and considerations," the plaintiff and Barrett, and the survivor of them, his executors or administrators, should stand possessed of the said 990*l.* Madras Stock, and the said 4000*l.*, and the stocks, funds, and securities in or upon which the same might be invested, upon trust to pay the interest, dividends, and annual produce thereof, or permit the same to be received by Isabel Barrett for her life for her separate use, and after her decease "upon trust to pay the said interest, dividends, and annual produce, or permit the same to be received, the said Samuel Barrett and his assigns for the term of his natural life, or until, or in case he shall become bankrupt, or take the benefit of any Act for the relief of insolvent debtors, or commit or do any act, deed, matter, or thing whatsoever whereby the interest, dividends, and annual profits of the said stocks, funds, and securities shall become vested in any other person. And then, and in such case, the estate for life of the said Samuel Barrett therein shall cease and determine as if he were actually dead. Anything herein contained to the contrary thereof in anywise notwithstanding." And after the decease of Samuel Barrett in trust for the children of the marriage.

Isabel Barrett died in Oct. 1862, leaving several children.

In May 1866 Barrett executed a bond for securing payment of 300*l.* and interest by annual instalments; and for the purpose of insuring the payment thereof it was agreed between the parties thereto, that the plaintiff should receive and retain the interest, dividends, and annual income of the stocks, funds, and securities under the settlement, and from time to time pay thereout the said annual instalments, and it was declared that the receipt of the plaintiff for all sums becoming due in respect of the interest and dividends in the said stocks, funds, and annual securities should be a good and sufficient discharge for the same to all persons paying the same, until the whole of the bond debt was satisfied.

In April 1867 Barrett became a bankrupt, and one of the defendants was appointed his assignee. In May 1868 Barrett died, and the plaintiff being in doubt whether the whole or part of his interest under the settlement ceased on his bankruptcy, declined to deal with the property without the intervention of the court.

Hence the institution of this suit.

Babington, for the plaintiff, submitted the question to the court.

Hughes, Q.C. and *Tanner*, for the assignee in bankruptcy, said that the sum given by the brother was not claimed by the assignee; but as to the 990*l.* Madras Stock, they contended that the settlement was invalid. That portion of the property belonged to Barrett, and could not, under a post-nuptial settlement, be so settled as to go over on his bankruptcy. They cited,

Higinbotham v. *Holme*, 19 Ves. 88;
Holmes v. *Penney*, 3 K. & J. 90;
Whitmore v. *Mason*, 2 J. & H. 204.

Dickinson, Q.C, and *F. H. Colt*, for the children, were not called upon.

Karslake, Q.C., *W. W. Karslake*, and *Moulton* for other defendants.

The VICE-CHANCELLOR.—This is not the ordinary case of a post-nuptial settlement, by which a husband settles his own property, reserving to himself a beneficial interest, defeasible upon alienation or bankruptcy. The principal part of the subject-matter of the settlement is a sum which comes from the wife's brother, and not from the bankrupt or his wife, and this being so, it is perfectly clear that the brother had a right to say that the smaller sum settled by the husband should go over on his bankruptcy. There is nothing obnoxious to the rules of bankruptcy, and no fraud on creditors by this stipulation. The assignee, therefore, is not entitled to any of the stock, the life interest of the bankrupt having ceased upon the execution of the bond.

Solicitors for the plaintiff, *Travers Burges*, for *Edward Burges*, Bristol.

Solicitors for the defendants, *Ley* and *Scott*; *Hudson*, *Matthews*, and *Co.*

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Tuesday, July 27.

GIBBS *v.* HARDING.

Husband and wife—Agreement to execute separation deed—Specific performance.

By a memorandum of agreement between a husband of the one part and the wife's father, on behalf of the wife, of the other part, the husband agreed to execute a deed of separation to contain the usual clauses, and to secure payment of an annuity to the wife's father for the maintenance of the wife and her child. The agreement was acted upon by the separation of the husband and wife, and by the maintenance of the wife and child by the wife's father. Subsequently the husband refused to execute the deed of separation:

Held, that the agreement was valid, and must be specifically performed.

This was a suit for the specific performance of an agreement for separation between a husband and wife. The facts were shortly these.

On the 1st March 1857, the defendant Thomas Archer Harding was married to the plaintiff Alice Harding, a daughter of the plaintiff Joseph Gibbs. No settlement was executed on the marriage. After the marriage differences arose between the husband and wife, and they then agreed to live apart on the terms mentioned in the following agreement:

Memorandum of agreement made the 5th July 1865, between Thomas Archer Harding of the one part, and Joseph Gibbs of the other part. Whereas differences having arisen between the said Thomas Archer Harding and Alice his wife, the daughter of the said Joseph Gibbs, and it hath been agreed between the said Thomas Archer Harding and the said Joseph Gibbs, on behalf of his said daughter, that the said Thomas Archer Harding and the said wife should live apart, and the said Thomas Archer Harding doth hereby agree with the said Joseph Gibbs, when thereunto required to execute and sign a deed of separation, to be prepared by Messrs. Bradford and Foote, to contain all usual and proper clauses, and also to secure the sum of £40 a year to commence from this date, and to be paid by equal quarterly payments by the said Thomas Archer Harding for the maintenance of his wife and child, but if the said wife should now be in the family way, and have another child within eight months from this time, then the sum of 40*l.* shall be increased to 50*l.*, to be paid in like manner as the 40*l.* provided for, so long as such child shall live, and the costs of the deed of separation and of this agreement shall be paid in equal portions by the parties hereto.

This memorandum of agreement was signed by Thomas Archer Harding, Alice Harding, and Joseph Gibbs.

The child referred to in the agreement was the defendant Victoria Harding, an infant seven years of age, and the only surviving issue of the marriage. Mrs. Harding had no other child after the separation.

In pursuance of this agreement, the husband and wife lived apart. Joseph Gibbs brought up the child and assisted in maintaining his daughter until she went into service, where she had since remained. The annuity was regularly paid to Joseph Gibbs up to Oct. 1867. In that month Gibbs applied to the defendant to execute a deed of separation, which he had caused to be prepared, charging the annuity on certain real estate belonging to the defendant; but the defendant refused to execute it.

Thereupon, this bill was filed, praying that the defendant might be decreed specifically to perform the agreement of the 5th July 1865, and to execute the said deed of separation, or some proper deed of separation to be approved by the court, and to pay the said annuity, and to do all other acts pursuant to the said agreement, the plaintiffs offering specifically to perform the same on their part, and in particular to execute a proper deed of separation, pursuant thereto, to be approved by the court, and that an account might be taken of the amount due in respect of the said annuity.

Greene, Q. C. and *Bagshawe*, for the plaintiffs, submitted that it was not necessary, in order to enforce the agreement, that the wife should be a party to it. They were stopped by the court. They cited

Williams v. *Baily*, L. Rep. 2 Eq. 731; 14 L. T. Rep. N. S. 802;
Wilson v. *Wilson*, 1 H. of L. Cas. 538; 5 H. of L. Cas. 40.

Dickinson, Q. C. and *W. W. Karslake*, for the defendant Harding, contended that the agreement was not binding upon him. It was wanting in consideration and mutuality. The husband and the wife's father were the contracting parties; the wife's mere signature availed nothing; but even if it did, she, as a married woman, could not contract. Moreover, the deed of separation which the defendant was asked to execute was not in accordance with the agreement. It charged the annuity upon his landed property, and it contained no covenant for indemnifying him against his wife's debts. There was no analogy between this case and that of *Wilson* v. *Wilson*. They cited

Mornington v. *Keane*, 2 De G. & J. 292;
Walrond v. *Walrond*, John. 18.

Langley for the infant defendant.

The VICE-CHANCELLOR.—This suit has been instituted for the purpose of enforcing an agreement for separation between husband and wife. The parties to the agreement are the husband and the wife's father on behalf of the wife. It is signed not only by the parties to it, but by the wife herself, who has therefore, as far as it is in the power of a married woman, bound herself by the contract. There can be no doubt that the agreement is perfectly valid. It has been acted on by the father of the wife, who at the present time is maintaining the defendant's child, and whenever an agreement which is not illegal has been acted upon, and obligations have been incurred upon the faith of it, the court, when asked, will see that it is specifically performed. Although there is nothing in the written agreement to justify charging the annuity upon the land, as has been done by the deed which has been prepared, still the husband would have done better to have executed it, and if well-advised, will do so now; but if he will not, a proper security must be prepared in chambers, in accordance with the agreement. The case is one which ought never to have come into court, and it is with great reluctance that I make a decree at all; but as the question has been left to my decision, I can do nothing else than make a decree in the terms of the prayer of the bill, with costs against the defendant Harding.

Solicitors for the plaintiff, *Few* and *Co.* for *Bradford* and *Foote*, Swindon.

Solicitor for the defendant, *W. Moon.*

Friday, Nov. 5.

GERRARD *v.* DAWES.

Re THE ESTATE OF MATTHEW DAWES.

DRYDEN *v.* DAWES.

Solicitor and client—Charge for costs on property recovered—Injunction to restrain payment of money out of court—Attorneys and Solicitors Act (23 & 24 *Vict.* c. 127).

A solicitor, who after establishing his client's claim, as creditor in an administration suit, was unable to obtain payment of his taxed bill of costs:

Held, entitled to an order restraining the payment of a

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cheque drawn by the Accountant-General in favour of the client in respect of such claim, until a petition could be presented, under the Attorneys and Solicitors Act, setting forth all the facts of the case.

This was an *ex parte* application on behalf of a solicitor to restrain the delivery of a cheque drawn by the Accountant-General for payment of a sum of money out of court until a petition could be presented under the Attorneys and Solicitors Act, setting forth all the particulars of the applicant's case. The facts stated in support of the application were these:—

In 1862 an order was made, in a creditor's suit, for the administration of the estate of Matthew Dawes, the testator in the above causes. In the same year John Whittle, one of the testator's creditors, obtained through his solicitor, the present applicant, admittance of his claim, which, together with taxed costs of 25*l.* 16*s.* 6*d.*, amounted to 88*l.* 0*s.* 1*d.* In 1864 Whittle received out of court 29*l.* 10*s.* 1*d.*, the first dividend on his claim.

Shortly afterwards the applicant delivered his bill of costs in respect of the proof of the claim and other matters, amounting to 64*l.* 4*s.* 7*d.*; and on the 6th March 1866 Whittle paid the applicant 5*l.* on account of his bill, and gave him a six months' promissory note for the balance. Whittle did not pay the money due upon the note, and on a writ being issued to enforce payment it was discovered that he had left his usual place of residence, and could not be found.

On the 29th Feb. 1869, an order was made for the final distribution of the testator's estate, and the cheque in question was then drawn by the Accountant-General for payment to Whittle of the residue of his claim. Hence this application.

E. S. Ford appeared in support of the application.

The VICE-CHANCELLOR said he would make an interim order restraining the payment of the cheque, but the applicant must undertake to indemnify Whittle against damages.

Solicitors: *Shaw* and *Tremellen.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Nov. 2 and 3.

BRADBURY v. BEETON.

Injunction—Title of periodical—Trade mark—Property in name.

A comic periodical, called Punch, *having been for twenty-five years published by B. and Co., at 3d. weekly, and another comic periodical, called* Judy, *being published by other parties, a publication of a like character, called* Punch and Judy, *was brought out and published weekly, at 1d., of the same size as* Punch, *but with a different illustration on the cover, and on paper of a different tint, B. and Co. moved to restrain such publication, on the ground that the public were liable to be deceived into purchasing the new periodical for the old, either from haste at railway stations, &c., or from supposing that* Punch *and* Judy *had been amalgamated; and the bill charged fraudulent intention, and the passing off a rival publication for that of the plaintiffs, whose property in the name* Punch *was illegally appropriated:*

Motion refused.

This case came on upon a motion for an injunction to restrain the defendant, his servants, agents, and workmen, from printing, publishing, selling, exposing for sale or otherwise disposing of, and from procuring to be printed, published, sold, exposed for sale, or otherwise disposed of, any copy or copies of any weekly journal or other periodical with or under the name or title of *Punch and Judy*, or any other name or title of which the word *Punch* should form part, or which should be a colourable imitation of the name or title of the plaintiffs' periodical *Punch*.

The bill stated that the plaintiffs, Messrs. Bradbury, Evans, and Co., were, as they had been for some years past, the proprietors of a well-known weekly illustrated comic periodical entitled and commonly called *Punch*, the exclusive property and copyright in each number being vested in the plaintiffs, who were the duly registered proprietors of such copyright. That a number of such periodical had been regularly issued for more than twenty-five years, during which period it had acquired a great reputation and popularity under the name or title of *Punch*, so that at the present time a very large number of copies were sold every week; from which sale the plaintiffs derived great profits, and, in fact, the name of *Punch*, or the right to use such name as the title of a periodical publication, had become, and was, a very valuable property, to which no person or persons other than the plaintiffs had any right or title whatsoever. That the defendant had recently begun to publish a weekly illustrated periodical under the name or title of *Punch and Judy*, of the same size, and similar in general style and appearance and nature of contents to *Punch*, but with articles and illustrations of an inferior character. The first, second, and third numbers of such periodical being dated and purporting to be published on the Saturdays, Oct. 9th, 16th, and 23rd, 1869; the plaintiffs' periodical bearing date and purporting to be published on the Saturday, although really issued on the Wednesday preceding. That of every number of the plaintiffs' periodical many were sold at railway stations, it being a common practice for passengers when they passed through a station where newspapers and periodicals were sold, to purchase a copy of *Punch* during the time that the train stopped for the purpose of allowing persons to enter or alight. This time was usually very short, seldom above a minute or two, so that the purchase was necessarily made without a close examination of the article purchased; and by reason of the similarity in size and general style and appearance of the defendant's periodical, but in particular by reason of the word "*Punch*" forming the principal part of the name or title thereof, many copies of such periodical would be sold to persons intending to purchase the plaintiffs' publication. That this would continue to be the case as long as the word "*Punch*" formed part of the title of the defendant's periodical, or such periodical bore a title which was merely a colourable imitation of the title of the plaintiffs' periodical. The bill then stated that there was another comic periodical published every week under the name of *Judy*, and similar in size and general appearance to *Punch*. That the publication and sale of a weekly comic periodical of the same size under the name or title of *Punch and Judy* was calculated to mislead the public into the belief that the two publications of *Punch* and *Judy* had become united, and that the defendants' periodical was issued by and under the management of the proprietors of the two older publications, and in particular of *Punch*, and divers persons would purchase a number or numbers of *Punch and Judy* under the erroneous impression created by the title that they were purchasing either the current number of *Punch* with the current number of *Judy*, or that some arrangement had been made for the amalgamation of the two as a united publication. The bill then charged that the conduct of the defendant in publishing his said periodical would be injurious to the plaintiffs' pro-

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perty in their periodical, and that the defendant had selected the title *Punch and Judy* for the express purpose of deception, and with a view to selling (and the fact was that the defendant had sold, and was every week passing off upon the public) a rival publication of a similar but inferior description, under such a title and in such a manner as was calculated to induce incautious purchasers and the public generally to believe that the defendants' periodical either was or included the plaintiffs' or otherwise was a continuation thereof, or in some way connected therewith to the damage and injury of the plaintiffs. The bill then charged that the intention and design of the defendant was to attract the trade and custom of the plaintiffs, who had long used, and until the defendants' publication were the only persons using the name *Punch* as the title of a comic periodical, and that their trade would be seriously damaged as long as the defendant used the word *Punch* as part of his title. The bill then charged that the title of the defendant's publication was merely a colourable imitation of the plaintiffs', and was in fact and law a fraud on the plaintiffs and the public, and a fraudulent appropriation of the plaintiff's property and productive of irreparable loss, not capable of being compensated for by damages at law. That on the 15th Oct. 1869, the plaintiffs' solicitors wrote to the defendant threatening proceedings to restrain the publication of *Punch and Judy* if it was continued, to which it was replied that there was no infringement of copyright, and this bill was filed on the 29th, containing the above facts and charges, and alleging that the defendants' publication was not registered at Stationers Hall.

There was an affidavit of Mr. John Francis, publisher of the *Athenæum*, that he considered the public would be misled. The defendant's publication was sold for one penny, the plaintiffs' being threepence weekly.

Jessel, Q.C., *C. Hall*, and *Lindley*, appeared in support of the motion, and contended that the defendant was making an unfair use of the appearance and style of *Punch*. There was a general similarity. The framework, the name, &c., had a resemblance sufficient to attract the unwary. A large number of *Punches* were sold at railway stations, bought in a hurry, and therefore people might be easily deceived, and it might be thought that *Punch* and *Judy* were united. The title of a newspaper was sometimes called trademark, and erroneously, perhaps, "copyright," yet a periodical had nothing more of value, and when the whole was appropriated, it was within the authorities which held that you must not use materials to prejudice your neighbour. Mr. Kerr, in his Treatise on Injunctions (p. 478) thought there was a property in the title. Here, what was asked was to restrain any publication with a name or title of which the word *Punch* formed part. In *Kelly* v. *Hutton*, L. Rep. 3 Ch. App. 703; 20 L. T. Rep. N. S. 201, it was held that you could not use the same name for a similar publication. *Chance* v. *Shepherd*, before this court, was the case of the *Bedfordshire Express*, where the prominent part of the title was used. There was a *Punch and Judy* belonging to Mr. Cruikshank twenty-eight years ago. *Clements* v. *Maddick*, 1 Giff. 19, was as to the *Penny Bell's Life*. The goodwill, as well as the copyright was indisputably connected with the name, and that was being invaded here.

Glasse, Q.C. and *Langley*, for the defendant, insisted that there was no case for an injunction, the mischief being merely prospective. No one could possibly be deceived into purchasing one periodical for the other; they were so different in appearance and colour, whereas *Judy* was somewhat similar, and if doubled crosswise the lower part was almost identical, and some proceedings had been taken against them. [*C. Hall* denied all knowledge of such proceedings.] There was no pretence of decrease of circulation or loss in any way; the case was not within the authorities: (*McNeile* v. *Williams*, 11 Jur. 344.) The plaintiffs could try this question at law, but to obtain an injunction, it must be shown that the public had been deceived, of which there was no evidence; the court would not assist persons not exercising due discretion. *Hogg* v. *Kirby*, 8 Ves. 215, was the case of the continuation of a magazine of the plaintiffs by the defendants. There were numerous instances of newspapers using part of the same title as others, as the *Illustrated Times*, the *Law Times*, &c.; and if a periodical was published at Birmingham it might be called the *Birmingham Punch*, and could not be restrained. *Welch* v. *Knott*, 4 K. & J. 747, was the case of Schweppe's soda water, where, although the old bottles were used, the injunction was dissolved. The motion must be refused with costs.

Charles Hall, in reply, submitted that in this case the word *Punch* being used so prominently distinguished it from the cases put. The evident intention was to deceive, and the court would protect the property in a title so used.

The VICE CHANCELLOR.—This case is not wholly free from difficulty, but on the whole I am unable to come to the conclusion that the plaintiffs are entitled to what they ask. The principles of law on this subject are hardly in dispute; they may be sufficiently stated thus: Every person who uses a trade mark, be it as a label on a bottle, as in *Schweppe's* case, or a periodical, magazine, comic or otherwise, by that appropriation and user of the name (not intended user) acquires a property in that name, and, having that right, any other person using the same name, which, if used, would lead, or be calculated to lead, the public to believe they are purchasing the one publication when in truth they are purchasing another, ought to be restrained from so doing. That is laid down by the present Lord Chancellor in *Kelly* v. *Hutton* (*sup.*) It is not disputed by the defendant's counsel that he could not have used the simple word *Punch*, for that would have been an infringement of the rule which I have referred to and a fraudulent use of the property of the plaintiffs. For a quarter of a century this well-known publication, *Punch*, has existed, of high reputation, and admirable in this respect, that never during that period has it contained anything of an offensive nature to make it unfit for the table of any family. No doubt also it has had an extensive circulation from the commencement, and probably to the present time, and the owners have a right to the name originally adopted from that well-known exhibition "Punch and Judy," which from our childhood has been, and probably for ages to come will be, well known throughout Europe. This is plain from the figures on the cover. About three years since another publication, called *Judy*, had come out. It was said that some proceedings had been taken against the publisher of that periodical, but there is no evidence of it, and it was denied, and it must be assumed there never were. It is clear there could be no right to interfere with a publication using another name. There being, therefore, two periodicals, *Punch* and *Judy*, the defendant has appropriated both names, with a picture of the street exhibition on the cover, and the sole question which I have to decide is, whether one party having used the name *Punch* and another *Judy*, either or both acquired such a title to the use of these words as to be able to prevent the defendant using the combination and adopting the

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whole. The principle is clear; you cannot adopt a trade-mark or use a name, calculated to mislead or deceive persons as to an article, already appropriated, into the belief that they are purchasing one thing when they are purchasing another. On the whole, I come to the conclusion that this publication is not calculated to mislead the ordinary run of mankind, who are alone to be considered. The court does not legislate for the careless class, who know not what they are purchasing. The word *Punch* is well known, and it is impossible that an ordinary person can be misled; and as the defendant has appropriated the title of two, the whole is left open. I cannot help thinking that the plaintiffs might well have remained satisfied with the well known-reputation of their periodical and have refrained from interfering with one with only a general similarity in form. As to the merits of the defendant it is impossible not to see that the well-known reputation of *Punch* has induced him to make that word a part of his title. He might easily have adopted some other name. His conduct is not satisfactory in that respect. It would have been better if the parties had agreed to arrange the matter, and I suggested that, but, it not being acceded to, I must decide the question. If the defendant's publication is successful the two will be perfectly distinct; if unsuccessful, it is immaterial. The motion must be simply refused, saying nothing about the costs. If the parties would agree to treat this as the hearing the bill might be dismissed without costs.

Charles Hall said he would agree to that.

Glasse, Q. C. said he could not accede to it.

The motion was, therefore, simply refused.

Solicitors for the plaintiffs, *Chester* and *Urquhart*.

Solicitor for the defendant, *C. H. Collette*.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Tuesday, July 6.

(Present: The Right Hon. Sir JAMES W. COLVILE, Sir JOSEPH NAPIER, and Lord Justice GIFFARD.)

WARWICK HASTINGS RYLAND (app.) v. ALEXANDRE MAURICE DELISLE (resp.).

Lower Canada—Railways—Action against shareholder—President of a company with a salary—Compensation.

A creditor of a Canadian railway company brought an action against a shareholder to recover, under the provisions of the General Railways Act (Canada), "an amount equal to the amount unpaid on the stock held by" the defendant. The defendant pleaded compensation, alleging that the amount due from him to the company on the stock was extinguished by an amount voted to him for salary as president of the company, and credited to him in the company's books. By Art. 1188 of the Code of Lower Canada, compensation takes place between "debts which are equally liquidated and demandable."

Held (reversing the judgment of the Court of Queen's Bench of Lower Canada), that there was no compensation, as alleged in the plea; for no calls having been made by the company, at the time when action was brought by the creditor, there was then no counter-right as against the claim of the defendant on the company.

This was an appeal from a judgment of the Court of Queen's Bench for Lower Canada, bearing date the 5th March 1868, which reversed on appeal a judgment of the Superior Court of the district of Montreal, bearing date the 31st March 1866.

In the month of May 1853, the respondent subscribed for and became a shareholder to the extent of forty shares of 25*l.* each in the Montreal and Bytown Railway Company, a body politic and corporate, duly incorporated as such by virtue of a public Act of the province of Lower Canada.

At a meeting of the directors held on the 9th Nov. 1853, the respondent was duly appointed president of the said company, and the sum of 1000*l.* was duly voted to him for his services as such president for the year ending on the 1st Monday of March, then next (1854) and credit for the said sum was given him in the books of the said company.

On the 30th April 1856, one Joseph Doutre recovered judgment in an action against the said Montreal and Bytown Railway Company for the sum of 612*l.* 10*s.* with interest from the 13th Sept. 1854, and costs. The debt in respect of which the said action was brought was contracted on or about the 23rd May 1854.

The company having failed to satisfy the judgment, Doutre made out a writ of execution against the goods, chattels, lands, and tenements, of the company, which execution was afterwards returned by the sheriff to whom it was addressed, unsatisfied either in the whole or in part.

Afterwards Doutre, by deed of transfer duly executed, ceded and transferred to the appellant, for valuable consideration, all his rights and interest in the said judgment and execution.

The several sums due and payable as principal money, interest and costs, under the judgment and execution, amounted at the date of the deed of transfer to 638*l.* 4*s.* 7*d.*

The appellant afterwards brought an action in the Superior Court of Montreal, against the respondent as being a shareholder in the said Montreal and Bytown Railway Company, for the said sum of 638*l.* 4*s.* 7*d.*

The action was grounded on sect. 80, c. 66 of the Consolidated Statutes of Canada, which is set out in the judgment.

The declaration alleged that the respondent was personally liable to the appellant as a creditor of the company, for the debt so due, to an amount equal to the amount unpaid on the stock so held by him, to wit, 900*l.*

The respondent in bar to the action, put in a plea of compensation. He alleged in substance that the said sum credited to him in the books of the company for his salary, as president, operated in law as an extinguishment by compensation of any amount, which he might have owed the company, upon any shares of stock subscribed for by him and unpaid.

A *defense au fond en fait* was also filed.

The Superior Court of Montreal on the 31st March 1866, gave judgment condemning the respondent to pay 638*l.* 4*s.* 7*d.* currency, with interest on the sum of 612*l.* 10*s.* from the 13th Sept. 1854, together with the costs of suit.

The respondent appealed to the court of Queen's Bench of Lower Canada; and on the 5th March 1868, that court revoked the said judgment of the Superior Court of Montreal.

This was the subject of the present appeal.

The question at issue in the case on which the judgment turned was as to whether the amount due by the respondent for balance unpaid on the stock subscribed for by him was compensated by the amount due by the company to him in March 1854, for the salary as president, up to that date. This question depended on the application of Arts. 1187, 1188, of the code of Lower Canada, containing provisions set out in the judgment.

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J. Brown, Q. C., *A. H. Thesiger*, and *H. W. Austin*, were for the appellant.

Mellish, Q. C., and *Kerr*, were for the respondent.

Judgment was delivered by Sir JOSEPH NAPIER:—The appeal in this case is from a judgment of the Court of Queen's Bench in Lower Canada, reversing a judgment of the Superior Court of the district of Montreal, with costs. The judgment in the Montreal court, which was delivered on the 31st March 1866, found the respondent to be debtor to the Montreal and Bytown Railway Company in 900*l.* on the stock held by him, and approved the appellant's claim as a judgment-creditor of a company, having execution against the company unsatisfied, and condemned the respondent accordingly, as prayed for by the appellant. The action in which that judgment was given was an action brought by the appellant as a creditor of the company against the respondent, a shareholder, as a defendant, and in that action it was proved that there had been a return by the sheriff of *nulla bona* to an execution against the company. The action was founded on the section of the General Railways Act, which is under the head of "shareholders," and is the first paragraph of sect. 19. By that section and paragraph it is enacted that "each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities of the company, and until the whole amount of his stock shall have been paid up, but shall not be liable to an action therefor, before an execution against the company shall have been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs, against such shareholders." The defendant referred to the code, and the case made by him was, that there was due to him from the company for salary a sum very far exceeding anything that he was or could be made liable to the company for in respect of calls; that the sums due to him from the company, in point of fact, extinguished his liability to the company, and that inasmuch as the company never could have maintained proceedings against him in respect of any calls that they might make, the creditor was in no better position than the company. We assume that no calls beyond calls for a sum of 100*l.* had been made on the part of the company; if any such calls had been made, it was the business of the defendant both to have alleged and proved that they had been made; there is neither allegation nor proof to this effect; the courts below proceeded on the assumption that no calls beyond 100*l.* had been made; and there can be no doubt but that they were right upon the pleadings and facts before them in making that assumption. What then are the provisions of the code which were relied on? They were these: first of all, it is said in the 1187th clause: "When two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation which takes place between them in the cases and manner hereinafter declared;" and then in the 1188th clause, "Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality." As calls had not been made, there could have been no compensation as between this shareholder and the company at the time of the action being brought by the creditor, for when we turn to the Railways Act we see that before any action could have been maintained by the company as against the shareholder there must have been calls made by the directors, and thirty days must have elapsed from the date of the calls. Moreover, at the time when the appellant brought his action as creditor, the respondent, if he had any claim at all, had a right to proceed against the company, and recover payment from the company of the 2000*l.*, or whatever sum was due to him, and the company could not have set up as against that action any counter claim which they might have had in respect of his being a shareholder; it follows, therefore, that the amount payable on the stock held by the defendant was not actually paid, discharged, and extinguished, and that the clauses in the code which have been relied on do not apply to a state of circumstances in which, although there was a claim by the defendant against the company, there was no counter right on the part of the company, and no compensation as between him and them, and consequently no extinguishment of the debt. The creditor under the Act is in a different position to that of the company, and can recover so long as anything remains unpaid on the stock held by the shareholder. This being so, their Lordships will humbly advise her Majesty that the judgment of the Court of Queen's Bench should be reversed. The result, therefore, will be to restore the judgment of the Superior Court in Montreal; and their Lordships are of opinion that the appellant should have the costs in both the courts below, and also the costs of this appeal.

Judgment reversed.

Agents for appellant, *Mackenzie, Trinder*, and *Co.*

Agents for respondent, *Roberts* and *Simpson.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Thursday, Nov. 4.

FAIR *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Railway accident—Measure of damages—Pecuniary loss and bodily suffering—Future improved income.

When a jury are called upon to assess damages for personal injuries occasioned by negligence, they should take into consideration two things—first, the pecuniary loss occasioned by the accident; secondly, the injury the party sustains in his person, or in his physical capacity of enjoying life; and, as regards the first, they should take into account, not only his present loss, but his incapacity to earn a future improved income.

This was an action brought by the Rev. Campbell Fair against the London and North-Western Railway Company for compensation for injuries sustained by him in consequence of an accident whilst travelling upon their line from Birmingham to Rhyl on the 16th Sept. 1868, near Holyhead. The accident was occasioned by a collision with a goods train. The cause was tried at the last Hertford Assizes, when the company, not disputing their liability, contested only the amount of compensation. It appeared that the plaintiff, who was twenty-seven years of age, and unmarried, was, at the time of the accident, secretary to the Irish Church Mission, with an income as such of 250*l.* a-year. From the evidence it appeared that at the time of the accident he was in the enjoyment of excellent health, but that in consequence of such accident he received an injury to his spine, which has resulted in permanent deafness and injuries to his other senses, besides paralysis of the lower extremities, from which, according to the medical evidence, it was hopeless to expect he would ever recover. The jury returned

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a verdict for 5000*l.* damages, besides 250*l.* for medical and other expenses.

Vernon Harcourt, Q. C. now moved, on the part of the defendants, for a rule calling upon the plaintiff to show cause why there should not be a new trial on the ground of the damages being excessive, or why such damages should not be reduced. The verdict of the jury for 5250*l.* is excessive, and would be more than sufficient to purchase an annuity of 250*l.*, which was the whole of the plaintiff's professional income. The jury had evidently given damages in respect of his probable increase of income, which they had no right to do. [Cockburn, C. J.—I cannot assent to that; I think under some circumstances they would be perfectly justified in considering the probable increase of income. Take the familiar case of a young barrister of great promise, whose progress in his profession is certain. He may make perhaps only 100*l.* a year; would it be right to give him compensation only upon that scale?] If any other considerations are to be regarded, it would let in evidence of a most inconvenient description; for whilst it might be suggested that he would advance in his profession, evidence on the other side might be adduced to show that he had no chance of rising in his profession. [Cockburn, C. J.—There may be some difficulties in the case, but your proposition is that you cannot take into consideration his probable advance; so that his being a young man would really stand in the way of his compensation; whereas were he a man of forty or fifty years of age, whose position has been made, he might obtain substantial compensation. Mellor, J.—Such difficulties must be left to the good sense of a jury. It is not said that the exact amount of compensation can be stated as a rule. It is one of the difficulties which are inherent in such cases.]. The income of the plaintiff at the time must after all be the test of the amount of compensation, and it cannot be left to speculate upon what he may earn at a future time. [Cockburn, C. J.—There is not merely the incapacity to earn an income, but the future bodily discomfort and the inability to enjoy life as a man in health would enjoy it. I dare say, if you were to offer this gentleman 50,000*l.*, or double that amount, he would not take it as the price of his present condition.] But if so there would be no limit, and a person who happened to be earning 10,000*l.* a year might be compensated by 200,000*l.*, and yet pay no more for being thus insured than a man who does not earn 50*l.* a year. Had this been a common street accident, of which there are hundreds in the year, no such amount of damages would have been given. [Cockburn, C. J.—In any such case I should certainly lay it down to the jury that they should give full compensation. It is very true that these street accidents seldom come into our courts. They generally occur to poor persons who are satisfied with comparatively small compensation, which is readily given them. In all cases we should see whether or not the damages are more than adequate. In many cases of compensation against private parties, juries will look to their means of paying damages, and so will moderate them; but in a railway accident they feel that they are not so restrained, and so give full damages.] There is really no difference in principle between the carriage of goods and individuals, and as regards the former the Legislature has itself imposed limits of compensation. [Cockburn, C. J.—That is for the Legislature. If it thinks fit to limit the liability as to compensation for personal injuries it can do so, but it has not done so at present.] The companies are really made insurers, without having any premiums. [Mellor, J. referred to *Pym* v. *The Great Northern Railway Company*, 6 L. T. Rep. N. S. 537; and 8 L. T. Rep. N. S. 734.]

Cockburn, C. J.—I think there should be no rule in this case. Mr. Harcourt, by his argument, would desire us to review the law upon this subject, and to change the practice which has hitherto prevailed, and to establish some new rule. It is very true that cases sometimes occur in which a jury, being over anxious to fully compensate a party, give damages so great as to induce the court to interfere. In the great majority of cases, however, I am quite satisfied at the common sense views upon which they act. Now the rule is, that where a railway company undertake to carry a passenger, and he receives an injury in consequence of their negligence, he is entitled to receive compensation from them, and in assessing that compensation the jury should take into account two things; first, the pecuniary loss he sustains by the accident; secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss, they have to take into account not only his present loss, but his incapacity to earn a future improved income. Mr. Harcourt says that that is not a ground of compensation. But it would be really monstrous that because a young man has only arrived at a certain position—though from past experience you can see with tolerable certainty that he will within a reasonable time greatly increase his income—you are to exclude this most important element from consideration. So far from thinking that it should be excluded, I think the very reverse should be the rule Then as to the second ground. Undoubtedly, health is the greatest of all physical blessings; and to say that, when it is utterly shattered, no compensation is to be made for it, is really perfectly extravagant. Then here, ve have a gentleman of good prospects who, by this accident, is not only rendered incapable of following his profession, but is in all probability incapacitated for life. The jury, under the circumstances, have awarded him 5000*l.*; and I cannot but think that such a compensation is within fair limits.

Mellor, J.—I am of the same opinion. We have no means of ascertaining by a fixed rule what shall be the limit of damages in such a case. There is no principle which will apply equally to animals, goods, and passengers. Damages in such a case must be left to the common sense of the jury, assisted by the presiding judge. In the present case, I cannot say that the verdict is unreasonable. The jury were undoubtedly entitled to consider not only the physical suffering of the plaintiff, but the destruction of his prospects.

Lush and Hannen, JJ. concurred.

Rule refused.

COURT OF COMMON PLEAS.

Reported by M. W. McKellar, and H. H. Hocking, Esqrs., Barristers-at-Law.

Wednesday, Nov. 3.

Abrey v. Crux.

Bill of exchange—Indorser's liability—Verbal evidence of an agreement not to sue until a certain event.

In an action by the drawer and indorsee of a bill of exchange against the indorser, it was alleged in denial of the defendant's liability that he indorsed the bill as surety for the acceptor; and that it was agreed between the three parties that the plaintiff should dispose of certain securities belonging to the acceptor in satisfaction of the debt before he sued defendant on the bill. The plaintiff had not disposed of the securities:

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Held (Willes, J, dubitante) that verbal evidence of this agreement was not admissible.

This was an action by the drawer and payee of a bill of exchange against the indorser; it was tried before Keating, J. in Middlesex, and a verdict was entered for the plaintiff upon the terms that if the Court of Common Pleas should be of opinion that certain oral evidence tendered by the defendant in support of his pleas, and rejected by the judge, was legally admissible, a new trial, *pro formâ*, was to be granted, and the action was to be retried, but for all purposes of costs the case was to be treated as if it had been adjourned.

The bill of exchange was in the following form:

£200. London, March 2, 1868.

Twelve months after date, pay to my order the sum of two hundred pounds for value received. J. ABREY.

To Mr. Arthur Crux, Queen of England,
New-road, Hammersmith.

The bill was crossed, "Accepted, Arthur Crux;" and indorsed, "Theodore Crux."

The declaration stated:

That John Abrey sues Theodore Crux, for that the defendant, on the 2nd March 1868, by his bill of exchange now overdue, directed to Arthur Crux, required the said Arthur Crux to pay to the plaintiff's order the sum of 200*l.* twelve months after date. And the said bill was duly presented for payment, and was dishonoured, of all which the defendant had due notice. And for a second count the plaintiff sues for that the defendant on the day of the year aforesaid, by his bill of exchange now overdue, directed to the said Arthur Crux, desired the said Arthur Crux to pay the bearer of the said bill the sum of 200*l.* twelve months after date, and then delivered the said bill to the plaintiff, who thereby became, and was, and yet is the lawful holder and bearer thereof, and the said bill was duly presented for payment and was dishonoured; of all which the defendant had due notice, but did not pay the same.

The 1st, 2nd, 4th, 5th, and 6th pleas denied the various allegations contained in the declaration, and the 3rd plea was as follows:

The defendant, as to the said first count, says that he drew the said bill and delivered the same to the plaintiff for the accommodation of one Arthur Crux, and as surety for him for the payment of the said bill, and, save as aforesaid, there never was any value or consideration for the drawing, delivery, or payment of the said bill by the defendant. And the defendant says that at the time he so drew and delivered the said bill to the plaintiff, it was agreed by and between the plaintiff and the defendant and the said Arthur Crux, that the said Arthur Crux should deposit with the plaintiff certain securities, that is to say, a lease of a messuage and premises situate at Blenheim Villas, New-road, Hammersmith, and four dock warrants for the delivery of certain goods, to be held by the plaintiff, as security for the due payment of the said bill, and in case the said bill should not be duly paid, that the plaintiff should sell and dispose of the said securities, and apply the proceeds thereof in payment and liquidation of the said bill; and that until the plaintiff should have so sold and disposed of the said securities, the defendant should not be liable for, or be sued upon, the said bill. And the defendant says that the said Arthur Crux deposited the said securities as aforesaid with the plaintiff, and he received and held the same for the purpose and on the terms aforesaid, and that the plaintiff did not before the commencement of the suit, sell, realise, or dispose of the said securities, or any part thereof, and the plaintiff still holds the same.

The seventh plea repeated the third plea in terms applicable to the second count. To both of these pleas the plaintiff demurred on the grounds that they attempted to vary the terms of a written agreement by what was not alleged to have been agreed to in writing, and also that the alleged agreement was collateral to the contract between the parties, and could not be pleaded. It was admitted at the trial that the defendant had no written evidence of this agreement, and the admissibility of oral evidence thereof was now the only contention between the parties.

H. James, Q.C. on behalf of the defendant, obtained a rule *nisi* in pursuance of leave reserved at the trial that the plaintiff's verdict be set aside, and a new trial had, on the ground of improper rejection of evidence.

Chantrell (with him *Huddleston*, Q.C.) showed cause against this rule. The case of *Young* v. *Austen*, L. Rep. 4 C. P. 553; 20 L. T. Rep. N. S. 396, is a clear authority that in an action against the acceptor such an agreement as this can be a good defence against the drawer and payee only if proved by written evidence. A distinction is attempted to be shown as to the necessity for a written agreement in an action against the indorser on the authority of *Pike* v. *Street*, M. & M. 226; that was an action by an indorsee against the drawer and indorser of a bill of exchange; the defence was that the plaintiff took the bill under a verbal agreement to sue the acceptor only, although the indorsement was general and unqualified; Lord Tenterden in summing up told the jury to find for the defendant if they were satisfied that the plaintiff took the bill on these terms; the verdict, however, was for the plaintiff, and there was therefore no opportunity to review that dictum; moreover, in the 6th edition of Bayley, J.'s book on Bills, the authority of that case is questioned. Byles, J., at p. 96 of the 9th edition on Bills says, "No mere oral agreement can have any effect at law in controlling the instrument, if contemporaneous with the making of it; for that would be to allow oral evidence to vary a written contract;" in support of this many cases are cited, the chief of which are—*Hoare* v. *Graham*, 3 Camp. 57, in which Lord Ellenborough refused to admit evidence of a verbal agreement to renew a promissory note made at the time it was framed between the defendants, the payees and indorsers, and the plaintiffs, the indorsees; *Free* v. *Hawkins*, 8 Taunt. 92, in which the court confirmed the ruling of Lord Ellenborough in *Hoare* v. *Graham*; and *Foster* v. *Jolly*, 1 C. M. & R 703, in which a distinction was carefully drawn between evidence concerning the consideration for a bill and the contract contained on the face of the bill: Parke, B. said, p. 707: "Here the event upon which the defendant contends that the note was payable was contingent and might never happen, which is a clear contradiction of the contract contained in the note. *Rawson* v. *Walker* is in point; *Pike* v. *Street* falls within the other class of cases in which the consideration has been contradicted: There the agreement was that the plaintiff should sue the acceptor of the bill only, and should not sue the indorser (the defendant). That as between the plaintiff and defendant negatived any consideration, and so was admissible." [WILLES, J.—The real question here is whether the present case comes within the first or the second of the classes of cases named in *Foster* v. *Jolly*.] The only contract for which the defendant could have been surety was that which appears upon the face of the bill; and the agreement set up in the plea was made at the time the bill was drawn, and varies the written contract between the parties. "This would be," said Lord Ellenborough in *Adams* v. *Wordley*, 1 M. & W. 374, "incorporating with a written contract an incongruous parol condition, which is contrary to first principles." Also,

Moseley v. *Hanford*, 10 B. & C. 729.

James, Q. C., supported the rule.—This evidence is admissible, first, in order to show the real consideration between the parties; and secondly, in order to show that the defendant's liability was suspended even if the contract were that on the face of the bill. There is here no written contract on the part of the drawer; an indorser or drawer makes no written contract whatever with the payee; his liability depends on what by the custom of merchants his signature implies. This was the effect of *Castrique* v. *Buttigieg*, 10 Moo. P. C. 94; Maule, J., in delivering the judgment of the court, said, p. 108, "The liability of an indorser to his immediate indorsee arises out of a contract between

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them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question, but that contract arises out of the written indorsement itself, the delivery of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words either spoken or written of the parties, and the circumstances (such as the usage at the place, the course of dealing between the parties, and their relative situations) under which the delivery takes place; thus a bill with an unqualified written indorsement may be delivered and received for the purpose of enabling the indorsee to receive the money for account of the indorser, or to enable the indorsee to raise money for his own use on the credit of the signature of the indorser, or with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only, and not against the indorser, who agrees to sell his claim against the prior parties, but stipulates not to warrant their solvency. In all these cases the indorser is not liable to the indorsee, and they are all in conformity with the general law of contracts, which enables parties to them to limit and modify their liabilities as they think fit, provided they do not infringe any prohibitory law." There is here no written contract further than that which the custom of merchants implies from the defendant's signature; and, in accordance with the principle laid down by the Privy Council, this evidence ought to be clearly admitted in order to explain the defendant's liability. The general rule, that oral evidence of a contemporaneous agreement to vary a written contract is not admissible, has many exceptions and no regular limit; at all events none of the cases cited bear upon the facts of the present one. *Wallis* v. *Littell*, 31 L. J. 100, C. P.; 5 L. T. Rep. N. S. 489, is the nearest case in point. There an action was brought upon the breach of an agreement to transfer the lease of a farm, and the defendant pleaded a contemporaneous oral arrangement that in the event of the landlord not consenting to the transfer, the agreement sued upon was to be null and void; and the defendant alleged that the landlord had refused his consent: it was held that evidence of the contemporaneous oral arrangement was rightly received; for that under the circumstances the inference of fact was that the oral arrangement was intended to suspend the written agreement, and not as a defeasance of it. Here what is sought to be proved will not contradict or vary any written contract, it will only suspend the commencement of liability; evidence of such matter was held to be admissible in

Davis v. *Jones*, 17 C. B. 625;
Pym v. *Campbell*, 6 E. & B. 370;
Thompson v. *Clubly*, 1 M. & W. 212;

and the cases cited in

Byles on Bills, 9th edit., pp. 147, 148; and also in the 4th American Edition, p. 222;
Lloyd v. *Howard*, 15 Q. B., 995.

In *Young* v *Austen*, upon which the judge based his ruling at the trial, the defendant was not as here the indorser, but the acceptor of the bill; moreover in that case the question of the admissibility of oral evidence to renew was only raised incidentally, the real point decided was that it was unnecessary in a plea to aver that the agreement between the parties had been in writing. [WILLES, J.—*Young* v. *Austen* may also be distinguished from the present case in that there the alleged agreement made no provision for payment at all.]

BOVILL, C. J.—I am of opinion that oral evidence of the agreement mentioned in this plea was properly rejected, and that this rule should therefore be discharged. The defendant's signature is to be taken as attached to the bill as it was drawn, and to import the liability which by the custom of merchants an indorsement implies. The effect of the plea is, that the defendant entered into an agreement, when he signed his name, which is contrary to the custom of merchants, and by which payment was to be made by other means than the contract appearing upon the bill required. This agreement essentially goes to contradict the written contract, and is therefore not admissible according to various authorities, which lay down the general rule that oral evidence is not admissible to vary or contradict a written contract, such as, for example, *Hoare* v. *Graham*, *Free* v. *Hawkins*, and also the recent decision of this court in *Young* v. *Austen*. Mr. James has relied on two cases, the first of which was *Castrique* v. *Battigieg*, where the judgment of the Privy Council was delivered by Maule, J. I agree with the principle there laid down, but the facts of that case were so different from those now before us that it can have no authority as to this point. There the question raised was whether an agent abroad for the purpose of buying and remitting bills on account of money received by the agent for his principal was liable to the principal upon bills being dishonoured which the agent had indorsed without any reservation as to his liability; it was held that in the absence of special circumstances, showing that any liability was intended by the general mercantile law, the agent was not responsible. Upon the facts in that case there was no consideration for the indorsement, and the signature was placed on the back of the bill for convenience without any intention of entailing responsibility. No doubt a signature may be put to the back of a bill, and yet the contract may not necessarily become operative, but when the signature, delivery, and other elements of an indorsement are completed, as they were here, at the time of the drawing, the indorser's contract is operative. The other case relied on for the defendant was *Wallis* v. *Littell*, upon the peculiar facts of which a certain verbal agreement was held not to be in defeasance of a written contract, but only to suspend its operation; but the ground of that decision was that according to the intention of the parties the written contract was not to be operative at all till after a certain event happened; this is by no means the effect of the agreement alleged in this plea. This case, therefore, seems to me to be in no way affected by the authorities cited for the defendant, but, on the contrary, to be bound by the cases relied on by the other side, which show that the plea in question is no defence to the action. The rule, therefore, will be discharged.

WILLES, J.—I should be better satisfied if the court could see its way to arrive at another conclusion, for I entertain great doubt as to the propriety of excluding the parol evidence; and if it had depended at the trial only upon my own opinion, I should certainly have admitted the evidence. I feel, however, so much deference for the opinion of the other members of this court, and also for the many authorities which seem to be against my view, that I intend to concur in discharging this rule. As I understand the facts of the case, the bill was drawn by the plaintiff for the debt of the acceptor, and was indorsed by the defendant as the acceptor's surety. It does not appear on the bill itself whether the plaintiff knew the object of the indorsement; but it is proposed by the defendant to adduce verbal evidence to show not only the plaintiff's knowledge of the defendant's suretyship, but also that at the time of the drawing, the plaintiff, the defendant, and the acceptor entered into a certain agreement

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which rendered the defendant's liability conditional; this agreement was that if the acceptor failed to pay the amount of the bill at maturity, the plaintiff should dispose of certain securities belonging to the acceptor, which were handed to the plaintiff for this purpose; and only in the event of nonpayment by the acceptor, and these securities proving inadequate to satisfy the amount, was the plaintiff to exercise his remedy against the drawer. This agreement does not seem to me to be like those in *Hoare* v. *Graham*, and in *Young* v. *Austen*, for here there is merely a mode of payment appointed, and not an abrogation of the liability to pay; nor is this like the case of *Free* v. *Hawkins*, where evidence of the waiver of a right to notice of nonpayment by the maker of a note was held inadmissible. In *Foster* v. *Jolly*, it was attempted to show that payment of a note was to be contingent upon a verdict in an action between other parties, and the alleged agreement did not relate to the sufficiency of any fund for payment. All these cases appear to me to be distinguishable from the present, for the words of the agreement here are not contradictory to the contract upon the bill. This is a case in which I should wish to uphold the agreement, perhaps not exactly as put in the plea, but rather as a pre-arranged payment and satisfaction if the securities should turn out to be insufficient in value; and then, and not till then, the bill to be capable of being enforced. I see nothing in such an agreement inconsistent with law, and it would be like a payment by way of fraudulent preference to the creditor of a bankrupt, which at the choice of the assignees is always liable to be done away with; the creditor's debt then revives, the payment fails, and the creditor is entitled to prove. Even if there were no such precedent in the case of ordinary debts, I do not see why we should not make a new one to meet the case of bills of exchange, which differ from ordinary debts in many ways; for instance, as to release and waiver, a bill of exchange is not subject to the technical rules of ordinary debts; also a bill of exchange differs from an ordinary contract in the suspension of a right of action. I do not see exactly why we should not, in a novel case of this kind, follow justice rather than authority, especially when we can find no authority exactly in point. I conclude by putting a case which might here cause great injustice; suppose the plaintiff had wilfully destroyed these securities by throwing them into the fire or by other means, before the bill of exchange became due, he would have been liable no doubt to the owner of the securities, but he might enforce the bill of exchange against the defendant, and what remedy would the defendant have? Unless we decide for the defendant, we must exclude all consideration of the terms of the contract. For these reasons I entertain great doubt, but I do not feel so strongly on the point as to dissent formally from the decision of the other members of the court.

KEATING, J.—I agree with my brother Willes in the belief that it is desirable that we could in this case decide in favour of the admissibility of this evidence. The rule which has been laid down has no doubt had for its object the benefit of suitors, but it may in some cases, as I think possibly in this, be the cause of hardship and injustice. But upon the authorities which have been discussed, I think the rule is inflexible that the terms of a written contract cannot be varied or contradicted by parol evidence. Now what is the plea as to the effect of the agreement alleged? "Until the plaintiff should have so sold and disposed of the said securities the defendant should not be liable for, or be sued upon, the said bill." This seems to me in no way to touch the consideration for payment, but it creates a postponement of the liability. I could not discover any authority in the cases cited by Mr. James, for admitting verbal evidence of an agreement so as to avoid the written contract upon the bill. In *Foster* v. *Jolly* it was sought to give evidence to qualify the defendant's liability on a promissory note; the alleged agreement was not precisely like this, but was not very dissimilar, and it was held that parol evidence is admissible to contradict the consideration or value of a bill or note, but not the terms of the instrument itself. The only case like an exception is *Pike* v. *Street*, but as explained by Parke, B. in *Foster* v. *Jolly*, it does not relate to the agreement in this case. Under these circumstances, I conclude, although I admit somewhat reluctantly, that this evidence is not admissible.

BRETT, J.—I agree that this evidence is not admissible, and I think so on the ground that it does not relate to the question of consideration; it does not impeach the consideration, nor allege either that there was no consideration or that there was a failure of consideration. It attempts instead to vary the terms of the written contract on the bill; the agreement as to the securities does not alter or affect the consideration for which the bill was indorsed. At the moment of signature the defendant contracted to be liable as indorser upon the bill. An acceptor clearly cannot prove by verbal evidence that his liability commenced only after a certain event, and I know of no authority for saying that the position of a drawer or indorser is different from that of an acceptor. I agree that the rule should be discharged.

Rule discharged.

Attorneys for plaintiff, *C.* and *J. Allen* and *Son.*

Attorney for defendant, *L. Hand.*

Friday, Nov. 5.

MORRIS v. BETHELL.

Bill of exchange—Forged acceptance—Liability of person whose name was forged, he having paid one other similar bill.

The holder of a bill of exchange sued the person whose name appeared as the acceptor. The defendant's signature had been forged, but he had previously taken up and paid to the plaintiff one other bill similarly drawn and accepted, and had not given notice to the plaintiff that he would not pay again under the same circumstances.

At the trial the jury found that the defendant's name as acceptor was neither written, authorised, nor adopted by him, and that his previous conduct did not lead the plaintiff to believe that this acceptance was his signature:

Held, that the defendant having paid only one similar bill, and that not in the course of business, was not estopped from disputing his liability, and that upon the findings of the jury, the verdict was rightly entered in favour of the defendant.

This was an action upon a bill of exchange for 400*l.*, drawn the 20th July 1868, by Richard Bethell, upon the defendant, his brother, and apparently accepted by the defendant. The acceptance was a forgery.

In the month of May 1867 the plaintiff discounted another bill for 300*l.*, which was paid by the defendant when it became due, in the following August; it was drawn and accepted exactly in the same manner as the bill now sued upon.

Two other bills, similarly drawn and accepted, whilst held by another person than the plaintiff,

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had also in the year 1867 been taken up and paid by the defendant.

The three previous bills were taken up by the defendant upon a promise from Richard Bethell, the drawer, that he would not use his brother's name again.

The case was tried before Bovill, C. J., at Westminster, and a verdict was entered for the defendant; the jury having found that the acceptance to the bill was not written by the defendant, nor with his authority, nor was it adopted by him. They also found that the defendant had not undertaken to be responsible for the form of his signature, which was attached to the bill he had previously paid, and that he did not lead the plaintiff to believe that this acceptance was written by him. Leave was reserved to the plaintiff to move to enter a verdict if the court should be of opinion that, as a matter of law upon these findings, the Lord Chief Justice ought to have directed a verdict for the plaintiff.

Huddleston, Q. C. (with him *Holl*) moved in pursuance of the leave reserved. By taking up the bills in 1867 the defendant represented that every acceptance of this kind was authorised by him, and he was therefore estopped from denying his liability upon such an acceptance unless he could show that he had given notice of the discontinuance of his authority. In *Barber* v. *Gingell*, 3 Esp. 60, it was held that if the defence to a bill of exchange be that it had been forged, it would be a good answer for the plaintiff to show that the defendant had paid other bills of the same party under similar circumstances; in that case it was proved that the defendant and one Taylor had been connected in business, and that the former had in fact paid several bills drawn as the one sued upon by Taylor, and to which Taylor (as it was supposed) had written the acceptance in the defendant's name. Lord Kenyon ruled that that was an answer to the case of forgery set up by the defendant; for though the defendant might not have accepted the bill, he had adopted the acceptance, and made himself thereby liable to the payment of it. In *Heane* v. *Rogers*, 9 B. & C. 577, it was laid down by Bayley, J. when delivering the judgment of the court, that "there is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, *unless another person has been induced by them to alter his condition;* in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction, but as to third persons he is not bound." This rule is also laid down or confirmed in

Greaves v. *Key*, 3 B. & Ad. 313;
Pickard v. *Sears*, 6 A. & E. 475;
Ryan v. *Sams*, 12 Q. B. 460;
Gregg v. *Wells*, 10 A. & E. 90;
Freeman v. *Cooke*, 2 Ex. 654;
Cornish v. *Abington*, 4 H. & N. 549.

[WILLES, J.—The question here is whether a man, not in business, should be liable to a person holding a bill to which his signature has been forged, merely because he paid that person one other similar bill.] Although it appeared that defendant exacted a pledge from his brother when he paid the former bill that the forgery of his name should not be repeated, the defendant never gave notice to the plaintiff that he would not be again responsible. Whatever the defendant's intention was, if he so conducted himself that a reasonable person would be justified in acting upon the previous representation which was to be inferred from his conduct, he cannot dispute his liability incurred in consequence of that representation. Partnership cases form a class analogous to these:

Collingwood v. *Berkeley*, 15 C. B., N. S., 145; 8 L. T. Rep. N. S. 763;
Maddick v. *Marshall*, 16 C. B., N. S., 387; 10 L. T. Rep. N. S. 272; and in Exchequer Chamber, 17 C. B., N. S., 829; 11 L. T. Rep. N. S. 611;
Young v. *Grote*, 4 Bing. 253;
Coles v. *Bank of England*, 10 A. & E. 437.

BOVILL, C. J.—At the trial of this case the learned counsel for the plaintiff insisted, as he does now, that the defendant was estopped from contesting his signature or denying his acceptance of the bill. On the other hand, it was urged for the defendant by the Solicitor-General that as a matter of law I was bound to nonsuit the plaintiff. If I did not do so, he insisted upon his right to go to the jury. I was inclined to withdraw the case from the jury, but I thought there was some evidence, though extremely slight, against the defendant, in that he was proved to have paid at maturity to the plaintiff one bill similarly accepted before; I therefore left the jury to decide certain questions, and their findings were, that the acceptance to the bill sued upon was not the defendant's signature, that it was not written by his authority, and that it was never adopted by him in order to make himself liable for it. The jury further found that the form of acceptance to the previous bill which defendant paid to the plaintiff in Aug. 1867 was not adopted by him as one for which he undertook to be responsible. They further found that the defendant did not know that the plaintiff had held the previous bill of 1867, and that defendant's previous conduct did not lead the plaintiff to believe that this acceptance was his signature. It seems, therefore, to me that the jury found in favour of the defendant and against the plaintiff on every point. Now Mr. Huddleston says, in order to avoid the effect of their findings, as a matter of law I was bound as judge to have entered the verdict in favour of the plaintiff; but I think he is precluded from so contending by the findings themselves. The only grounds on which a person could be made responsible on a bill not signed by himself are that he had either authorised some other person to make his signature or had adopted a particular signature, or had so conducted himself as not to be able to dispute a signature. It was contended that the defendant had done the last, by conduct, noble on his part, in having paid a bill drawn by his brother, and purporting to be accepted by the defendant, but not accepted by him or by his authority. Having paid that bill, it was said he held out to the world that he would pay all other bills accepted in a similar manner. The plaintiff seemed never to have troubled himself to ascertain whose the signature was. He had held a bill before, and it was paid. If there was a regular course of mercantile business between them, and bills were accepted and acted upon between them in that way, then there would be evidence for the jury that the acceptance was so confirmed. This was the ground of the decision in *Barber* v. *Gingell*, but in the present case there were no mercantile transactions, and nothing was proved but the simple fact that the defendant had paid a bill in one year which was a forgery. Was it to be said that he was to pay every bill of a similar character which turned out to be forged? I should be very sorry to affirm any such proposition. It was some sort of a scintilla of evidence which could not be withdrawn from the jury. It seems to me that the utmost to which the doctrine contended for could be carried would be that the facts should be left to the jury. If by a series of transactions a person had led another to believe that a certain signature was his, that was evidence that he ought to be

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bound by it. But the circumstances of this case are that the defendant never did lead the plaintiff to believe that the signature to the bill was a form of signature which he adopted. If he did not lead the plaintiff to believe that, there was no estoppel, and the case did not come within any of the cases referred to by the learned counsel, and it was a case for the jury, and not for the judge. I think, therefore, that the rule must be refused.

WILLES, J.—I am of the same opinion The length to which I am prepared to go in Mr. Huddleston's favour is to give him the benefit of that which he had at the trial; viz., that the evidence was sufficient to prevent his being nonsuited, and to afford him a right to take the opinion of a jury. Generally a person who pays one or more bills accepted in his name, makes evidence against himself as to his liability for bills similarly accepted, and if the circumstances show a continuance of the authority to the person who has previously written his name, he should be estopped from denying his acceptance. We are asked now to say that although the authority to sign the defendant's name, and all ratification of the apparent acceptance were contradicted, although no course of business was suggested, and no continuance of the adoption of the forged signature was proved, yet the fact of the defendant's having paid up one bill of a similar nature is sufficient to create a liability for all subsequent bills, accepted in the same way, as if they were genuine, unless notice were expressly given to the person who was injured by the forgery. The doctrine of estoppel does not reach such a case. To hold otherwise would be contrary to law, and contrary to the common sense of mankind.

KEATING, J.—I am of the same opinion. No doubt a man's paying one or more forged acceptances affords some evidence against himself of authority to sign his name, and the payment of one such bill was sufficient evidence for the jury; I think, therefore, my Lord was right to leave the matter to the jury. They found adversely to the plaintiff's view, and now Mr. Huddleston on his behalf contends that the plaintiff has, by the payment of one similar bill, precluded himself from maintaining that he did not authorise this signature. There is no authority in affirmance of that proposition, and the rule must therefore be refused.

BRETT, J.—This acceptance was not the defendant's signature, nor did he authorise the person who wrote it to sign his name, nor did he make any representation that it was his signature; but it is contended that the defendant having paid a former bill, accepted in his name without authority by the same person, is now estopped from disputing his liability. In my opinion there is much doubt whether this was a case for a jury at all; but however that may be, the jury were certainly justified in finding as they did. If a person once in his life authorises another to sign his name to a bill, it does not follow that he should be liable for every other bill signed in the same manner.

Rule refused.

Wednesday, Nov. 10.

Re JANE MENHENNITT.

Examination and acknowledgment of a deed by a married woman apart from her husband—Commissioners interested or concerned in the transaction—Fines and Recoveries Act 1833 (3 *&* 4 *Will.* 4, *c.* 74), *ss.* 79, 80 —*Regulæ Generales, Hilary Term,* 1834.

The examination of a married woman apart from her husband required by the 80*th section of the Fines and Recoveries Act* 1833 *to be made before her acknowledgment of a deed, should be, as well as the acknowledgment itself, in the presence of two commissioners; and notwithstanding the General Rules of Hilary Term* 1834, *which provide only that one of the commissioners shall not be interested in the transaction, no attorney in any way interested or concerned should interfere at all in the examination or acknowledgment.*

Willoughby moved the court to order that the certificate of acknowledgment of Jane Menhennitt, a married woman, together with the affidavit of one of the commissioners before whom the acknowledgment was taken, should be filed.

By sect. 79 of 3 & 4 Will. 4, c. 74 (Fines and Recoveries Act 1833), "every deed to be executed by a married woman" . . . "shall upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed, before a judge of one of the Superior Courts at Westminster, or a master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided."

And by sect. 80, "such judge, master in Chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this Act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely or voluntarily consents to such deed, and unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void."

The acknowledgment was duly taken by two commissioners, one only of whom was not interested in the transaction. The previous examination of the married woman was made before the disinterested commissioner; this commissioner, however, died before the required affidavit could be made by him, and the other commissioner was able to depose only as follows:—

"This deponent was informed by the said J. R. Rawlinson (the deceased commissioner), and believes, that previous to the said Jane Menhennitt making the said acknowledgment, the said J. R. Rawlinson inquired of the said Jane Menhennitt whether she intended to give up her interest," &c.

The affidavit was then continued in the terms of the lithographed parchment form used in such a case, which terms are those of the rules of court, Hilary Term 1834.

By these rules it is "ordered that where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said Act (viz., the Fines and Recoveries Act) one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned. And it is further ordered, that before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband, and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest; and where such married woman in answer to such inquiry shall declare that she intends to give up such her interest without any provision, and the said commissioner shall have no reason to doubt the

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truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment."

The rules further require that in the affidavit verifying the certificate it shall depose amongst other things "that one at least of the commissioners taking such acknowledgment, to the best of his deponent's knowledge and belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein." . . . "And that previously to such acknowledgment being taken the deponent had inquired of such married woman (or if more than one of each of such married women) whether she intended to give up her interest in the estate to be passed? and also the answer given thereto," &c. (These rules are set out in Chitty's Statutes, vol. ii., "Fines and Recoveries," 3rd edit., p. 119.) *Re Scholfield*, 3 Bing. N. C. 293, was an application upon a matter of this kind, and it was held that the affidavit verifying the certificate of a married woman's acknowledgment of a deed may be made by one of the commissioners who took the acknowledgment provided he be a practising attorney, and one of the commissioners has no interest in the affair.

BOVILL, C. J.—The Act requires that the acknowledgment shall be made before two commissioners, and whatever may have become usual under the rule of court, we cannot allow a custom to overrule the words of the statute. If no attorney to either party ever acted as a commissioner in such a matter, no difficulty of this kind could possibly arise. Although it may be competent for an attorney concerned to act in one part of the transaction, if he does not consider himself free to be present at the examination he should not interfere at all. It should be generally understood that this court considers the examination, as well as the acknowledgment, of a married woman, should be made by or before two disinterested commissioners; and the practice, of the mischief of which the present case is an instance, should no longer be adopted. The court declines to grant this application.

WILLES, J.—The affidavit omits the only essential matter, which is, that the married woman upon examination consented to the transaction. The Act, 17 & 18 Vict. c. 75, was passed in consequence of a doubt whether the court had power, when there appeared to have been impropriety, to quash the proceedings in order to prevent injury to innocent persons concerned. By the rules of 1834, certainly one commissioner only is required to be disinterested, but there may be a question whether the effect of that rule is not qualified by the subsequent statute (*a*). The case cited does not help the present application, because the required affidavit has not been produced.

KEATING and BRETT, JJ., concurred.

Application refused.

Attorney for applicant, *Strangways*.

(*a*) In 17 & 18 Vict. c. 75, which is "An Act to remove doubts concerning the due acknowledgment of deeds by married women in certain cases," it is recited that "it is apprehended that deeds executed by married women under the provisions of the said Act (viz., Fines and Recoveries Act 1833) may be liable to be invalidated by the circumstance that the judge or master in Chancery, or one or both of the commissioners taking the acknowledgment may be, or may have been, interested or concerned, either as a party or otherwise, in the transaction giving occasion for such acknowledgment, and it is not expedient that deeds executed in good faith under such circumstances should be invalidated." It is enacted that the acknowledgment of a deed should not be impeachable by reason only of the party before whom the same was taken being interested. The 2nd section provides for the stay of proceedings instituted before July 1854. The 3rd section gives the Court of Common Pleas power to make rules for preventing commissioners who are interested from taking acknowledgments; but no rules of court on the subject are in existence of a later date than 1834.

COURT OF EXCHEQUER

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

May 24, 25, and 26, and July 2.

THE MAYOR, ALDERMEN, AND CITIZENS OF CARLISLE v. GRAHAM AND ANOTHER.

The plaintiffs formerly had, by grant from the Crown, a several fishery in a portion of a tidal river. The waters of that portion of the river gradually deserted their original course, and flowed in a new channel over the land of a private proprietor:

Held, that the several fishery of the plaintiffs was not transferred from the old to the new channel.

This was an action of trespass to the plaintiffs' several fishery in the river Eden, in the county of Cumberland.

The defendants pleaded: 1. Not guilty. 2. That the said several fishery was not the plaintiffs', as alleged. 3. That the soil on and over which the said alleged fishery was at the said times when, &c, was and still is the soil and freehold of the Right Hon. William, Earl of Lonsdale, and that the defendants committed the acts complained of by his leave and licence, and as his servants, and by his command. 4. That the soil, &c., was the Earl of Lonsdale's, as in the 3rd plea alleged, and that he demised it to the defendants.

The plaintiffs joined issue on the defendants' pleas, and replied—Secondly, to the third plea, that the river Eden in the declaration mentioned was a river in the county of Cumberland, in which the tides and waters of the sea flow and reflow, and that the Corporation of Carlisle, from time whereof the memory of man runneth not to the contrary, had had and enjoyed, and still ought to have and enjoy, a several fishery in the said river. Thirdly, to the third plea, alleging that, from time whereof the memory of man is not to the contrary, until and at the time of the grant thereafter mentioned, the Kings of England, in right of the Crown of England, were seised of and entitled to a several fishery in the said river, and that King Edward II. granted the said several fishery to the corporation. Fourthly, to the fourth plea, repeating the allegation in the second replication to the third plea, and further alleging that the plaintiffs were, before and at the time of the alleged lease and demise to the defendants by the said Earl in the fourth plea mentioned, by virtue of the premises in the replication, possessed of and entitled to the said several fishery. Fifthly, to the fourth plea, repeating the allegations in the third replication to the third plea, and alleging that the plaintiffs were, before and at the time of the alleged demise to the defendants by the said Earl, by virtue of the premises in the replication, possessed of and entitled to the several fishery.

The defendants rejoined, taking issue on the replications.

The action was tried before Lush, J. at the Spring Assizes at Carlisle, in 1868, when the facts appeared to be as follows:—The plaintiffs were the corporation of Carlisle, and claimed to be entitled to a fishery in a certain portion of the river Eden, called the Goat. The defendants claimed under a lease from the Earl of Lonsdale, who was owner of the soil of the Goat.

It appeared that originally the river Eden, which in that part was a tidal river, flowed along a channel now called the Loop, in which the corporation of

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Carlisle had a several fishery. The Goat was at that time a ditch with very little water in it, and at parts entirely dry. In 1693 the waters of the river began to pass down the Goat, and in process of time they ceased to go down the Loop altogether, except occasionally during freshes, and the Goat became the course of the river. The corporation now claimed to have a several fishery in the Goat as they formerly had in the Loop.

The evidence, which was very voluminous, and the facts upon which the decision of the court proceeded, are fully set out in the judgments. The learned judge at the trial directed a verdict to be entered for the defendants, with leave to the plaintiffs to move to enter it for themselves for 40*s.* damages.

A rule *nisi* was accordingly obtained.

Manisty, Q. C., *T. Jones*, Q.C., and *R. G. Williams* showed cause.—Such a right as the plaintiffs claim cannot be created since Magna Charta unless it be granted by the Crown as having been previously owner of the soil of the river and the fishery. The land over which the new course of the river goes is not the soil and freehold of the Crown, but of the Earl of Lonsdale. The plaintiffs are seeking to make themselves the possessors of a new several fishery on the soil of a private individual. They also contended that the plaintiffs had lost the right of fishery, if they ever had any, over the new course of the river, by non-user for more than sixty years. They cited

The Fishery case, Davy's Reports, 55;
Rex. v. *Old Alresford*, 1 T. Rep. 358;
The Duke of Somerset v. *Foywell*, 5 B. & C. 875;
Holford v. *Bailey*, 13 Q. B. 426;
Marshall v. *Ulleswater Steam Navigation Company*, 3 B. & S. 732; 8 L. T. Rep. N.S. 416.

Mellish, Q. C., and *Kemplay*, supported the rule. The plaintiffs are entitled to the same rights of fishery in the new course of the river as they had in the old. The river, in its new course, is a tidal or navigable river. All public rights are transferred from the old course to the new. The new course is a highway, just as the old was. Why is it any greater hardship upon the private proprietor that a private right of fishery should also be transferred? The river being tidal, the fishery is certainly not his. Then, if not the plaintiffs', the right of fishery belongs to the public. They also contended that the plaintiffs' right had not been barred by 3 & 4 Will. 4 c. 27, s. 3, on the ground that that Act applied only to corporeal hereditaments, and that there was no evidence that they had ever abandoned their right or dedicated it to the public. They cited

Lord Hale, De Jure Maris, 11;
Attorney-General v. *Lord Lonsdale*, L. Rep. 7 Eq., 377; 38 L. J. 335, Ch.; 20 L. T. Rep. N. S. 64;
Re The Hull and Selby Railway Company, 5 M. & W., 327;
Murphy v. *Ryan*, 2 Ir. Rep. C. L. 143;
Gann v. *Whitstable*, 11 H. L. 192; 9 L. T. Rep. N. S. 263;
Duke of Somerset v. *Foywell*, 5 B. & C. 875.

July 2nd.—The following judgments were delivered.—KELLY, C. B.—In this action the plaintiffs claim a several fishery in a portion of the river Eden called the Goat, about half a mile in length, and extending from a point marked upon the plan which was laid before us as Thornbush Draught (Back o' Garth) to Bank End Pool. The river Eden is a tidal river, and the plaintiffs are entitled to two several fisheries, one called the Free Boat, and the other the King Garth, derived under grants and charters of Henry III. and Edward II., confirming more ancient grants anterior to Magna Charta. The Free Boat fishery extends from the highest point to which the tide flows to the point at which the King Garth fishery begins; and the King Garth fishery from that point to the head or upper part of the Goat, and thence formerly proceeded eastward in a semicircular course along what was once a portion of the river Eden, and which has been called in argument the Loop, and fell into the old river near Bank End Pool at the lower end of the Goat. It was at one time contended that the King Garth fishery continued throughout the semicircular loop to Bank End Pool; but it was afterwards admitted and is the fair result of the evidence, that it terminated at or near a point called Cargo Holme, and that the fishery from that point to Bank End Pool belonged to the Earl of Lonsdale or his predecessors in title, the corporation being entitled only to a third boat or draft. In this part of the river before or about 1693, the waters of the Eden began to recede from the Loop, and to pass up and down the Goat, which was at that time a ditch with very little water in it, and at parts entirely dry. The soil of the Goat, the lands on both sides of it, and the fishery throughout the whole course of the river from Bank End Pool to the sea, have belonged to the Lowther family, now represented by the Earl of Lonsdale under whom the defendants claim, from the earliest times to the present day. In 1693, when the fish began in any numbers to make their way up the Goat and so to desert the Loop and the King Garth fishery of the plaintiffs, a deed was made by which Sir John Lowther granted to the corporation liberty to fix posts and stakes, and to use boats and spread nets, and other utensils for fishing, for the more easy and better management of the King Garth fishery. The defendants allege that this was with a view to the erection of a weir or dam, and by that and other means to stop the passage of the fish up the Goat, and to turn them into the Loop and the fishery of the corporation. The plaintiffs insist that it is the effect of this deed to recognise their right to fish in the Goat. It is unnecessary to pronounce any opinion on this point. The evidence shows that in fact the waters of the Eden at length, by slow degrees, altogether receded from the Loop and made themselves a passage through the Goat, leaving the whole of the Loop dry land, and converting the Goat into a permanent integral portion of the tidal river. Between 1693 and 1760, several leases were granted by the corporation of their fisheries of King Garth and Free Boat, and in one of them, of 1711, they covenanted for the quiet enjoyment of the fishery called King Garth and Goat, and other the premises. In 1723, 1744, and 1755, the Lowthers granted leases of all their fisheries in the Eden to the corporation. The last of these leases expired in 1758. In 1760 a bill in Chancery was filed by the corporation against Sir James Lowther to establish their right *inter alia* to fish in the Goat. Evidence was taken upon depositions, the result of which was certainly far from supporting the claim of the corporation; but it is really immaterial whether this was so or not, for, inasmuch as the right of a fishery in the corporation could only be derived from a grant or grants anterior to Magna Charta, and the Goat was mostly dry ground until the 17th century, it is clear that the claim of the corporation depends upon whether, in point of law, the fishery to which they were entitled in the Loop when it formed a part of the tidal river was transferred to the Goat, and became their several fishery therein when the waters had receded from the Loop and flowed into and through the Goat, making it a portion of the river. The fishery suit seems to have terminated in a compromise, for no decree is to be found; and three years later, in 1763, and from that time till 1781, a number of leases appear to have been granted

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by the corporation to their tenants, not only of the Free Boat and King Garth fisheries, but of all the fisheries of the Lowther family within the river Eden. The last of these leases expired in 1784. The corporation must therefore have taken leases from the Lowthers of their fisheries in the Eden between 1760 and 1781, though none such appear upon the case. From 1784 to 1794 the Free Boat fishery appears to have been leased by the corporation to one Askham, or retained in their own hands, and from 1794 to 1842 was leased to the late Earl Lonsdale at 32*l.* a year. The King Garth fishery and the Goat are no more mentioned after 1784, except that we find that on the 12th Oct. 1805 Lord Lowther appears to have purchased of the corporation their boats and nets at King Garth, and that they on that day paid to him 105*l.* for twenty-one years' rent of the Goat fishery at 5*l.* per annum. From 1842 to 1866, the year before this action was brought, one Ralph held the Free Boat fishery under the corporation, and the Goat fishery under Lord Lonsdale. Such are the leading facts of the case, and upon these the question arises whether, upon the change in the course of the river from the Loop to the Goat as above described, the corporation became entitled to the several fishery in the Goat to which they had been before entitled in the Loop or ancient course of the river. The defendants deny their right to any fishery at all in the Goat, and insist that, upon the receding of the waters from the Loop, the several fishery came to an end at the point at which the Loop began. And we are called upon to decide the question which now arises for the first time—is the several fishery of a subject in a tidal river, the waters of which permanently recede from a portion of its course, and flow into and through another course where the soil and the land on both sides of the new channel thus formed belong to another subject, transferred from the old to the new channel, and so a several fishery created in and throughout such new channel, or in some, or if in any in what part of it? No authority has been cited at the bar, nor is any to be found in the books, to the effect that under such circumstances a several fishery is extended into or created in the new channel thus formed in the tidal river. It is said in Rolle's Abridgment, and appears to have been remarked by Thorp, J. in a case in the Year Books, 28 Edw. 3, c. 93, that wherever the tide flows and reflows it may be called an arm of the sea; and if the water be a highway, and changes its course from one soil to another, still it becomes a highway there where the water flows, as it was in its ancient course, so that the lord of the soil cannot disturb the waters in this new course. But this proposition if true as regards the use by the public of the tidal water as a highway, or the exercise of any other public right, fails to show that a private right to a several fishery arises within the new course of the tidal waters. In the case of *Murphy* v. *Regan*, 2 Ir. C. L. Rep. 143, O'Hagan, J., in delivering the judgment of the court, says, "But whilst the right of fishing in fresh waters in which the soil belongs to the riparian owners is thus exclusive, the right of fishing in the sea its arms and estuaries, and in its tidal waters wherever it ebbs and flows, is held by the common law to be *publici juris*, and so to belong to all the subjects of the Crown, the soil of the sea, and its arms and estuaries and tidal waters, being vested in the Sovereign as a trustee for the public. The exclusive right of fishing in the one case, and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner and by the Sovereign in a public river respectively." And this is the true principle of the law touching a several fishery in a tidal river. If therefore the right of the Crown to grant a several fishery in a tidal river is derived from the ownership of the soil which is in the Crown by common law, a several fishery cannot be acquired, even in a tidal river, if the soil belong not to the Crown, but to a subject. And all the authorities, ancient and modern, are uniform to the effect that if by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the rights of the Crown and the public may come into existence and be exercised in what has thus become a portion of a tidal river, or of an arm of the sea the right to the soil remains in the owner, so that if at any time thereafter the water shall recede, and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public: (see Hale De Jure Maris, pars prima, Hargreave's Tracts, pp. 5, 6, 11, 13, 16, 37.) If, then, the title of the corporation to the fishery is derived from a grant by the Crown, and the title of the Crown to grant from the ownership of the soil, how can the corporation claim a right to the fishery in the Goat, where the soil does not and never did belong to the Crown? Other difficulties present themselves in the way of this claim. Throughout what portion of the Goat can the King Garth several fishery be extended? Not to the whole of it, for the fishery of the corporation did not extend throughout the whole of the Loop; nor to the same length of space as it occupied in the Loop, for the Goat and the Loop are not of equal length, the Goat being much shorter than the Loop. Besides, the grant to the corporation must have been of some definite portion of the river, inasmuch as the King Garth fishery began where the Free Boat fishery ended, and ended where the Lowther fishery began. How then can a several fishery in the Eden, from the lower end of the Free Boat fishery to a point near Cargo Holme in the Loop, be converted into a fishery from its upper terminus to some undefined point on the Goat? If then the claim of the corporation cannot be maintained upon the ground that the fishery was transferred from the Loop to the Goat, it is clear that it cannot be maintained at all. The Goat has now become a portion of a tidal river or arm of the sea; and a several fishery there cannot exist in a subject but by a grant from the Crown anterior to Magna Charta; and until some period of time between 1693 and 1760 the Goat was dry land, where no fishery could have existed. It was argued for the plaintiffs that the grant by Sir John Lowther in 1693 conferred or recognised a right to fish in the Goat, and that the corporation have exercised the right at various periods between 1693 and 1805; but, the Goat having become a portion of a tidal river, no grant by a subject, and no length of user by a corporation since 1693, even if the grant of 1693 could be thus construed and any evidence existed of such user, could confer a right to a several fishery therein. The claim of the corporation, therefore, altogether fails. In the view thus taken of the principal points in the case, it becomes unnecessary to consider whether the right to this several fishery, if it ever existed, has been lost or extinguished by non-user or otherwise. I may, however, observe that, supposing the Acts of Parliament which in effect may be called statutes of limitation touching claims to property corporeal and incorporeal to be inapplicable to the case before us, it is yet difficult to sustain a claim to a several fishery in a tidal river after a non-user for nearly a century, and where, supposing no several fishery to exist, the public may claim a right to fish by reason of the waters having become a portion of an arm of the sea. It appears from the evidence that from 1784 to 1805 the corporation paid a rent of 5*l.* a year to

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the Lowthers for the Goat fishery. It is said that this was a payment made under the grant of 1693, and it may be so; but yet the payment, whether made under or with reference to that grant or not, being admitted by the corporation to have been made for the Goat fishery, is wholly inconsistent with a right in them to a several fishery in the Goat; while, on the other hand, one Ralph has enjoyed a fishery there for upwards of thirty years last past under the Earls of Lonsdale. If it be possible, therefore, by non-user to dedicate a fishery in a tidal river to the public, the facts of this case afford some evidence of such a dedication between the year 1780 and the present time. Upon these grounds I am of opinion that the claim of the corporation is not sustained; that the verdict for the defendants must stand; and that the rule must be discharged.

BRAMWELL, B.—I am of the same opinion; but I desire to add a few observations, as the point argued before us was one of novelty. In this case the question is, not whether the defendants have any and what right, but whether the plaintiffs have a several fishery. The burden of proof is on them. They must prove title to a several fishery which existed before Magna Charta. They say that they do so by showing a several fishery in a part of the Loop, and that the Goat is a new tidal channel in place of the Loop, and so they say they have a several fishery in a part of the Goat. It is for them to show affirmatively why this does follow as a consequence on the change in the course of the river, not for the defendants to show why it does not. It is difficult to prove and to argue a negative, and I might content myself with saying that I see no reason why the alleged consequence should follow. But the argument for the plaintiffs I understand to be this: that the plaintiffs had a fishery in the Eden from a certain point down the river, and that from that point down the river now leads along the Goat; therefore the plaintiffs' fishery is there; the fishery was formerly along the then public highway of the Eden, therefore it is now along the new public highway of the Eden. I repeat, I think it would be enough to say as to this argument that, though the premises are true, the consequence does not follow. The plaintiffs had a several fishery, which no doubt must have been granted or acquired by metes or bounds; the *locus in quo* is not within those metes and bounds. The plaintiffs had a several fishery over the soil and freehold of the Crown; this is not the soil and freehold of the Crown. It may be subject to the public right of navigation as a highway; but how has it become subject to the right of the plaintiffs? When did it so become? As the change of the river's course was gradual, there must have been a time when the river ran in both channels, and fish were found in both. Had the plaintiff at that time a several fishery in both channels? Suppose the owners of the soil of the Goat on the formation of a channel, and before evidence of dedication to the public, had thought fit, as they might have done, to stop the inlet of the waters, could they not have done so notwithstanding there were fish in the Goat? I should think they could. But if so, they could destroy the plaintiffs' fishery; so that it would be a several fishery in the plaintiffs, with a right to another to destroy it. Again, suppose the plaintiffs cleansed out the old Eden, would they not have a several fishery there? And can they have a right to both waters under a grant within the metes and bounds of which both waters certainly would not be? Further, I think the right to grant a several fishery arises from the ownership of the soil. But the Crown is not, nor is shown ever to have been, the owner of the soil of the Goat. The question in this case arises for the first time, and I think the plaintiffs do not give us sufficient reasons for answering it in their favour. Reference was made to Rolles Abridgment, title Chemin, and to a case in the Year Books 23 Edw. 3, c. 93, where Thorp, J. says that wherever the tide flows and reflows it may be called an arm of the sea, and if the water be a highway and changes course from one soil to another, still it becomes a highway there where the water flows as it was in its ancient course, so that the lord of the soil cannot disturb the waters in their new course. This may be true as regards the public right of navigation, or any other public right, but does not establish the right to a several fishery in the new course of the river. But there is a further consideration which I think fatal to the plaintiffs. If they have a several fishery in the Goat, its extent must be capable of ascertainment, not for the purpose of this action, as the defendants have fished the whole length of the Goat, but in point of law it must be a fishery from some one definite point to some other definite point. There must be some rule by which it can be ascertained; but in fact there is no such rule here. It is not the whole length of the Goat, nor do I think a rule-of-three sum would ascertain the matter—viz., as the length of the Loop was to the length of the Goat, so is the length of the old fishery to that of the new. Nor can I see that this solution, or one reaching by a line drawn from the terminus of the fishery in the Loop to the Goat, would be just or reasonable to the owners of the fishery below that of the plaintiffs. It seems to me therefore that, even if the plaintiffs, had they been the owners of the fishery the whole length of the Loop, could (as I think they could not) have made title to the Goat, that not being such owners the whole length of the Loop, they cannot. The measure of their right is lost. I have said nothing about the fact that the plaintiffs themselves caused this desertion of the old and formation of the new channel; but it certainly does seem a strong thing to say that by their own act they have acquired the right over another's soil. I think this consideration fatal to them, even supposing that they would have been right if the new channel was the work of nature. I think, therefore, the defendants entitled to judgment. As to the second point, it is unnecessary to decide it with the opinion I have, but I may say that as at present advised I could not decide it in favour of the defendants, for it seems to me the Statute of Limitations applies, and I can see no sufficient evidence of an abandonment to the public of this right, if it ever existed. My brother Channell concurs that our judgment should be for the defendants.

Rule discharged.

Attorneys for plaintiffs, *Gray, Johnston,* and *Mounsey.*

Attorneys for defendants, *James, Curtis,* and *James.*

June 24 and July 2.

HIGGS v. THE NORTHERN ASSAM TEA COMPANY (LIMITED).

SAME v. SAME.

Debentures—Assignment of—Calls on shares—Right of set-off—Equity.

The defendants' company issued to the plaintiff certain debenture bonds, by which they bound themselves to pay to the plaintiff, his executors, administrators, or assigns a certain amount upon a future day, together with interest thereon in the mean time. By the articles of association of the company the defendants were to have a lien upon the shares or debentures of members

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indebted to the company, and to be entitled to sell and transfer them, and apply the proceeds in discharge of such debt. Subsequently the plaintiff transferred certain of these debenture bonds to A. B. The defendants registered the transfer, and issued a certificate to A. B., stating that he had been registered as proprietor of the debenture bonds. Their secretary also, in a letter to A. B., acknowledged him to be the proprietor of the bonds, and requested time for payment. They likewise accepted one of the bonds in payment of calls due from A. B. to them on shares held by him in the company. The plaintiffs previously to the falling due of the debenture bonds became indebted to the defendants in a certain sum for calls upon shares held by plaintiff in defendants' company. This sum the defendants sought to set-off in an action brought in the name of the plaintiff, but really for the benefit of A. B., the assignee of the debentures:

Held, on a special case stated in the action raising the question whether the defendants were entitled in equity to set-off the calls, that they were not so entitled.

These were actions upon certain debenture bonds in which special cases had been stated, the question in each case being whether the defendants were entitled to rely on a set-off for calls due upon shares held by the plaintiff, the obligee of the bonds, in the defendants' company, or whether the actions, though nominally brought by the plaintiff, being really for the benefit of Messrs. Cavendish and Smith, the assignees of the debenture bonds, sued on in equity, would, under the circumstances of the case, restrain the defendants from availing themselves of this set-off at law.

On the 17th Oct. 1864, an agreement was entered into between the plaintiff and E. W. Wingrove on behalf of a company about to be formed, and to be called the Northern Assam Tea Company (Limited.) By this agreement the plaintiff agreed to sell his estates in Assam to Wingrove for 7000*l.* in cash, to be paid on or before the 15th Nov., and the sum of 47,000*l.* in debenture bonds of the company above mentioned in sums of 100*l.* each, and bearing interest at the rate of 5*l.* per cent. per annum from the 1st. Jan. 1865, such debentures to be delivered to the said plaintiff on the completion of the transfer of the estates as he might direct, and to be redeemable and paid—8000*l.* on 1st Jan. 1868, 10,000*l.* on 1st Jan. 1869, 14,000*l.* on 1st Jan. 1870, 15,000*l.* on 1st Jan. 1871, but the plaintiff was to have a lien for the unpaid purchase-money and interest on the said land as long as any part thereof should remain unpaid.

The company was registered on the 22nd Oct. 1864, and the articles of association contained the following provision:—

"The company shall have a pecuniary lien upon the share or shares, debenture or debentures, and dividends or profits of any member who may be either absolutely or contingently indebted, or liable to the company in any amount and on any account whatsoever, and that whether such member is liable or indebted solely or jointly with any other person or persons, and whether the debt be actually payable or not, and the board of directors may after any such debt has become actually payable, absolutely sell, dispose of, and transfer all or any one or more of the shares or debentures of any member so indebted or liable to them as aforesaid, and may apply the proceeds of such sale in or towards the payment or satisfaction of the said debt or liability, and the consent of any such member shall not be necessary for giving validity to such sale, disposition, or transfer, and the purchaser of any such share or shares, debenture or debentures, shall not be bound to ascertain whether such power of sale shall have arisen, and a resolution of such board that such sale shall be made, and the entry of the name of the purchaser in the company's share register as the holder of such share or debenture, shall confer a good title both at law and in equity on the purchaser against such member."

On the 4th April, 1865, the purchase of the land was completed, and the debentures issued to the plaintiff with the exception of those to be payable 1st Jan. 1871, which were retained, in accordance with the agreement, as a security for the performance of certain stipulations therein.

Each of the debentures payable Jan. 1st 1868, were in the following form:

The Northern Assam Tea Company (Limited).
Debenture Bond, 100*l.*

To all to whom these presents shall come, the Northern Assam Tea Company (Limited) send greeting. Whereas under and by virtue of an agreement dated the 17th Oct. 1864, made between E. H. Higgs, of, &c., of the one part, and E. W. Wingrove, for and on behalf of the said company of the other part, the said company became and is now liable to pay to the said E. H. Higgs the sum of 47,000*l.*, being the balance of the purchase-money agreed to be paid for certain tea estates situated in Upper Assam, in the said agreement described, and thereby agreed to be sold and transferred by the said E. H. Higgs to the said company, upon certain terms and conditions therein mentioned, and, amongst others, that the payment of the said sum of 47,000*l.* should be made in debenture bonds of the company in sums of 100*l.* each bearing interest at 5 per cent. per annum from the 1st Jan. 1865, and to be redeemable and paid as follows, 8000*l.* part thereof, &c., and that until such payment be made the said E. H. Higgs should have and he accordingly now has a lien on the said tea estates. And whereas, in pursuance and part performance of the said agreement, and in order to secure payment of the said sum of 47,000*l.*, the said company has this day issued four series of debenture bonds of 100*l.* each, bearing interest at 5 per cent. per annum for the respective sums, and payable at the respective times hereinbefore mentioned, the first series whereof for 8000*l.* in bonds of 100*l.* each bearing interest at 5 per cent, per annum, payable on the 1st Jan. 1868, is secured to be paid by these presents as hereinafter mentioned. Now, therefore, know ye, and these presents witness, that the said Northern of Assam Tea Company (Limited) hereby bind themselves to pay to the said E. H. Higgs, his executors, administrators, or assigns, on the 1st Jan. 1868, the principal sum of 100*l.* sterling, and also to pay interest thereon at the rate of 5*l.* per cent. per annum, half-yearly on the days mentioned in, and on presentation of the respective coupons hereto annexed, until payment of the said principal.

Given under the common seal of the said Northern Assam Tea Company (Limited), this 2nd June 1865,

P. BATTESCOMBE, } Directors.
S. W. MITCHELL, }
C. A. FIELDER, Secretary.

The other debentures were similar in form. On 28th July 1865 the plaintiff, in consideration of 1850*l.*, then paid to him by Henry Cavendish Cavendish, by deed transferred to the said Henry Cavendish Cavendish thirty of the said debentures, numbered 61 to 80, payable on the 1st Jan. 1868. The said Mr. Cavendish then was and from thence till action brought has been, a shareholder in defendants' company. The said transfer was expressed to be made to secure the sum of 2000*l.* and interest. On the 9th Aug. 1865 Cavendish gave notice of the transfer to the defendants, and sent them the deed of transfer for registration, and the transfer was registered by the defendants in a book kept by them for registering mortgages, and called the register of mortgages as transferred by plaintiff to Cavendish, and they delivered to Cavendish a certificate in the following form:

Certificate of transfer of debentures. The Northern Assam Tea Company (Limited) incorporated by Act of Parliament. This is to certify that Henry Cavendish Taylor, Esq., of &c., has this day been entered on the register of mortgages as the registered proprietor of twenty debenture bonds of 100*l.* each of the first series, first issue, numbered 61 to 80 inclusive, in the above company. Dated in London, this 9th day of Aug. 1865. C. H. FIELDER, Secretary,

N.B. Debenture bonds must be annexed hereto.

On Oct. 3rd 1866 the plaintiff, in consideration of 1020*l.*, then paid to him by Geo. Percival Smith, transferred to him twelve other of the first series of bonds, numbered 49 to 60 by a deed in similar terms to the former transfer. Smith was, and till action continued, a shareholder in defendants' company. On 16th Oct. 1866 Smith gave notice of the transfer to

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defendants, and was entered on the register, and received a certificate similar to that given to Cavendish. Defendants have paid interest on the debentures to Cavendish and Smith till 1st Jan. 1868. In Nov. and Dec. 1867 letters were written by the defendants' secretary to Cavendish and Smith acknowledging each of them to be the owners of the debentures respectively transferred to them soliciting further time for payment.

In Jan. 1868 the defendants proposed to accept, and accepted, from Cavendish and Smith, two of the said debentures so transferred to them in payment of an equal amount to that of the principal moneys in the said debentures due from each of them to the defendants for calls on the shares held by each of them in defendants' company.

Neither Cavendish nor Smith, when the debentures were transferred, had any notice that the defendants had or would claim any right of set-off or lien as against or on the said debentures, or any of them.

On the 23rd Feb. 1866, by a deed of mortgage between defendants of the one part, and the plaintiff of the other part, after reciting the original agreement for sale of the plaintiff's estates, and that plaintiff had requested defendants, in performance of the agreement for giving him a lien for unpaid purchase-money, to execute the mortgage thereinafter expressed for the benefit of himself and his assigns, the holders for the time being of the debentures, it was witnessed that the defendants granted the lands therein mentioned to plaintiff, with a proviso for redemption if defendant should pay the respective holders for the time being of the several debenture bonds so issued by defendants, the several sums of principal money secured thereby respectively, with the interest thereon respectively, at the rate thereon respectively specified at the several and respective times, and in the respective manner, by the said bond respectively provided.

The plaintiff, by deed dated 4th Oct. 1866, covenanted with defendants that he (the plaintiff), his executors, or administrators, would punctually pay the calls for the time being to be made on 2000 shares therein mentioned.

The following calls were afterwards duly made on the said shares, of which due notice was given: 16th July 1866, 1200*l.*; 16th July 1866, 800*l.*; 31st Oct. 1867, 600*l.*; 31st Oct. 1867, 400*l.*

Default was made in payment of these calls, and they still remained unpaid. The plaintiff at the time of the making of the calls hereinafter mentioned was registered owner of the shares on which they were made. Calls on (A) shares, 31st Aug. 1867, 692*l.* 10*s.*; 3rd Nov. 1867, 817*l.* 10*s.*; 28th Feb. 1868, 817*l.* 10*s.*; 16th July, 1868, 817*l.* 10*s.*; 1st May 1868, 817*l.* 10*s.*; 1st Aug., 817*l.* 10*s.* Calls on B shares, 16th July 1866, 1250*l.*; 31st Oct. 1867, 625*l.*

The said calls were duly made, and due notice given of them, and at the time of the commencement of the suit they were, and still were, due and unpaid to the defendant.

The court were to be at liberty to draw inferences of fact.

Brown, Q. C. (with him *R. F. Stone*) for the plaintiff.

Mellish, Q. C. (with him *Watkin Williams*) for the defendants.

Cur. adv. vult.

July 2.—BRAMWELL, B. now delivered the judgment of the court (himself and Channell, B.)—We are to consider these cases, not on the pleadings, but as special cases. The question in them is the same as would arise if Messrs. Cavendish and Smith had brought suits in their own names in equity against the defendants and the defendants had set up the defence they now set up of a legal set-off—would there be what is called an equity to prevent their doing so? that is, taking the set-off to be available at law, would equity restrain the defendant from relying on it? It is obviously a purely equitable question, and our answer must be given with great distrust, the more so owing to the state of the authorities. The set-off is a set-off in law: have the defendants so contracted or conducted themselves that they cannot avail themselves of it? The equity, if any, of Messrs. Cavendish and Smith to restrain the set-off is an equity between them and the defendants. Then, we presume that if it should appear that these debentures were to be paid to assignees of them, without the right of set-off, still, if Higgs himself sued, a set-off would be available against him. But though it is an equity between the assignees of the debentures and the defendants, it is an equity which may arise out of the original contract with Higgs, for if the contract with him was to pay his assignees without right of set-off, then the assignees would have an equity to prevent a set-off being enforced against him. Further, if whatever may have been the original contract with Higgs, the defendants have so conducted themselves to the assignees that it would be inequitable for the defendants to set up such a set-off, then also such an equity exists in the assignees. We have to consider then whether by the original contract with Higgs or by their subsequent dealing with Messrs. Cavendish and Smith, or by both combined, the defendants are precluded from defending themselves by this set-off due from Higgs. In considering this question it is impossible to doubt that both Higgs and the defendant contemplated that these debentures would be sold and assigned. Their amounts, 47,000*l.*, or 32,000*l.* deducting the 15,000*l.*, the defendants were to return, they being issued in separate debentures of 100*l.* instead of one bond or covenant given; the subsequent registration of them, and the issuing certificates to Messrs. Cavendish and Smith, stating them to be proprietors of the debentures; in short, the entire dealing and conduct in relation to these debentures, show the parties contemplated that they would be sold and assigned. The provisions in article 18 seem decisive. The company may sell the debentures of an indebted member, but that cannot mean subject to a set-off against him, otherwise the debenture of A. might be sold to B., and then payment refused to B. because A. was still indebted to the company. So under article 12, the company were to retain a reasonable number of Higgs's debentures, and have a lien on them to secure Higgs's guarantee of profits. It cannot be supposed that if they sold these debentures under this lien, the assignees would have been subject to Higgs's debt for calls. Further, the mortgage is expressly in trust for the "holders for the time being" of the debentures unpaid. Both parties, therefore, must have contemplated that these debentures would be assigned but as they could not practically be sold and consigned if subject to an uncertain set-off against Higgs, both he and the defendants must have intended that in the hands of transferees they should not be subject to that set-off. These considerations, and the cases of *Jeffreys* v. *The Agra Bank*, L. Rep. 2, Ch. 674; 36 L. J. 222, Ch.; *R. Blakely Ordnance Company*, L. Rep. 3 Ch. App. 154; 37 L. J. 418, Ch.; 16 L. T. Rep. N. S. 132; and *R. General Estates Company*, L. Rep. 3 Ch. App. 758; 18 L. T. Rep. N. S. 457, 894, would seem sufficient authority for our deciding this case in favour of the plaintiff, but it is said a difficulty is created by the case of *Re Natal Investment Company*, L. Rep. 3 Ch. App. 355; 37 L. J. 362, Ch.; 18 L. T. Rep. N. S. 171. By that case, of course, we are bound

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It was not a case of set-off, but of failure of consideration for the debenture assigned. It was decided on its own facts, and assuming it to be well decided it did not overrule *Re The Blakely Insurance Company*: (see per Wood, L. J. in *Re The General Estates Company*.) In the present case there is what did not exist in any of the four cases referred to, the dealing of the defendants with the assignees of the debentures. As we have observed they register them as proprietors, they give them certificates that they are registered proprietors of the debenture bonds. In Nov. and Dec. 1867, after the debt from Higgs was due, they write letters to Messrs. Cavendish and Smith acknowledging each of them to be owners of the debentures respectively transferred to them, soliciting further time for payment, and in Jan. 1868, after the debentures are due, they accept from them debentures in payment of a general amount of calls due from them. Mr. Mellish said all this was no more than they were bound to do, even with the amount of set-off, and cited *Mangles* v. *Dixon*, 3 H. of L. 702. It is impossible not to agree with the admirable reasoning of Lord St. Leonards in that case, and it is true a debtor cannot refuse to receive from the assignee of a debt notice of the assignment, and it is true that he is not bound to tell him that the debt is subject to equities not apparent on its face so to speak. But there is more in this case. Messrs. Cavendish and Smith are called by the defendants proprietors of these debentures. In truth the defendants now say that there is no beneficial property in them, or that they are not absolute proprietors of them, but qualified proprietors subject to a right in the defendants. Then they treat the debentures as to those they take in payment of calls, as being due to their full amount, and negotiate for thereby paying a debt which they now say they practically do not owe. *Watson* v. *The Mid-Wales Railway Company*, L. Rep. 2 C. P. 593; 36 L. J. 285, C. P.; 17 L. T. Rep. N. S. 94, was relied on for the plaintiff, and certainly the reasoning of the judges seems in point for him. But the bond sued on was made before the contract out of which the set-off arose; but whether it was assigned, and notice of the assignment given to the defendants before the making of that contract, or only before the set-off became due, does not appear. According to the argument of the plaintiff's counsel the latter was the case. If so, the case is in point. *Dickson* v. *The Swansea Vale Railway Company*, L. Rep. 4 Q. B. 44; 19 L. T. Rep. N. S. 346; 30 L. J. 17, Q. B., seems also in point. On these authorities, and taking all the above matters into account, we hold that the defendants and Higgs contemplated and intended that Higgs should assign those debentures; that they cannot practically be so dealt with if subject to such equities as now set up; that consequently Higgs and the defendants contemplated and intended that Higgs should assign free from those equities; and that the defendants have dealt with Messrs. Cavendish and Smith on that footing. Holding this, and guiding ourselves as we best can by the cases cited, we think the plaintiff entitled to our judgment.

Judgment for plaintiff.

Attorney for plaintiff, *Francis*.

Attorneys for defendants, *Hamber* and *Harrison*.

COURT OF PROBATE.

Reported by W. Leycester, Esq., Barrister-at-Law.

Tuesday, Aug. 3.

Brown v. Brown.

Testamentary suit—Examination of attesting witness de bene esse—20 & 21 Vict. c. 77, s. 32—Practice.

The court has power to order the examination of a witness de bene esse pending suit; but in making the order it will be guided not by the consideration of the witness's age, but by the fact that his testimony is of so essential a nature as that the loss of his evidence by his death would be detrimental to the interests of the suitor.

The will of E. B. Brown was propounded by the plaintiffs, as executors; and the defendants, in opposition, pleaded that the will was not duly executed according to the statute, that the testator was not of sound mind at the time of execution, that he did not know and approve the contents, and that certain alterations appearing on the face of the will were not there at the time of its execution.

Dr. *Tristram*, for the plaintiffs, now moved the court to grant an order for the examination, *de bene esse*, of James Secker, the surviving attesting witness to the will. He read two affidavits, one stating that the witness was 65 years of age, and frequently suffered from ill-health; and the other from the plaintiffs' attorney stating that the plaintiff could not safely go to trial without the witness's evidence. He submitted that the court had the power to make the order under the 32nd section of the Probate Act, which conferred on it all the powers of the common law courts, and he referred to

1 Daniel's Chancery Practice, 851, 4th edit.

Bayford, contra.—To justify the order the witness must be in such a state of health as to make it impossible that he could attend at the trial: (See 1 Lush's Practice, 511.) One of the legatees was present at the time of the execution, and could give evidence of the circumstances if the attesting witness was not forthcoming. His cross-examination would disclose the defendant's case.

Lord Penzance.—The first question is whether the court has power to grant the application. I think it has. The 32nd sect. of the 20 and 21 Vict. c. 77, not merely confers upon the court this power, but it also in so many words confers upon the court all the powers given to the courts of common law at Westminster, by the 13 Geo. 3, c. 63, and 1 Will 4, c. 22. I am therefore clear that the court has the power. It is said that under the circumstances of the case the courts of common law would not grant a commission for the examination of the witness. But that is one of the misfortunes of their practice; because the Court of Chancery might in the meantime step in and grant the relief refused by the Court of Common Law; and nothing, I think, is of greater evil than that a suitor should be obliged to go from the court in which the suit is proceeding to some other court to get that relief which the court in which the suit has been instituted has the power of granting. I am satisfied that the Court of Probate has the power and ought to exercise it where the testimony of the witness is so material that its loss by his death would be a serious injury to the suit. It is said that the witness is under seventy years of age; but it is idle to draw a distinction whether he is sixty or seventy. The substance of the matter is this—is his testimony so pertinent to the point at issue as to make it of that valuable character that if it were lost the interests of the suitor would be seriously compromised? I think that is the only way in which the court can

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defendants, and was entered on the register, and received a certificate similar to that given to Cavendish. Defendants have paid interest on the debentures to Cavendish and Smith till 1st Jan. 1868. In Nov. and Dec. 1867 letters were written by the defendants' secretary to Cavendish and Smith acknowledging each of them to be the owners of the debentures respectively transferred to them soliciting further time for payment.

In Jan. 1868 the defendants proposed to accept, and accepted, from Cavendish and Smith, two of the said debentures so transferred to them in payment of an equal amount to that of the principal moneys in the said debentures due from each of them to the defendants for calls on the shares held by each of them in defendants' company.

Neither Cavendish nor Smith, when the debentures were transferred, had any notice that the defendants had or would claim any right of set-off or lien as against or on the said debentures, or any of them.

On the 23rd Feb. 1866, by a deed of mortgage between defendants of the one part, and the plaintiff of the other part, after reciting the original agreement for sale of the plaintiff's estates, and that plaintiff had requested defendants, in performance of the agreement for giving him a lien for unpaid purchase-money, to execute the mortgage thereinafter expressed for the benefit of himself and his assigns, the holders for the time being of the debentures, it was witnessed that the defendants granted the lands therein mentioned to plaintiff, with a proviso for redemption if defendant should pay the respective holders for the time being of the several debenture bonds so issued by defendants, the several sums of principal money secured thereby respectively, with the interest thereon respectively, at the rate thereon respectively specified at the several and respective times, and in the respective manner, by the said bond respectively provided.

The plaintiff, by deed dated 4th Oct. 1866, covenanted with defendants that he (the plaintiff), his executors, or administrators, would punctually pay the calls for the time being to be made on 2000 shares therein mentioned.

The following calls were afterwards duly made on the said shares, of which due notice was given: 16th July 1866, 1200*l.*; 16th July 1866, 800*l.*; 31st Oct. 1867, 600*l.*; 31st Oct. 1867, 400*l.*

Default was made in payment of these calls, and they still remained unpaid. The plaintiff at the time of the making of the calls hereinafter mentioned was registered owner of the shares on which they were made. Calls on (A) shares, 31st Aug. 1867, 692*l.* 10*s.*; 3rd Nov. 1867, 817*l.* 10*s.*; 28th Feb. 1868, 817*l.* 10*s.*; 16th July, 1868, 817*l.* 10*s.*; 1st May 1868, 817*l.* 10*s.*; 1st Aug., 817*l.* 10*s.* Calls on B shares, 16th July 1866, 1250*l.*; 31st Oct. 1867, 625*l.*

The said calls were duly made, and due notice given of them, and at the time of the commencement of the suit they were, and still were due and unpaid to the defendant.

The court were to be at liberty to dr[illegible] inferences of fact.

Brown, Q. C. (with him *R. F.* [illegible]) for plaintiff.

Mellish, Q. C. (with him *Watk*[illegible]) for defendants.

July 2.—BRAMWELL, B[illegible] ment of the court (hi[illegible] are to consider the[illegible] but as special case[illegible] same as would a[illegible] had brought [illegible] against the defendants and the defendants had set up the defence they now set up of a legal set-off—would there be what is called an equity to prevent their doing so? that is, taking the set-off to be available at law, would equity restrain the defendant from relying on it? It is obviously a purely equitable question, and our answer must be given with great distrust, the more so owing to the state of the authorities. The set-off is a set-off in law: have the defendants so contracted or conducted themselves that they cannot avail themselves of it? The equity, if any, of Messrs. Cavendish and Smith to restrain the set-off is an equity between them and the defendants. Then, we presume that if it should appear that these debentures were to be paid to assignees of them, without the right of set-off, still, if Higgs himself sued, a set-off would be available against him. But though it is an equity between the assignees of the debentures and the defendants it is an equity which may arise out of the original contract with Higgs, for if the contract with him was to pay his assignees without right of set-off, then the assignees would have an equity to prevent a set-off being enforced against him. Further, if whatever may have been the original contract with Higgs, the defendants have so conducted themselves to the assignees that it would be inequitable for the defendants to set up such a set-off, then also such equity exists in the assignees. We have to consider then whether by the original contract with Higgs, or by their subsequent dealing with Messrs. Cavendish and Smith, or by both combined, the defendants are precluded from defending themselves this set-off due from Higgs. In considering question it is impossible to doubt that both and the defendant contemplated that the [illegible] tures would be sold and assigned. Their [illegible] 47,000*l.*, or 32,000*l.* deducting the 15,000[illegible] fendants were to return, they being issued rate debentures of 100*l.* instead of one covenant given; the subsequent regis[illegible] them, and the issuing certificates to Mes[illegible] dish and Smith, stating them to be [illegible] the debentures; in short, the entire de[illegible] duct in relation to these debentures [illegible] ties contemplated that they would assigned. The provisions in article [illegible] sive. The company may sell the [illegible] indebted member, but that cannot [illegible] set-off against him, otherwise the [illegible] might be sold to B., and then pa[illegible] because A. was still indebted to [illegible] under article 12, the compa[illegible] reasonable number of Higgs' [illegible] a lien on them to secure [illegible] profits. It cannot be sup[illegible] these debentures under this [illegible] have been subject to H[illegible] ther, the mortgage is [illegible] "holders for the time [illegible] unpaid. Both partie[illegible] templated that these [illegible] but as [illegible] sign[illegible]

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-bes and Co., was re-
-ioner's private room,
-ked him whether he
-e 268*l.* 2*s.* 6*d.* which
l in his hands rom
-d that he had spent
led to be allowed for
he had received on
-sequently he declined
he commissioner then
-d to make an order on
commissioner that he
e pleased. Mr. Prance
-t the matter, and no
any intention to apply
-d pay over the money.
was made by the com-
-iting (*inter alia*) the ex-
e, proceeded—"Whereas
-ired the said Vaughan
said Theophilus Carrick,
-nted as aforesaid, the said
-e said Vaughan Prance re-
to deduct therefrom certain
-ve been made, and costs in-
the said bankrupt's estate.
-y reported to me by the said
-e said Vaughan Prance has
the said sum of 268*l.* 2*s.* 6*d.*"
to direct that Prance should
-m the date thereof pay into
-ial assignee the said sum of
-der was not served upon Mr.
l Aug, 1869. and from it he
-d that he had paid out of pocket
-te of Kemp sums amounting in
-. 3*d.*, and that costs, amounting
-7*l.* 5*s.*, were also due to him for
-m for the official assignee.

-nd *Bagley*, on behalf of the appel-
-at the order was one which ought
-n made *ex parte;* it ought not to
-e except upon notice. They re-

-he Orders of 19th Oct. 1852.

and *Doria*, on behalf of the official
-d that justice imperatively required
-of the order. The appellant was an
-e court, and there was a summons
r him. He must be taken to know that
-uty of the assignee to pay all moneys
him on behalf of the estate into the bank
The Bankruptcy Act 1861, sects. 127, 128,
) The appellant had, therefore, no right to
-s money, and according to the rules of the
-e had no power to retain money for his

-rders of 19th Oct. 1852, rules 65, 114.

-Without calling for a reply,

Lord Justice GIFFARD said that the order appealed from was one which, in his opinion, could not be supported. Upon the evidence it must be taken to have been made *ex parte*, and Mr. Prance had a right to say that no such order ought to be made upon him without his being heard in his defence. A solicitor of the court had the same right in this respect as any other subject of Her Majesty. The order must be discharged, but without prejudice to any other similar application being made to the commissioner upon notice to Mr. Prance. The deposit would be returned.

Solicitor for the appellant, *Chidley*.

Solicitors for the respondents, *Linklaters* and *Hackwood*, agents for *Rogers* and *Rogers*, of Exeter.

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apply the rule. This witness being an attesting witness, falls within the category I have named, and I think he should be examined. On the other side, the only real objection is, that they would disclose their case by his cross-examination. But that is the case in Chancery, where a bill of discovery is filed, and is the case at common law, where interrogatories are served. The notion that an advantage is to be gained by leaving a case in the dark is, I am happy to say, exploded in modern times. The advantage is, I think, the other way. I am, therefore, not at all pressed with the difficulty suggested on the part of the defendant, and shall make the order for the examination of the witness.

Attorneys for plaintiff, *Abram* and *Roffey*.

Attorney for defendant, *G. S. Brown*.

Tuesday, July 27.

In the Goods of SMITH.

Testamentary paper contingent on option of executrix.

A testator made a codicil to his will which he directed should be added to his will or not at the option of his wife, his sole executrix. The wife desired to exercise her option of not recognising the validity of the codicil, and the court excluded it from probate.

The testator died June 3, 1861, leaving a will and codicil, dated April 24, 1844, and Feb. 21, 1860. On May 15, 1867 he executed a testamentary paper concluding in the following form: "I give my wife the option of adding this to my will or not as she may think necessary."

The widow was the sole executrix, and she was not desirous to add this codicil—which affected the interests of a son of the deceased—to the will.

Dr. *Spinks* accordingly now moved that probate be granted to the will and first codicil, excluding the third testamentary paper altogether. It was in the nature of a contingent codicil, and might be so treated.

Lord PENZANCE.—There is no doubt of this proposition, that the mere fact of a man having executed a paper in the form of a will, does not necessarily make that paper testamentary. There must be the *animus testandi*—a man must intend the paper to operate as a testamentary instrument to make it such. What the testator has here endeavoured to do is this: He has endeavoured to leave to his wife the right of saying whether this paper shall be testamentary or not. He has not said that its testamentary effect should depend on his disposition at the time he signed the paper, but on an event that should happen after his death, namely, the determination of his wife to treat it as testamentary, and it is the business of this court to carry out a man's intention so far as it can in law, and the only question in the case is whether there is anything illegal in the testator's object. It seems to me that there is not. It is quite true that a testator cannot confide to another person the right of making his will after his death, nor can he leave in the hands of another the power of revoking a paper which is testamentary at the time of his death, because the statute says the revocation must be done in his full sense, but I do not know of anything in the statute which would prevent a testator from saying that the question whether a paper shall be testamentary or not shall depend upon an event to happen after his death, and that event may be the assent of an individual. I have looked into the books for a case bearing on the point, and the only one I can find is *Parsons* v. *Lance*, 1 Ves. sen. 190; which, however, I think, is conclusive that such a thing can be done. I think in this case that the testator's object was lawful, and as the widow has exercised her option by refusing to recognise the validity of the second codicil, I shall therefore decree probate of the will and first codicil only.

Attorneys, *Tucker* and *Lake*.

COURT OF BANKRUPTCY AND INSOLVENCY (IRELAND).

(Reported by JOHN LEVY, Esq., Barrister-at-Law.)

Tuesday, Aug. 31.

(Before MILLER, J.)

Re HORNER (a Bankrupt).

Debts contracted in England—Limited trading in Ireland—Petition to annul adjudication on the ground that there was no bonâ fide trading in Ireland.

Where an English trader contracts debts in England to a large amount, and then comes to Ireland, where he trades to a very limited extent as a commission agent, and has only one debt that could be properly called an Irish debt, and English creditors petition to annul the adjudication on the ground that there was no trading in Ireland, the Irish Bankruptcy Court will annul such adjudication with a view that the trader be remitted back to the jurisdiction where the debts were contracted.

This case came before the court upon a petition to annul the bankruptcy on the ground of there being no trading in Ireland, and that the bankruptcy was had recourse to for the benefit of the bankrupt himself, and not for creditors.

Dr. *Leeds* appeared for an English creditor in support of the petition. He cited the case of *William Ansell Day*, 7 Ir. Jur. 163 and 207.

John Harris, in support of the adjudication, contended that the case of *Day* did not apply to the present case.

MILLER, J., after referring to the facts of the case, said, after a full discussion, and a reference to *Day's* case, as reported in the 7th Irish Jurist, and afterwards decided by the Court of Appeal in Chancery: I will confine myself to two questions, first, whether a trading sufficient to maintain the present adjudication in bankruptcy had existed; secondly, if such a trading had been established, whether the petition as presented was a *bonâ fide* proceeding, and the adjudication founded on it such as this court, under all the circumstances of the case, could sustain. Upon all the facts of the case, I must come to the conclusion that the bankrupt did not carry on such trading in Ireland, as could fairly support the adjudication. And, as to the second question, viz., was the petition presented for the legitimate purposes of a bankruptcy, or for the bankrupt's own advantage? I must come to the conclusion that it was presented for the latter purpose. The petition for annulling this adjudication was presented on the 7th Aug. 1869, and it contains the specific charge that the proceedings were instituted fraudulently, or in collusion with the bankrupt, and for his benefit, and not for the benefit of creditors, and there was no denial of the charge. I have, therefore, no more difficulty on the second question than on the first, and without prolonging the case further, I will say that the bankruptcy must be annulled, and let the trader go back to where the debts were contracted.

Attorney for the creditors seeking to annul, *Oldham* and *Eator*.

Attorney for the petitioning creditor, *Forsyth*.

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Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Saturday, Nov. 6.

(Before Lord Justice GIFFARD.)

Ex parte PRANCE; *Re* KEMP.

Bankruptcy—Solicitor to creditors' assignee—Money in his hands belonging to the bankrupt's estate—Order that he should pay it over—Whether such an order can be made ex parte.

P. was solicitor to the creditors' assignee of K.'s estate. The assignee was afterwards removed from his office, but some money, forming part of the bankrupt's estate, which had been received by P., remained in his hands, and he claimed to retain it for costs and expenses incurred by him.

He admitted, in an examination to which he voluntarily submitted, without having been summoned to attend, that he had received the moneys in question, and that he claimed to retain them. In a private conversation between P. and the commissioner, the latter said that, if P. would not pay over the money, he should have to make an order upon him to do so.

The money not having been paid, the commissioner, without any notice to P., made an order that he should pay over the money within seven days from the date of the order.

On appeal,

Held, that this order ought not to have been made ex parte.

The order was accordingly discharged.

This was an appeal from a decision of the Commissioner in Bankruptcy at Exeter, the appellant being Mr. Vaughan Prance, a London solicitor, who had acted as solicitor to the creditors' assignee in the bankruptcy of one James Kemp. The bankrupt was a miller and corndealer of Exwick Mills, near Exeter, and was adjudicated bankrupt in the Exeter Court on the 4th Feb. 1869. Michael Schandorf was appointed creditors' assignee, and while he continued to fill that office, Mr. Prance acted as his solicitor in the bankruptcy. Schandorf was on the 24th May 1869, removed from the office of creditors' assignee, and the winding-up and administration of the estate was therefore intrusted to Mr. Theophilus Carrick, the official assignee of the court, alone. After this Prance was employed by a firm of Forbes and Co., of Glasgow, as their solicitor, they having a large claim upon the estate of Kemp, and on the 17th June 1869, he was attending the Exeter Court of Bankruptcy upon the business of his clients. He had not been summoned then for examination with regard to his dealings with the estate, or for any other purpose, but while he was there he was asked to be examined with regard to his receipts. He then stated that he had received and retained in his hands the sum of 140*l.*, which had arisen from the sale of some leasehold property of the bankrupt, and also various sums from debtors to the estate, but of which he could not state the exact amount. On the 5th July 1869 he was again at the Exeter Court on the business of Forbes and Co., without any summons to attend, and he again, on being requested to do so, submitted to be examined by the commissioner, and upon examination he stated that he had received the sum of 128*l.* 2*s.* 6*d.* from debtors to Kemp's estate, which sum, as well as the 140*l.*, he had kept in his possession. On the 10th July 1869 Prance, being again in attendance at the court on behalf of Forbes and Co., was requested to go into the commissioner's private room, and the commissioner then asked him whether he would undertake to pay over the 268*l.* 2*s.* 6*d.* which he had admitted that he had in his hands rom Kemp's estate. Prance alleged that he had spent out of pocket, and was entitled to be allowed for costs, a sum exceeding what he had received on account of the estate, and consequently he declined to give the undertaking. The commissioner then said that he should be obliged to make an order on Mr. Prance, and he told the commissioner that he must take what course he pleased. Mr. Prance heard nothing further about the matter, and no notice was given to him of any intention to apply for an order that he should pay over the money. On the 28th July an order was made by the commissioner, which, after reciting (*inter alia*) the examinations of Mr. Prance, proceeded—"Whereas the court thereupon required the said Vaughan Prance to pay over to the said Theophilus Carrick, the official assignee appointed as aforesaid, the said sum of 268*l.* 2*s.* 6*d.*, but the said Vaughan Prance required first to be allowed to deduct therefrom certain payments alleged to have been made, and costs incurred on account of the said bankrupt's estate. And whereas it is this day reported to me by the said official assignee that the said Vaughan Prance has not paid into his hands the said sum of 268*l.* 2*s.* 6*d.*" And the order went on to direct that Prance should within seven days from the date thereof pay into the hands of the official assignee the said sum of 268*l.* 2*s.* 6*d.* This order was not served upon Mr. Prance until the 3rd Aug, 1869. and from it he appealed. He alleged that he had paid out of pocket on behalf of the estate of Kemp sums amounting in the whole to 100*l.* 4*s.* 3*d.*, and that costs, amounting in the whole to 327*l.* 5*s.*, were also due to him for business done by him for the official assignee.

De Gex, Q. C. and *Bagley*, on behalf of the appellant, contended that the order was one which ought not to have been made *ex parte*; it ought not to have been made except upon notice. They referred to

Rule 17 of the Orders of 19th Oct. 1852.

Little, Q. C. and *Doria*, on behalf of the official assignee, urged that justice imperatively required the making of the order. The appellant was an officer of the court, and there was a summons pending over him. He must be taken to know that it was the duty of the assignee to pay all moneys received by him on behalf of the estate into the bank at once: (The Bankruptcy Act 1861, sects. 127, 128, 174, 175) The appellant had, therefore, no right to keep this money, and according to the rules of the court he had no power to retain money for his costs:

Orders of 19th Oct. 1852, rules 65, 114.

Without calling for a reply,

Lord Justice GIFFARD said that the order appealed from was one which, in his opinion, could not be supported. Upon the evidence it must be taken to have been made *ex parte*, and Mr. Prance had a right to say that no such order ought to be made upon him without his being heard in his defence. A solicitor of the court had the same right in this respect as any other subject of Her Majesty. The order must be discharged, but without prejudice to any other similar application being made to the commissioner upon notice to Mr. Prance. The deposit would be returned.

Solicitor for the appellant, *Chidley*.

Solicitors for the respondents, *Linklaters* and *Hackwood*, agents for *Rogers* and *Rogers*, of Exeter.

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Saturday, Nov. 6.

(Before Lord Justice GIFFARD.)

Ex parte CLAYTON; *Re* CLAYTON.

Bankruptcy—Conditional order of discharge—Discretion of court—Right of bankrupt to unconditional discharge where he has not been guilty of any of the offences mentioned in the B. A. 1861, *sect.* 159.

A bankrupt who has not been guilty of the offences mentioned in the B. A. 1861, *sect.* 159, *is entitled to an unconditional discharge, there being no general discretion reposed by that Act in the court to refuse or suspend, or make conditional, an order of discharge, save for some of the reasons mentioned in sect.* 159.

Where a bankrupt was a co-respondent to a suit in the Divorce Court, which he did not defend, and damages and costs were ordered to be paid by him, it was

Held, that those damages and costs could not be said to have been a debt contracted by him.

Observations upon Re Boswall, 6 *L. T. Rep. N. S.* 407, *and Re* Mew and Thorne, 31 *L. J.* 87, *Bank.*

This was an appeal by John Clayton, a bankrupt, from an order made on the 28th July 1869, by the judge of the Cheshire County Court, granting to the bankrupt a conditional order of discharge. The bankrupt sought to have his order of discharge made unconditional.

The bankrupt was the son of a small farmer, by whom he was employed as a farm labourer, at wages amounting to about 12*s.* a week. His father had also made over to him, subject to his own life interest, a share in some freehold property. This share or interest the bankrupt estimated as being worth 240*l.*, and in March 1868 he mortgaged it for that sum On the 12th March 1867 a petition was filed in the Divorce Court by one Chas. Dale, a gardener, for the dissolution of his marriage with his wife, upon the alleged ground that she had committed adultery with Clayton. To this petition Clayton was made a co-respondent, and damages were sought to be recovered from him. The petition was heard on the 21st Feb. 1868, and Clayton did not appear, but allowed judgment to go against him by default. A decree *nisi* was made for the dissolution of the marriage, and it was further ordered that Clayton should pay to Dale 50*l.* damages and costs. The decree in due course became absolute. The costs were taxed at 104*l.* 10*s.* 6*d.*, and on the 4th May 1869 an order was made that Clayton should pay the sum of 154*l.* 10*s* 6*d.*

On the 10th May 1869 Clayton petitioned the County Court for an adjudication of bankruptcy against himself, and he was adjudicated a bankrupt accordingly. The accounts filed by the bankrupt showed that, besides the above-mentioned secured debt of 240*l.*, he owed only a sum of 30*l.*, which was described as for money lent upon an I. O. U. It appeared also that during the year preceding the bankruptcy the bankrupt had expended 200*l.* On the bankrupt making application for his order of discharge, the granting of it was opposed by Dale, and it was alleged in opposition that the bankrupt had vexatiously defended the suit in the Divorce Court, and thus brought himself within sect. 159. clause 3, of the Bankruptcy Act 1861, which provides that the court may either refuse an order of discharge, or may suspend the same from taking effect for such time as the court may think fit, or may grant an order of discharge subject to any condition or conditions touching any salary, pay, emoluments, profits, wages, earnings, or income which may afterwards become due to the bankrupt. where (among other cases) the bankrupt has put any of his creditors to unnecessary expense by frivolous or vexatious defence to any action or suit to recover any debt or money due from him.

The judge, however, held that, as the bankrupt had not defended the suit, he could not be said to have been within the above-mentioned provision, and his Honour was also of opinion that he had in no other way brought himself within the provisions of sect. 159. But his Honour thought that the court had a general discretion as to granting an order of discharge, and that it might, if of opinion that the bankrupt's conduct had been improper, refuse to grant an order of discharge, or make only a conditional order of discharge. His Honour relied upon the opinion of Turner, L. J., as expressed in *Re Boswall*, 6 L. T. Rep. N. S. 407, notwithstanding the fact that in the same case Knight Bruce, L. J. expressed a contrary opinion. His Honour accordingly granted the bankrupt an order of discharge subject to the condition that he should pay 1*l.* per month out of his wages, earnings, or income, or out of any property to which he might become entitled. From this order the bankrupt appealed.

W. P. Macdonald (of the Common Law Bar), on behalf of the appellant, contended that unless the judge found as a fact that there existed any of the grounds mentioned in sect. 159 of the Bankruptcy Act 1861, for refusing, suspending, or qualifying the order of discharge, the bankrupt was entitled to an unconditional order of discharge. The opinion of Turner, L. J. in *Re Boswall* (*ubi sup.*) was disapproved afterwards by Lord Westbury in *Re Mew and Thorne*, 31 *L. J.* 87, Bank., and the latter case must be taken to have settled the interpretation of the Act.

De Gex, Q. C. *contra*, urged that as the damages and costs in question were proveable in, and would be barred by the bankruptcy, it was reasonable that the way in which they had been incurred should be taken into consideration in granting an order of discharge. Another reason for making an order of discharge conditional, as mentioned in sect. 159, was that the bankrupt could not have had, at the time when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same. The word "contracted" did not necessarily include only a debt arising out of a contract, but would include any debt. The damages and costs now in question were a debt, and it might be said that the bankrupt when he incurred this liability had, looking at his means, no reasonable or probable ground of expectation of being able to discharge it, and the judge's order might be supported in that way. Moreover, under sects. 201 and 256 of the Act of 1849, which were analogous to sect. 159 of the Act of 1861, it was always considered that the court had a discretion to refuse to grant a certificate in cases not specified in the Act. He referred to

Ex parte Rufford, 2 D. M. & G. 234.

Without calling for a reply,

Lord Justice GIFFARD said, that if the opinion of Lord Westbury expressed in *Re Mew and Thorne* had been present to the mind of the learned judge, it was clear that he would have come to a different conclusion. But the only case before him was that of *Re Boswall*, in which the opinion of Turner, L. J., differed from that of Knight Bruce, L. J. This court could not overrule a decision of the Lord Chancellor even if of a different opinion, but in fact his Lordship entirely agreed with the opinion of Lord Westbury, and, for the reasons given by him, was of opinion that sect. 159 made it imperative to grant an unconditional order of discharge, when none of the reasons mentioned in that section for

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not doing so existed. The only question, therefore, was whether any of those reasons existed in the present case. This court had to administer the law, not to make it, whatever might be its opinion as to the justice of the bankrupt's being able to escape from the payment of these damages. They could not be properly described as a debt contracted, and there being (besides the debt of 30*l.*) no other debt proved in the bankruptcy, it could not be said that the bankrupt had contracted debts without reasonable or probable ground of expectation of being able to pay them. There was nothing to show that he had committed any other of the offences mentioned in sect. 159. He must have an unconditional order of discharge.

Solicitor for the appellant, *W. P. Roberts.*

Solicitors for the respondent, *Meredith* and *Co.*

ROLLS COURT.

Reported by HENRY PRAT, Esq., Barrister-at-Law.

July 17 *and* 19, *and Aug.* 16.

Re THE DUKE OF NEWCASTLE; *Ex parte* PADWICK.

Judgment-creditor—Equitable estate for life in leaseholds—Petition for sale under 27 *&* 28 *Vict. c.* 112, *s.* 4—"*Actually delivered in execution.*"

A judgment-creditor issued a writ of fi. fa. in execution of his judgment, and lodged it with the sheriff, who, in obedience to the writ, took possession of a leasehold house in which his debtor had an equitable estate for life, and seized certain goods and chattels in the house.

On a petition under the 4th section of 27 *and* 28 *Vict. c.* 112, *for an order for the sale of the debtor's equitable estate for life in the house:*

Held, that no order could be made on the petition, as the judgment-creditor had not acquired a charge on the land under 1 *&* 2 *Vict. c.* 110, *s.* 13, *and the debtor's equitable estate for life was incapable of being "actually delivered in execution" as required by the Act.*

This was a petition by Mr. Henry Padwick, a judgment-creditor of the Duke of Newcastle, for an order for the sale of the life interest of the Duke of Newcastle in the family mansion in Carlton House-terrace. The petition was presented under the 4th section of the Law of Judgments Amendment Act (27 & 28 Vict. c. 112), by which every creditor to whom any land of his debtor shall have been "actually delivered in execution, and whose writ or other process of execution shall have been actually registered," is entitled to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land.

By the late duke's will the mansion house was vested in trustees upon trust that they should offer the use and occupation thereof to his son during his life, upon condition that he, during his life, should pay the rent and observe and perform all the covenants and conditions to be observed and performed by the tenant and lessee of the house.

Mr. Padwick was a judgment-creditor of the Duke for 95,000*l.* He had issued a writ of *fieri facias* in execution of his judgment, and lodged it with the sheriff, who in obedience thereto took possession of the mansion house, and seized certain goods and chattels in the house. There remained due in respect of the judgment nearly 90,000*l.*

The writ was duly registered on the 1st July 1869, in accordance with the provisions of the Act.

Charles Hall and *D. Jones*, in support of the petition, submitted that Mr. Padwick had done all that was possible to entitle him to the assistance of the court, and that he was entitled to an order for the sale of the Duke's interest in the house. Some meaning must be given to the words, "actually delivered in execution," applicable to incorporeal hereditaments which were included in the 2nd section of the Act. They cited

Re Cowbridge Railway Company, L. Rep. 5 Eq. 413;
Guest v. *Cowbridge Railway Company*, 18 L. T. Rep. N. S. 871: L. Rep. 6, Eq. 619;
Smith v. *Hurst*, 1 Coll. 705; 10 Hare 30;
Gore v. *Bowser*, 3 Sm. & Giff. 1;
Yascombe v. *Laudor*, 28 Beav. 80.

Jessel, Q. C. and *Vaughan Hawkins*, for the trustees of the will, contended that a mere equitable interest in a term of years not being capable of being taken in execution, and the 4th section of the Act requiring the land to be "actually delivered in execution" before the court ordered a sale, the court could not order a sale in the present case. They cited

Scott v. *Scholey*, 8 East. 467;
Hunt v. *Coles*, Comyns's Rep. 226;
Doe d. Hull v. *Greenhilt*, 4 B. & Ald. 684;
Harris v *Booker*, 4 Bing. 96;
Re Bailey's Trust, 20 L. T. Rep. N. S. 168;
Mildred v. *Austin*, 20 L. T. Rep. N. S. 939;
Neate v, *Duke of Marlborough*, 3 My. & Cr. 407.

Sir *Richard Baggallay*, Q. C. and *Bedwell* appeared for the Duke of Newcastle.

Charles Hall replied.

Aug. 6.—Lord ROMILLY.—In this case, Mr. Padwick, an execution-creditor of the Duke of Newcastle, applied by petition under the statute 27 & 28 Vict., for an order to sell the interest of the duke in the house in Carlton House-terrace. The first question is what is the interest of the duke in this house? The trust contained in the will of the late duke is this: the testator bequeaths his mansion house in Carlton House-terrace to the trustees on trust that they shall complete the mansion house and so on, and then upon further trust that they "shall offer the use and occupation of the same mansion house, stable, coach house, and premises, to my son, the Earl of Lincoln, during his life, upon condition that he, during his life, pays the rent and observes and performs all the covenants and conditions to be paid, observed, and performed by the tenant or lessee of the same premises; but if my said son shall refuse such offer," then it goes over in a different direction. I expressed at the time when this came before me that the present duke having accepted these conditions, I was of opinion that he had an equitable estate for life in the mansion house for the residue of the term, and that being so, the question, which is the real question, arises; does the statute give this court the power of selling that interest? This requires some review of the law on this subject as affected by modern statutes. I think it is convenient, if the Bar will excuse it, to read the clauses of the 1st and 2nd of the Queen (1 & 2 Vict. c. 110). According to the law as it stood before the statute of the 27th and 28th of the Queen (27 & 28 Vict. c. 112), the sheriff, under the 11th section of the 1 & 2 Vict. c. 110, was enabled "to make and deliver execution of all such lands, tenements, rectories, tithes, advowsons, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might

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without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments by force or virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out, as a tenant by *elegit* is now subject to in a court of equity." Then under the 13th sect. of the same Act, a judgment is to "operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seized, possessed, or entitled for any estate or interest whatever, at law or in equity whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest, in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments." Now the words of the 11th section, except so far as relates to copyholds and lands over which the debtor has a disposing power, follow those of the Statute of Frauds (29 Car. 2, c. 3), and must be considered to be governed by the construction put upon the Statute of Frauds. The words of the 13th section, on the other hand, are wider and more general, and include many estates and interests which are not comprised in the 11th section. In this state of things the statute of 27 & 28 Vict. c. 112, was passed, and by the 4th section a new summary remedy is conferred upon certain creditors; it is enacted that "every creditor to whom any land of his debtor shall have been actually delivered in execution and whose writ or other process of execution shall have been actually registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery upon petition in a summary way an order for the sale of his debtor's interest in such lands," &c. Now the words are precise. The lands must be actually delivered. The Legislature must be taken to have known that many interests in real property may be affected by judgments under the Act of 1 & 2 Vict. c. 110, s. 13, which cannot be delivered in execution under the 11th section, but notwithstanding this, the Legislature has distinctly limited the power given by the 4th section of this Act (27 & 28 Vict. c. 112), to creditors to whom land shall have been actually delivered in execution, and whose writ of execution shall have been duly registered. I do not think that it is in the power of the court to exempt a creditor seeking to exercise the power conferred by the statute from observing the formalities which are expressly enjoined by such statute, and certainly I cannot consider that these formalities have been observed in the present case. A strict construction of the words "actually delivered in execution" in other parts of the Act raises certain doubts whether the 13th section of 1 & 2 Vict. c. 110 has not been repealed, or, if not, how far it is reconcileable with the provisions of the statute of the 27 & 28 Vict. And it is also to be observed that the 5th section of the latter Act speaks of charges under other judgments, suits, or recognisances, which, however, could not, under this construction of the Act of the 27 & 28 Vict., ever become charges. That section, however, may possibly be intended to apply to judgments which had become charges on real estate before the passing of the Act, and it might also be possible that the Legislature intended thenceforth to put a construction upon the words "actually delivered in execution" more in accordance with the continuing power of the 13th section of the 1 & 2 Vict. which has not been done, but as the words now stand, looking at it in every way I can, I do not think that any construction would be legitimate which would make these words requiring the land to be actually delivered in execution, and the writ of execution to be registered, to mean nothing more than what has been done in this case, namely, the mere suing out of a *fieri facias*. It is proper, however, that I should state that I do not see in the view I take of the case how the petitioner could have taken any steps that would have enabled him to claim the assistance of this court under the stat. 27 & 28 Vict. c. 112. If he had sued out a writ of *elegit* he would simply have had a return of *nil*; and the present application is met by the insuperable difficulty that the property must be actually delivered, which, in this case, has not been done, and cannot be done. What the intention of the Legislature was in introducing these words, and making the actual delivery a condition precedent to the order for sale taking effect it is impossible for me to surmise, unless indeed it was confined to the avoidance of the expenses occasioned by the necessity of making all the judgment-creditors parties to a bill of foreclosure, but admitting this to have been, and though I do not believe that the object of the Legislature was to restrict the means of obtaining payment of their debts by judgment-creditors, it is obvious that, if my view is correct the effect of the statute is rather to restrict than advance the remedies of the judgment creditor. I do not think that the 23 & 24 Vict. c. 38, has any application to this case. I do not express any opinion whether, under any equitable doctrine such as that laid down by Lord Redesdale (*O'Fallon* v. *Dillon*, 2 Sch. & Lef. 19) equity would assist the judgment-creditor to enable him to acquire the possession of the house itself. My judgment is founded on this: in the first place the petitioner has no charge upon the land under the 13th section of 1 & 2 Vict. c. 110, and, therefore, cannot, on the statute, come here and ask the court to sell; and, in the second place, as the judgment-creditor cannot take an equitable leasehold in execution under a *fi. fa.*, he cannot under that Act get actual possession of the land; and not having done so, he cannot, by petition, call upon this court to sell the interest of the Duke. Both the cases in the matter of the *Cowbridge Railway Company* before the present Lord Chancellor and the Lord Justice Giffard, confirm this view of the case, and I shall make no order on this petition.

Jessel, Q. C.—It will be dismissed?

Lord ROMILLY.—Yes. I do not give any costs.

Solicitor for the petitioner, *Robson* and *Tidy*.

Solicitors for the trustees of the will, *Duncan* and *Merton*.

Solicitors for the Duke of Newcastle, *Lewis*, *Munns*, *Nunn*, and *Longden*.

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Thursday, July 15.

Re THE JOINT-STOCK DISCOUNT COMPANY;

Ex parte THE WARRANT FINANCE COMPANY.

Company—Winding-up—Double proof—Interest after full payment of debt.

The holders of bills of exchange accepted by one company and indorsed by another company (both of which companies were afterwards ordered to be wound-up), proved against both companies for the amount due on the bills for prinxcipal and interest up to the date of the winding-up order, and received dividends on the estates of both companies, amounting together to 20s. in the pound on the amount of their proof:

Held, that they were not entitled to continue to receive dividends in respect of interest which had accrued due after the date of the winding-up order; but that they must be excluded from further dividends till all the other creditors had been paid the amount of their proofs in full.

Re The Humber Iron Works Company, *ex parte* The Warrant Finance Company, 20 *L. T. Rep. N. S.* 859, *followed.*

This was a motion on the part of the official liquidator of the Joint Stock Discount Company, that the Warrant Finance Company might be excluded from participating in any further dividend on the estate of the Joint-Stock Discount Company until all the other creditors of the company had received 20*s.* in the pound on the amount of their proofs.

The Warrant Finance Company were the holders of certain bills of exchange, drawn upon and accepted by the Contract Corporation (which was also being wound-up), and indorsed by the Joint-Stock Discount Company. They had proved for the amount of principal and interest due on the bills at the commencement of the winding-up against the Contract Corporation and the Joint-Stock Discount Company, and had received dividends from both companies, those from the Contract Corporation amounting to 4*s.* 6*d.* in the pound on the amount of their proof and those from the Joint-Stock Discount Company amounting to 15*s.* 6*d.* in the pound, so that the amount of the principal debt, together with interest up to the date of the winding-up order had been paid in full.

The question was whether the Warrant Finance Company were entitled to continue participating in the dividends till they had received the interest which had accrued due subsequently to the date of the winding-up order, or were to be excluded from further participation till all other creditors had been paid 20*s.* on the amount of their debts.

Jessel, Q. C., and *Locock Webb*, in support of the application, submitted that the question was settled by the decision of the Lords Justices in *Re The Humber Iron Works Company, ex parte The Warrant Finance Company*, 20 L. T. Rep. N. S. 859.

They also cited

Cockerell v. *Dickens*, 3 Moo. P. C. 98.

Sir *Richard Baggallay*, Q. C., and *Langley*, for the Warrant Finance Company, contended that *Re The Humber Ironworks Company* (*sup*), applied only to a simple proof by an unsecured creditor against a single estate; here there was a double proof. They claimed to be entitled to receive dividends till they had been paid the full amount of both principal and interest, because this was the case of a creditor having security for his debt, and who could therefore take interest only out of his security, and proceed against his debtor for the principal. They cited

Re Barned's Banking Company, Kellock's case, 18 L. T. Rep. N. S. 671; L. Rep. 3 Ch. App. 769;

Ex parte Waring, 19 Ves. 345;

Re New Zealand Banking Corporation, Hickie and Co's case, L. Rep. 4 Eq. 226;

Ex parte Reed, 3 Deac. & Ch. 481;

Bower v. *Marris*, Cr. & Phil. 351.

Lord ROMILLY, without calling for a reply, said:—This case seems to me to be governed by the decision of the Lords Justices in *Re The Humber Ironworks Company* (*sup.*). I need not enter into the niceties relating to double recourse and double proof. The Lords Justices have laid down the rule that interest stops at the date of the winding-up order, until all the principal and interest then due has been paid on all debts proved. Therefore the Warrant Finance Company cannot continue to receive dividends in respect of interest which accrued due after the date of the winding-up order. If the estate ultimately pays all the debts in full, then the Warrant Finance Company will be entitled to be paid the subsequent interest, but the question does not arise in the case of a solvent estate. This case is governed by the decision of the Lords Justices. It may be said that is judge made law, and no doubt it is; it is necessarily judge made law. The rule there laid down is that the tree must lie as it falls. You prove for the amount due for principal and interest at the date of the winding-up; you have received the amount of your proof in full, and you cannot receive any more dividends until all the other creditors have been paid the amount of their proofs in full. The order will be that the Warrant Finance Company be excluded from further participating in dividends until all the other creditors of the Joint-Stock Discount Company have been paid the amount of their proofs in full. The costs of both parties will come out of the estate.

Solicitors for the official liquidator, *Lawrence, Plews, Boyer*, and *Baker*.

Solicitors for the Warrant Finance Company, *Flux, Argles*, and *Rawlins*.

Thursday, July 15.

Re HORSLEY AND KNIGHTON'S PATENT.

Patent—Assignment—Register of proprietors—Entry in register—Expunging entry—Patent Law Amendment Act 1852, *ss.* 35, 38.

A patent for certain improvements had been granted to H. and K., their executors, administrators, and assigns. K. sold his share of the patent, and in the deed of assignment purported to release the purchaser, his heirs, executors, &c., from all actions and suits by himself and H. The deed of assignment was entered verbatim in the register of proprietors at the patent office.

On a motion by H. under the 38th section of the Patent Law Amendment Act 1852:

Held, that he was entitled to have the whole deed expunged from the register.

Order accordingly.

This was a motion on the part of T. Horsley, under the 38th section of the Patent Law Amendment Act 1852 (15 & 16 Vict. c. 83), that an entry made under colour of the provisions of that Act in the register of proprietors kept at the patent office might be expunged, vacated or varied.

A patent for improvement in core bars, dated 8th Nov. 1866, had been granted to T. Horsley and G. Knighton, their executors, administrators, and assigns. By an indenture dated the 24th Dec. 1868, and made between G. Knighton of the one part, and

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T. H. Oakes of the other part, Knighton assigned to T. H. Oakes his estate and interest in the patent, and entered into the usual covenants for title; in the concluding portion of the deed Knighton purported to release Oakes, his heirs, executors, administrators, and assigns from all incumbrances, actions, suits, causes of action or suit, claims or demands whatsoever, which they the said G. Knighton and T. Horsley, or either of them, or their or either of their executors or administrators had, or but for this deed might have had, against Oakes, his heirs, executors, or administrators, for or by reason or on account of the letters patent, or the invention, the subject thereof, or any matter or thing in anywise relating thereto. This deed was entered in the register of proprietors, in accordance with the 35th section of the Patent Law Amendment Act 1852; the entry consisted of a copy of the deed *in extenso.*

The 35th section of the Patent Law Amendment Act 1852 (15 & 16 Vict. c. 83) provides that there shall be kept at the office appointed for filing specifications in Chancery under the Act, a book entitled "The Register of Proprietors," wherein shall be entered, in such manner as the commissioners shall direct, the assignment of any letters patent, or of any share or interest therein, &c. And the section goes on to provide that "a copy of any entry in such book, certified under such seal as may have been appointed or as may be directed by the Lord Chancellor to be used in the said office, shall be given to any person requiring the same, on payment of the fees hereinafter provided; and such copies so certified shall be received in evidence in all courts and in all proceedings, and shall be *primâ facie* proof of the assignment of such letters patent, or share or interest therein, or of the licence or proprietorship as therein expressed," &c.

The 38th section of the Act is in the following words:—

If any person shall deem himself aggrieved by any entry made under colour of this Act in the said register of proprietors, it shall be lawful for such person to apply, by motion, to the Master of the Rolls, or to any of the courts of common law at Westminster in term time, or by summons to a judge of any of the said courts in vacation, for an order that such entry may be expunged, vacated, or varied; and upon any such application the Master of the Rolls, or such court or judge respectively, may make such order for expunging, vacating, or varying such entry, and as to the costs of such application, as to the said Master of the Rolls or to such court or judge may seem fit; and the officer having the care and custody of such register, on the production to him of any such order for expunging, vacating, or varying any such entry, shall expunge, vacate, or vary the same, according to the requisitions of such order.

Jessel, Q. C. and *Rodwell*, and *T. Aston* (of the common law bar), in support of the motion, submitted that at least so much of the deed as related to the release should be expunged, as it might be very prejudicial to the rights of Horsley against Oakes, the 35th section of the Act rendering copies of the entry *primâ facie* proof of the assignment, &c. They cited

Re Morey's Patent, 25 Beav. 581;
Chollett v. *Hoffman*, 29 L. T. Rep. 158; 26 L. J. 249, Q. B.;
Mathers v. *Green*, 13 L. T. Rep. N. S. 420; L. Rep. 1 Ch. App. 29.

Sir *Richard Baggallay*, Q. C. and *Cracknall*, for Knighton and Oakes, contended that one of two joint owners of a patent was entitled to give such a release as that contained in the deed; that the deed was correctly entered, and that it was only in case of fraud that the court ordered entries to be expunged. They cited

Re Green's Patent, 24 Beav. 145.

Lord ROMILLY. — It is quite clear that Mr. Horsley is entitled to come here and have this entry altered. Where A. and B. are patentees, both may use the patent, but B. cannot dispose of A.'s share. In the present case Oakes has infringed the patent of Horsley and Knighton; Knighton then assigns it to Oakes, and in the deed of assignment gives a release of Horsley's claims. I cannot alter the entry by striking out the latter part of the deed. I must strike out the whole deed, and Oakes and Knighton must pay the costs of the motion.

Solicitors for Horsley, *Dubois* and *Maynard.*

Solicitor for the other parties, *F. C. Greenfield.*

May 24, 25, 26, *and Aug.* 6.

PRESTON *v.* PRESTON.

Power of appointment—Execution in fraud of power—Deed of confirmation—Suit to set aside—Lapse of time.

Mr. and Mrs. P., who had under their marriage settlement a power of appointment over a certain fund in favour of such one or more exclusively of the others or other of the children of the marriage as they should jointly by deed, &c., appoint, made certain appointments nominally in favour of objects of the power, but in reality for their own benefit. By a deed, to which all the children of the marriage were parties, and which they all executed, these appointments were subsequently ratified and confirmed.

On a bill by C. P., a child of the marriage who had not attained his majority at the date of the deed of confirmation, but had executed the deed some months after he came of age, to set aside the appointments and the deed of confirmation:

Held, that the appointments were not ipso facto void, but only voidable, and that C. P. having deliberately executed the deed of confirmation could not now after the lapse of nearly seven years rip open the transaction.

Bill accordingly dismissed.

By an indenture of settlement dated the 24th April 1818, and executed in contemplation of a marriage then intended and shortly afterwards solemnised between Christopher Richard Preston and Elizabeth Mary Hillary, four sums of money, amounting in the whole to about 14,000*l.*, were assigned to Messrs. Disney and Fortescue, upon trust for the benefit of the husband and wife during their joint lives and the life of the survivor, in manner therein mentioned, and immediately after the death of the survivor in trust for all and every the children of the marriage (other than and except an eldest or only son for the time being entitled to certain lands and hereditaments therein mentioned, and late the property of Richard Preston, deceased), or for such one or more of them exclusively of the others or other, to be vested in and payable at such times and in such shares and proportions, and subject to such conditions and limitations as the husband and wife at any time or times during their joint lives, by any deed or instrument in writing, with or without power of revocation, to be sealed and delivered in the presence of two witnesses, or as the survivor should by like deed or instrument, or by last will and testament direct or appoint; and in default of any such appointment for all the children of the marriage (except such eldest or only son as aforesaid), and their respective executors, administrators, and assigns, in equal shares. And in the indenture of settlement was contained a clause directing any child who took a part of the unappointed fund to bring into hotchpot any portion taken by way of appointment.

The issue of the marriage were twelve children.

Richard the eldest child died shortly after his birth, and Richard Christopher the second son on

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birth became the eldest son, according to the provisions of and the exception contained in the settlement, and the ten younger children became the objects of the power of appointment of the 14,000*l.*

On the marriage of Frances Elizabeth, the eldest of the ten younger children with a Mr. Bonham in Aug. 1845, Mr. and Mrs. Preston, by a deed poll bearing date the 1st Aug. 1845, appointed one-tenth part of the trust fund to the said Frances Elizabeth her executors, administrators, and assigns, and on the following day a settlement of this money was executed in favour of Mr. and Mrs. Bonham and their children.

By a second deed poll bearing date the 8th Jan. 1846, Mr. and Mrs. Preston appointed four-tenth parts of the trust fund to Augustus Richard Preston (the second of the ten younger children), his executors, administrators, and assigns.

On the 28th of the same month of January, Augustus Richard Preston assigned the four-tenths, so appointed to him, to George Tyrrell, his executors, administrators, and assigns, to secure the repayment of 700*l.* and interest.

On the 20th Aug. 1849, Mr. and Mrs. Preston appointed another one-tenth part of the trust fund to Mary Anne, another daughter of the marriage.

On the 12th Dec. 1849, they appointed another tenth-part of the trust fund to their daughter Elmira on her marriage with a Mr. Hand.

On the 25th March 1852, they appointed another tenth-part of the trust fund to John Richard Preston, another son of the marriage; and on the 8th Dec. 1852, they appointed the remaining two-tenth parts of the trust fund to Mary Anne, the daughter to whom they had already in Aug. 1849, appointed one-tenth.

On the following day (9th Dec. 1852) Mary Anne Preston assigned these two-tenths to Henry Wm. Goulding, his executors, administrators, and assigns to secure the repayment of 850*l.* and interest.

The object of the present suit was to set aside the appointment of the four-tenths to Augustus, and the two-tenths to Mary Ann, on the ground that they were made, in fraud of the power, for the benefit of the father, and not for the benefit of the appointed.

Mary Ann Preston married a Mr. Dewick in 1853, and in the following September Mrs. Preston, the mother, died.

By an indenture dated the 31st Dec. 1853, two of the four-tenths of the trust-fund, which had been appointed to Augustus in Jan. 1846, and the two-tenths, which had been appointed to Mary Ann, were assigned to Timothy Tyrrel, his executors, administrators, and assigns, subject to the mortgages of Jan. 1846 and Dec. 1852, upon trust to sell and to apply the proceeds, subject to the said mortgages, for the four younger children of the marriage (to whom no appointment had been made), in equal shares as tenants in common.

By an indenture dated the 1st Jan. 1854, and made between the ten younger children of Mr. and Mrs. Preston and the husbands of the married daughters of the first ten parts, and Mr. Preston, the father, of the eleventh part, after reciting the above-mentioned six deeds of appointment and the death of Mrs. Preston, it was declared that all the persons of the first ten parts were satisfied with the appointments made and therein recited, and by this indenture they and every one of them did confirm, ratify, and establish the appointments therein recited. And it was thereby agreed and declared that the trustees of the settlement should stand possessed of the trust-fund according to the said six appointments; and Christopher Richard Preston, the father, did thereby release unto the parties of the first ten parts the power of appointment vested in him as the survivor of his wife.

This deed of confirmation was executed by all the parties. The three youngest children, Edward Hillary, Sophia Isabella, and Charles Ernest, the plaintiff, were infants at the date of the deed, and they all executed it on attaining their majority. The plaintiff came of age on the 30th Aug. 1860, and executed the deed in the following October.

The six-tenths of the trust-fund, the appointments of which were sought to be set aside, were disposed of thus: Of the four-tenths assigned to Timothy Tyrell in Dec. 1853, two-tenths were sold to the Law Reversionary Interest Society, on the 6th June 1854 for 1466*l.*, and two-tenths were sold for 1400*l.* to the National Reversionary Interest Society, and the proceeds, after payment of the mortgage-debts, were divided amongst the four youngest children of the marriage, to whom no appointment had been made.

On the 10th June 1854 the remaining two-tenths were assigned to Timothy Tyrell, on the trusts of the indenture of Dec. 1853.

In 1853 Messrs. Longbourne and Vickerman were appointed trustees of the original settlement of 1818, in the place of Messrs. Disney and Fortescue.

By an indenture dated the 18th Jan. 1861, and executed by the plaintiff, the two-tenths of the trust-fund remaining in Timothy Tyrell were assigned to Longbourne and Vickerman, upon certain trusts in favour of the four youngest children of the marriage, and at the same time the plaintiff signed an account showing the dealings with the four shares.

Christopher Richard Preston, the father, died in Feb. 1861.

On the 19th April 1861 the plaintiff assigned his one-fourth part of the two-tenths to trustees to raise a sum of 600*l.*, and on the 23rd May following he assigned this fourth part to Stephen Moore absolutely, subject to the indenture of 19th April 1861.

The plaintiff now filed his bill to set aside the appointments of Jan. 1846 and Dec. 1852, and also the deed of confirmation of 1854, which he alleged that he had executed in ignorance of the fraudulent nature of the appointments.

Sir *Richard Baggallay*, Q. C. and *Jason Smith*, for the plaintiff, submitted that it was clear that the appointments of Jan. 1846 and Dec. 1852 had been made in fraud of the power for the benefit of the appointors, and that the purchasers (the Reversionary Societies) could not be in a better position than the persons in whose favour the appointments were made. These appointments were void, at least in so far as they were made for the benefit of the appointors:

Ranking v. *Barnes*, 3 N. R. 660;
Re Marsden's Trust, 4 Dr. 594;
Daubeney v. *Cockburn*, 1 Mer. 626.

With regard to the plaintiff's right to put in the answer of one of the defendants as evidence for himself, they cited

Lord v. *Colvin*, 3 Dr. 222;
Sturgis v. *Morse*, 26 Beav. 562;
Powys v. *Blagrave*, 2 W. R. 289.

Roxburgh, Q. C. and *Blackmore*, for Augustus Preston, contended that if the appointment to him was originally voidable, the plaintiff could not now set it aside after having deliberately ratified it nearly seven years ago.

Southgate, Q. C. and *Bristowe*, for the Law Reversionary Society, contended that the appointments could not be set aside as against the society who were purchasers for valuable consideration without notice. *Ranking* v. *Barnes* (*sup.*) was not an authority applicable to the present case; there the

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appointment was merely for the benefit of a stranger. They cited

Stroud v. *Norman*, Kay, 313.

W. Pearson, *Harrison Dalton*, and *T. A. Roberts* appeared for the other defendants.

Sir *Richard Baggallay*, Q. C. in reply, contended that the deed of confirmation did not render the appointments valid; the deed of confirmation ought to have set out the reason why the matter to be confirmed was considered invalid. He cited

Wellesley v. *The Earl of Mornington*, 2 K. & J. 143.

Aug. 6.—Lord ROMILLY.—This is a suit praying for the delivery up and cancellation of certain deeds of appointment executed on the 8th Jan. 1846, and the 8th Dec. 1852, on the ground that they were in fraud of the power enabling the appointments to be made. In order to explain this matter, it is necessary to examine the facts which raise the question, and to explain the grounds of my decision. [His Lordship stated the settlement, the six deeds of appointment and the two mortgages, and continued:] As regards the application of the money raised by the two mortgages, I think it is proved that out of the 700*l.* raised in Jan. 1846, 100*l.* was paid to Augustus, 435*l.* was applied for the advancement of William Richard Preston, another younger son of the marriage, but whose name does not appear in the deed of appointment, and that the remainder, amounting to 165*l.*, was retained by the father. It is also proved that the whole of the 850*l.* raised in Dec. 1852, was paid to or for the benefit of the father and mother. If the matter rested here there could, I think, be no doubt that the two appointments were bad and invalid as being in fraud of the power, and exercised in some measure for the benefit of the father, and not for the benefit of the appointees. That the money was applied as I have stated is, I think, established by the evidence consisting principally of the letters proved in the cause, and the dates of the appointments show that they were made in order to raise the money which was raised immediately after the execution of the deeds of appointment. [His Lordship stated the subsequent facts, and continued.] The plaintiff contests the validity of his execution of the deed of 1854. He says that he executed it in ignorance of the real facts of the case, and that he never discovered the fraud that had been practised by these two appointments until it appeared by the correspondence of his mother, which he discovered amongst his father's papers after his death. The two reversionary societies are each of them purchasers for value, and, as they allege, without any notice or means of discovering the fraud, and the question I have to consider is, first, whether the two appointments are void; and secondly, whether the purchasers for value without notice stand in any better situation, or take more than the appointees had to give them. The appointments must, I think, be considered separately. By themselves I think it would be difficult to support either appointment. As to the four-tenths appointed to Augustus in Jan. 1846, of which two-tenths were sold to the Law Reversionary Society, the appointment was obviously executed in order to raise 700*l.*, and, accordingly, within a few days 700*l.* was raised on this share, but of this 435*l.* was paid in respect of the premium and stamp on the articles of clerkship of William Richard Preston, who was one of the objects of the power of appointment, and 100*l.* was applied in payment to Augustus himself, but I find it difficult to say that this application of 435*l.* for the benefit of William Richard Preston can legitimately be treated as an appointment made to him; if it were so, it ought to have been in writing, which it is not, and I can only treat this as money paid by the father for the benefit of his son, and, as far as I can gather from the evidence, the remaining 165*l.* was retained by the father for his own benefit. It would, I think, be contrary both to principle and authority if an appointment to one object of the power could be supported by the application of money raised by the appointee on the share so appointed for the benefit of another object of the power nowhere mentioned in any of the deeds of appointment. It is, I think, unquestionable that to render this valid as an appointment it must be put in writing according to the express words of the power; this is, I think, distinctly established by the case of *Topham* v. *Duke of Portland*, 31 Beav. 525. As to the other appointment, the arrangements for raising the money had obviously been made previously to the execution of the deed, and the transaction is in fact contemporaneous. The appointment to Mary Ann is executed on the 8th, and the money is raised on the 9th Dec. 1852, and the money raised seems to me to have been wholly employed for the benefit of the father and mother; and if the matter rested here I should, as at present advised, set aside both these appointments. This brings me to the consideration of the effect of the deed of the 1st Jan. 1854, and this raises two questions: Was this a transaction capable of confirmation? and, if it was, has it been confirmed? On the first question I think it clear that the appointment was not *ipso facto* void, but that it was only voidable. As the appointments stand alone on the deed polls they are good and valid; it is only the discovery of the purpose for which they were made that renders them invalid, and this purpose must be proved by the persons who seeks to impugn the appointments. I therefore hold it to be clear that they were only voidable and consequently that they were capable of being confirmed. The next question is, Has this deed of the 1st Jan. 1854, confirmed these two appointments? I have no doubt that it has, provided that it has been duly executed by every person who is a party thereto understanding its true purport and effect. It is only impugned by the plaintiff; some of the defendants, if it be set aside, will be ready to take advantage of it, but they do not, as indeed they could not as defendants, directly attack it. The question is, therefore, resolved into this: does the plaintiff prove that he was induced to execute the deed without fully understanding its purport and effect? On this head I must say that after considering in every way and examining all the evidence on the subject, it appears to me that it is impossible for the plaintiff to overcome, or in the least degree to impeach his execution of the deed on the 9th Oct. 1860. He was the articled clerk of a solicitor (his brother-in-law). He was endeavouring to raise money on his share; he was aware that the deed he was called upon to execute was a deed to confirm six appointments. He knew, therefore, that the appointments, to render them valid, required confirmation, and in this state of circumstances he voluntarily, not on compulsion or persuasion, or indeed at the instance of anybody, unless it be that of his intended mortgagee, deliberately executed the deed. I think that it is impossible to get over this. The direct evidence is insuperable, and it is confirmed in various ways. In the first place, he executes the deeds of April and May 1861, and he does this six months after the execution of the deed of confirmation. If the transaction were capable of being ratified and made valid by confirmation, this has made it so. I think, as I have stated, that the appointments were not *ipso facto* void, that they were capable of being ratified, and that the plaintiff has ratified them. It lies upon him to show that he was in-

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duced to do so by undue influence or by misrepresentations or other circumstances of fraud. He has wholly failed in doing so; he was bound to inquire why he was called upon to confirm the appointments, in other words, why the appointments required confirmation; he deliberately ratifies them, and he takes no step to set them aside for nearly seven years. It is true that he was out of the country during a large portion of that time, but he was in the country for many months after he had executed the deed, and while he dealt with these shares. In this state of circumstances I am of opinion that he cannot now rip open the transaction, and that his bill must be dismissed with costs.

Solicitors for the plaintiff *Taylor* and *Son*.

Solicitors for defendants, *J. Turner*; *W. R. Preston*; *Capron* and *Co.*

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Friday July 9th.

ROSE *v.* ROWE.

Will—Construction—Gift of rents, with power to sell—Life estate.

A testator gave to his wife the rents and interest of all property for her life, but still giving her liberty to sell and dispose of the whole or any part of the said property if she should think proper so to do; and he directed that all his property remaining at her death should be divided into two equal parts, one moiety among six persons, and the other moiety among three, but that if any of the nine legatees should die before receiving their share, having no child, such legatee's share should be equally divided between the other legatees:

Held, that the testator's widow took only a life interest in the property:

Held, further, that none of the legatees to whom one moiety of the property was bequeathed were entitled to share in the other moiety.

This was an administration suit.

Joseph Swann by his will, dated the 28th Feb. 1834, made the following disposition:—

I give to my dear wife Ann Swann the rents and interest of all my property whatsoever and wheresoever for her life, but still giving her the liberty to sell and dispose of the whole or any part of the said property if she shall think proper so to do; and what property remains at her death my will is that the freehold and copyhold estates be then sold, if not sold before, and with all the other property remaining to be divided into two equal parts; one part I direct to be equally divided between the six following persons: my brother William Swann, of Little Bookham, in Surrey, my sister Elizabeth, the wife of Peter Weller, my sister Ann, the wife of Richard Chitty, my sister Hannah, the wife of Richard Rose, my brother-in-law James Comfort, all of Dorking aforesaid, and my brother Henry Swann, now or lately living with Edward Hamshar, at Newick, in Sussex; and the other part I direct to be equally divided between the three following persons: William Hall, my brother-in-law, now or late of Eltham, in Kent, Stephen Hall, my brother-in-law, Mary Cant, my sister-in-law, both of Dorking aforesaid. If any of the above nine legatees should die before receiving their share, having no child or children, such legatee's share to be equally divided between the other legatees. And if the legatees should die before receiving their share, having a child or children, such shall receive their parent's share the same as such parent would do if living, and to be equally divided if more than one child. And I make my dear wife Ann Swann executrix, and William Ryde, of Dorking aforesaid, executor, of this my will.

The testator died in 1843, and his will was proved by his widow alone. Part of his personal estate consisted of 700*l.* stock, which the widow sold in order to lend 200*l.* to a friend, and which on being repaid she placed to her own credit in the London and County Bank.

The testator's widow made her will in March 1857, and by it she bequeathed the residue of her personal estate to two persons therein named, and appointed the defendant her executor. She died in 1865, and upon her death the defendant claimed the property. Thereupon this suit was instituted for the administration of the testator's estate.

Two questions arose upon the construction of the will—first, whether the testator's widow took an absolute, or merely a life interest in his property, and, secondly, whether the persons to whom one moiety of the testator's residuary estate was bequeathed were entitled to share in the other moiety, some of the persons to whom the said moieties were respectively bequeathed having died in the lifetime of the testator's widow without children.

Hallett, sen., for the plaintiff, submitted the questions to the court.

Renshaw, for the representative of a deceased legatee, argued that the testator's widow had only a life interest in the property. He cited

Martin v. *Holgate*, L. Rep. 1 Eng. & Ir. App. 175;
Lanphier v. *Buck*, 2 Dr. & S. 484;
Re Orton's Trust, L. Rep. 3 Eq. 375; 16 L. T. Rep. N. S. 146.

Karslake, Q.C. and *A. E. Miller*, for the defendant, contended that the life estate given to the widow was enlarged by the subsequent words in the will to an absolute interest. The gift over merely operated on such part of the property as she had made no disposition of either in her lifetime or by her will. They cited

Martin v. *Martin*, L. Rep. 2 Eq. 404; 15 L. T. Rep. N. S. 99;
Wynne v. *Hawkins*, 1 Bro. C. C. 179;
Gude v. *Worthington*, 3 De G. & Sm. 389;
Phillips v. *Eastwood*, Ll. & G. (temp. Sugd.), 270, 298;
Constable v. *Bull*, 3 De G. & Sm. 411;
Holmes v. *Godson*, 8 De G. M. & G. 152.

Hemming and *Hallett*, jun., for other parties.

The VICE-CHANCELLOR.—It has been argued that the testator's widow took an absolute interest under her husband's will. That argument, however, is inconsistent with the plain and sensible view of the testator's language. Nothing can be clearer than the words at the beginning of the will, which give the widow a life estate. It has been said that the life estate, so clearly given, is enlarged into an absolute interest by the subsequent words giving the widow power to sell or dispose of the whole or any part of the property, and directing a division on her death of the residue. That direction to divide, however, applies not merely to that portion of the property which should remain undisposed of at the widow's death, but to every part of it. To enlarge the life estate into an absolute interest would be not only to destroy the estate expressly given, but to defeat the gift over. The authorities referred to differ from the present case. That of *Gude* v. *Worthington* (*sup.*) is the strongest, but that is a most remarkable decision, and the case was not very elaborately argued. It is not necessary to notice the other cases. My opinion is that the widow took only a life estate with power to sell for the purpose of conversion. As to the other question, there is a clear gift over of one moiety of the property to the first six persons named in the will, and a similar gift of the other moiety to the last three persons named. The direction that if any of the nine legatees should die before receiving their share, leaving no child or children, such legatee's share should be divided among the other legatees, must be read *reddendo singula singulis*, in which case none of the persons to whom one moiety of the property

is bequeathed can be entitled to share in the moiety given to the others.

Solicitors for the plaintiff, *Duncan* and *Murton*.

Solicitors for the defendants, *Heathfield; Young*.

Thursday, Nov. 11.

Re ASIATIC BANKING COMPANY; *Ex parte* DR. COLLUM.

Company — Winding-up — Shares—Provisional certificate for—Liability of holders.

The directors of a company duly issued provisional certificates for new shares, which provided that if a second instalment of the capital and premium money in respect of the shares was not paid before a particular day, the amount paid for the shares, with all the rights and privileges appurtenant to the certificate, would be forfeited.

Held, that the holder of such certificates who had transferred his shares without paying the second instalments was not liable as a contributory.

This was an adjourned summons on behalf of Dr. Collum, for the purpose of having his name removed from the list of contributories of the above company under these circumstances.

The company was established under a royal charter and a deed of settlement, dated respectively the 19th Feb. and the 11th April 1864.

The original capital was 500,000*l.*, in 25,000 shares of 20*l.* each. On the 3rd Jan. 1865 the directors, having previously received the consent of the Commissioners of the Treasury, passed a resolution to increase the capital of the company from 500,000*l.* to 1,000,000*l.*, by the creation of 25,000 new shares of 20*l.* each. From the date of the formation of the company the shares stood high in public opinion, and the directors issued the new shares at 15*l.* premium on the 20*l.* shares.

On the 27th Jan. 1865, Dr. Collum, who had not held any original shares, but had seen the prospectus embodying the resolution of the 3rd Jan., applied, on one of the printed forms, for 100 new shares. On the 10th Feb. 1865, the acting manager wrote to Dr. Collum stating that the directors had allotted him thirty-five shares, and requesting the payment of 350*l.*, being 2*l.* 10*s.* per share capital, and 7*l.* 10*s.* per share premium on the allotted shares. At the foot of the letter was affixed the following statement: "This sheet to be presented entire at the bankers, who will sign the receipt annexed, and must be retained by the allottee until exchanged for the usual certificate."

On the 15th Feb. 1865, Dr. Collum paid the 350*l.*, and received a receipt from the bank. Shortly afterwards the directors, having caused to be prepared certain provisional certificates of the new shares, thirty-five of them were forwarded to Dr. Collum in respect of his shares. These certificates were in the following form:

Provisional Certificate of New Issue.
New Share, 02240.
Asiatic Banking Corporation; Incorporated by Royal Charter, 1864.

This is to certify that the holder of the provisional certificate having paid to the Asiatic Banking Corporation the sum of 2*l.* 10*s.*, being the first instalment of capital, and 7*l.* 10*s.*, the first instalment of premium, in respect of new share, No. 02240, for 20*l.*, in the Asiatic Banking Corporation, will be entitled upon payment of the sum of 2*l.* 10*s.*, being the second instalment of capital, and 7*l.* 10*s.*, being the balance of premium in respect of the said shares, on or before the 30th June 1865, and in execution of the deed of accession, to be prepared in respect of such new capital, to be registered as a proprietor of share No. 02240 for 20*l.* in the new capital of the said company, having 5*l.* paid thereon, subject to the published terms of issue and to the regulation of the charter-deed of settlement and deed of accession thereto.

Dated this 21st day of March 1865.

J. A. RUSSEL, THOMAS CARDWELL, } Directors.
J. W. LAWRENCE, Acting General Manager.
Entered. A. D. DAVIS, Acting-Accountant.

N.B. In default of payment of the second instalment of capital and the balance of premium on or before the 30th June 1865, the amount paid, together with all the rights and privileges appurtenant to this certificate, will be forfeited. Holders desirous of doing so may anticipate these payments at a discount of 6*l.* per cent. Payment may be made at Bombay at the rate of 2*s.* per rupee.

On the 29th March 1866, Dr. Collum, without paying the second of the above-mentioned instalments, sold his thirty-five shares through his brokers. In the case of twenty-five of the shares, the purchasers, having paid the second instalments, were accepted by the company and placed on the register, but as to the other ten no instalment had been paid, and the allottee had not been registered.

The company having been ordered to be wound-up, Dr. Collum's name had been placed on the list of contributories.

Hence this application.

Sir *R. Palmer*, Q. C., *A. E. Miller*, and *Chitty*, in support of the summons, submitted that the new shares which were held by Dr. Collum were transferable by the delivery of the provisional certificates, and that upon the terms of the contract between him and the company as above set forth, he was clearly no longer a shareholder in the company. They cited:

Re Littlehampton, Havre and Honfleur Steamship Company, L. Rep. 5 Eq. 110;
Eustace v. *Dublin Trunk Connecting Railway Company*, L. Rep. 6 Eq. 182; 18 L. T. Rep. N. S. 679;
Re Kollman's Railway, Locomotive, and Carriage Improvement Company; Ex parte Berresford, 2 M. & G. 197.

Dickenson, Q. C. and *Kekewich*, for the liquidator, contended that the true contract, by which Dr. Collum was bound, was that which arose out of his undertaking (when he accepted the shares), to sign the charter and deeds of the company; that in connection with that the bank could have compelled him to perform his contract, and accept all the shares for which he had agreed with them, and that the delivery of the provisional certificates could not exonerate him from his original contract, of which, in reality, he had committed a breach. Even if the case rested entirely upon the contract contained in the certificates, the provision as to the rights under the certificate being forfeited in default of payment of the second instalment must be understood as for the benefit of the company, and not for the benefit of the shareholders. It could not be intended that a shareholder, by breaking the contract, was to be allowed to avoid his liability. They cited

Edwards v. *Kilkenny Railway Company*, 14 C. B., N. S., 526;
De Pass's case, 4 De G. & J. 537.

The VICE-CHANCELLOR.—The subject-matter of this contest relates to a contract between the directors of the company and the holder of certain provisional certificates for new shares in it. At the end of each certificate is a notice showing that the right to the shares conferred by the certificate is not, upon the authorities, one that could enable the company to make the holder of the certificate liable as a shareholder. The case of *Eustace* v. *The Dublin Trunk Connecting Railway Company* (*sup.*) shows that a mere allottee of shares by virtue of such a document as this, cannot be compelled to go

further and make himself a complete shareholder. The terms of the contract between the directors and the holders of the provisional certificates are clear and distinct; they are as follows:—"In default of payment of the second instalment of capital, and the balance of premium on or before the 30th June 1865, the amount paid, together with all the rights and privileges appurtenant to this certificate, will be forfeited." It is said that Dr. Collum dealt with the thirty-five shares as his own property, and that he has retained some of them. But even if that were so he never paid the second instalments, and therefore all his rights and privileges as a holder of the provisional certificates is forfeited. There is no analogy between the present case and those cited in the course of the arguments against the application. The summons must be allowed with costs. The liquidator will have his costs out of the estate.

Solicitors for the application, *Rickards* and *Walker*.

Solicitors for the liquidator, *Freshfield* and *Co.*

V. C. MALINS' COURT.

Reported by G. T. Edwards, Esq., Barrister-at-Law.

Friday, July 2.

Ross v. Tatham.

Administration suit—Distribution of assets—Liability of executor—Creditor.

Where a creditor omits to bring in his claim under a decree of administration, he loses his remedy, not against the property, but against the executors, who, by distributing the assets under the decree, are exonerated from all liability in respect of them.

The testator in this administration suit was a lessee for a term of ninety-nine years from Christmas 1860 of certain land, upon which he covenanted by the lease to expend 1800*l.* in building a messuage or warehouse of certain dimensions within twelve months from the date of the lease, and to keep the messuage so to be built in good repair, and give it up in good repair at the end of the term. The testator died in 1864, having been prevented by an injunction of this court from building according to this covenant. A decree for the administration of his estate was made in Dec. 1864. In March 1866 the executors sold the leasehold property, and obtained from their assignee a covenant of indemnity against all breaches of the covenants in the lease.

The whole of the testator's estate was now in court, and the only question which arose upon the present petition, which was presented by a residuary legatee of a moiety of the testator's estate, for payment of his share, was whether the executors were entitled to have any portion of the fund retained in court to meet the liabilities under the covenants of the lease.

Owen for the petitioner, and *Nalder* for the plaintiff in the suit, contended that no part of the fund should be retained, as the executors were sufficiently indemnified by the decree of the court.

Wickens for the executors, and *Romer* for other parties, maintained that a portion of the fund should be retained as an indemnity fund.

The Vice-Chancellor.—This petition raises a point of great importance. It appears that the testator was the lessee of various properties, and in particular of one which was subject to a covenant within twelve months to erect a building, and thereon to expend 1800*l.*, and the lease being dated in 1861, that there was a breach of that covenant in 1862, which entitled the lessor to recover damages before the 1st Jan. 1863. In 1864 the testator died, and there has been a decree for the administration of his estate, which calls on all the creditors on that estate, to bring in their claims. The lessor was a creditor for or in respect of the breach of the covenant, and if he had brought an action against the executor, would have been entitled to recover. I apprehend that every creditor is bound, under a decree for administration, to bring in his claim, and if he omits to do so, the consequence is, not that he loses his remedy against the property, but against the executor who, by distributing the assets under the decree, is exonerated, and the claim on the assets thereby must fail. The lessor omitted to bring in his claim, for it was a debt to which he was entitled as much at that time as now or on any day between that and the expiration of the lease. Not having brought in the claim, he can no longer proceed against the executor, but must follow the assets. This is a rule of much convenience, and being a rule of this court, I do not know how I can do otherwise than hold that the executor is exonerated; for if I do not, suppose there is a lease of ninety-nine years, and an executor distributes the assets where there has been a covenant broken, there is a liability during all that time, and in this case there are thirty or forty years to run, and the argument goes to that extent, because it is a continuing breach, and the lessor may bring an action at any time, and the executor seeks protection. The case of *Bennett* v. *Lytton*, 2 J. & H. 55, was referred to, where the assets were distributed under an order of the court in an administration suit, and there was an indemnity to the executor precisely as in the present case. Mr. Wickens has done right to bring this matter to the attention of the court, but I am of opinion that there is no right to keep the assets in court. It may be made a part of the order that the peculiar circumstances were brought to the attention of the court. The executor having made a claim to retain the fund to answer any liability under the head of covenant in omitting to build such buildings as by the contract are covenanted to be erected—Order as prayed. I have not put this case as coming under Lord St. Leonards' Act (22 & 23 Vict. c. 55, s. 27), but have decided quite independently of that statute.

Solicitors for the plaintiff, *Few* and *Co.*

For the executors, *Fladgate, Clarke*, and *Co.*

For the widow, *Baker* and *Key*.

V. C. JAMES'S COURT.

Reported by W. H. Bennet, and R. T. Boult, Esqrs., Barristers-at-Law.

Tuesday, Nov. 9.

Twynam v. Porter.

Practice—Order to continue suit without representative of a deceased defendant—15 & 16 Vict. c. 86, s. 44.

In a suit for account against a trustee, the court on death (before replication or notice of motion for decree) of a defendant who was a tenant for life of one share of the trust property, made an order, ex parte, to continue the suit without any personal representative of the deceased.

This was a suit instituted against the defendant, George Twynam Porter, for an account of moneys which he had received on behalf of the plaintiff, including the rents and profits of certain real and leasehold estates to which the plaintiff, her brother

Edward Twynam, and her sister Emily Porter, the wife of the first defendant, were entitled, as tenants in common. The plaintiff and Edward Twynam had conveyed their share of the same estates to the defendant G. T. Porter, upon trusts for the management thereof, and the same defendant had received the rents and profits thereof for a number of years. Edward Twynam and Emily Porter were made defendants to the suit in respect of their interests in the estates. The share of the defendant Emily Porter was in settlement, but she was entitled to the rents and profits of the estates for her life for her separate use, with remainder to the defendant G. T. Porter for his life. In March 1869, the defendant Emily Porter, duly appeared to the bill, and in Aug. 1869, she died before replication or notice of motion for decree.

Thurstan Holland now moved *ex parte* on behalf of the plaintiff that the suit might be carried on and prosecuted either without any representative of the deceased defendant, Emily Porter, being present, or against the defendant, G. T. Porter, her husband, as representing her interest.

The VICE-CHANCELLOR had some doubt whether he had jurisdiction to make such an order *ex parte* without notice having been given to the other defendants; but upon being informed that the bill did not pray for a partition, he made an order that proceedings in the suit might be carried on without any representative of the defendant, Emily Porter.

Solicitors, Messrs. *Walker*, *Twyford*, and *Belward*.

Thursday, Nov. 11.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY *v.* GARNETT.

Injunction—Covenant not to use a house as a beerhouse.

A covenant not to use a house as "a beerhouse, inn, or public house for the sale of spirituous liquors":

Held not to be infringed by the sale of beer by retail to be drunk off the premises.

This was a motion for an injunction to restrain the defendant from using a house and premises as a beerhouse for the sale of beer or other liquors, or otherwise, in contravention of a covenant entered into by the defendant

The plaintiffs had sold to the defendant certain building land at Wolverton, in the county of Buckingham, and by the deed of conveyance, dated the 24th March 1860, the defendant covenanted (*inter alia*) that the land and other hereditaments thereby conveyed, and the buildings to be erected thereon, or any of them, should not "be used as a beerhouse, inn, or public-house, for the sale of spirituous liquors," and that no slaughter-house, candle, hat, or soap manufactory, tanyard, brick kiln, tinman, blacksmith, or common brewer, or any other trade or business of any description, should be carried on, which should, or might hereafter, be a nuisance or annoyance to the said company, their successors or assigns, or their tenants or the owners or occupiers for the time being of the neighbouring premises.

The defendant occupied a house built on the land, and in Aug. 1869, he had taken out a licence to sell beer in casks, and had subsequently taken out a licence to sell by retail beer to be consumed off the premises, and had sold beer by retail in accordance with the licence.

Speed and *Ince*, in support of the motion, contended that the defendant had committed a breach of the covenant, and referred to

11 Geo. 4 & 1 Will. 4, c. 64, s. 31;
4 & 5 Will. 4, c. 85, s. 11;
The Wine and Beerhouse Act 1869 (32 Vict. c. 27);
Pease v. *Coats*, 14 L. T. Rep. N. S. 886; L. Rep. 2 Eq. 688;
Fielder v. *Slater*, 20 L. T. Rep. N. S. 112; L. Rep. 7 Eq. 523.

Jones-Bateman, for the defendant, *contra*.

Speed in reply.

The VICE-CHANCELLOR said it was conceded that a beer-house could not mean a place where beer was sold in any quantities. The question was what did the parties to the deed mean? What was the ordinary meaning of the word beer-house at the time (1860)? To a person minded to ascertain the legal meaning of the word beer-house, he would naturally resort to Barnes' Justice of the Peace, and in that book (edit. of 1845, heading "Alehouse"), there was the following definition: "A beer-house or shop is a house in which beer, ale, porter, cider, or perry is sold by retail to be drunk or consumed on the premises." He was, therefore, of opinion that the plaintiffs were not entitled to the injunction asked. Costs to be costs in the cause.

Solicitor for the plaintiff, *James Blenkinsop*.

Irish Election Petitions.

CARRICKFERGUS ELECTION PETITION.

Friday, Jan. 29.

(Before O'BRIEN, J.)

Treating—Sects. 4 *and* 23 *of* 17 & 18 *Vict. c.* 102—Cooper *v.* Slade—*Decisions of committees of the House of Commons—Procedure—Costs.*

The 4*th section of* 17 & 18 *Vict. c.* 102 *enacts that "every candidate" who "shall corruptly" by himself give meat or drink to persons for the purpose of being elected, or for being elected, or with the view of corruptly influencing such persons, shall be guilty of treating.*

The 23*rd section makes no reference to the candidate, but enacts that the giving of entertainment on the polling day by way of refreshment shall be punishable in the penalty of* 40*s.:*

Held, that the 23*rd section applies as well to acts done by the candidate or his agent as to other persons, and that the giving of such entertainment on the polling day is not necessarily corrupt because it is done by a candidate or his agent.*

Cooper *v.* Slade, 6 *E.* & *B.*; 6 *H. of L. Cas., examined, and all the decisions of the House of Commons committees on the subject of treating considered and compared.*

On the polling day a large number of voters partook of drink at the house of G., the agent of the respondent. They had all promised to vote for the respondent; many of them had their polling cards with them, and the great majority were country voters, who left their homes very early. The principal part of the drink, moreover, was not supplied until the contest was virtually decided. G. denied that he had any corrupt intention, and stated that what he did was of his own motion:

Held, not to be treating within sect. 4.

Where drinking, &c., goes on during the canvass, the candidate soliciting votes in public houses and places where drink is supplied, the inference must be in favour of a corrupt intention.

A voter was promised a day's coursing for his son.

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Another voter who solicited employment was told to go to certain works, and see if the manager wanted hands. The respondent denied that he contemplated influencing votes:

Held, that neither inducement amounted to bribery, the latter act being one of mere charity.

The respondent was declared duly elected, but his agent was proved to have offended against sect. 23 of the Act, and to have done acts which were to be reprehended:

Held, therefore, that the respondent was not entitled to his costs.

This was a petition against the return of Mr. Dalway. It contained the usual allegations.

O'BRIEN, J.—(Having dealt with the allegation of undue influence said):—Now, it is material to direct attention to the two sections of the Corrupt Practices Prevention Act 1854, which have been so much referred to. The fourth section provides that, "every candidate at an election who shall *corruptly* by himself, or by or with any person, or by any other ways or means on his behalf at any time, either before, during, or after any election, directly or indirectly give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay, wholly or in part, any expenses incurred for any meat, drink, entertainment, or provision, to or for any person, in order to be elected, or for being elected, or for the purpose of corruptly influencing such person or any other person to give or refrain from giving his vote at such election, or on account of such person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be deemed guilty of the offence of treating, and shall forfeit the sum of 50*l.* to any person who shall sue for the same, with full costs of suit." According to the obvious and grammatical construction of that section, the word "corruptly" at the beginning of it governs the entire of the section. It is not necessary to rely on the word "corruptly" which occurs in the middle of the section of the Act before the word "influencing," because that refers to only one of the acts mentioned in the section, but the word "corruptly" at the beginning of that section, renders it necessary that every act therein mentioned should be done corruptly, in order to constitute an offence within that section. The 23rd section then provides, "That the giving or causing to be given to any voter on the day of nomination or day of polling, on account of such voter having polled or being about to poll, any meat, drink, or entertainment by way of refreshment, or any money or ticket, to enable such voter to obtain refreshment, shall be deemed an illegal act, and the person so offending shall forfeit the sum of 40*s.* for each offence, to any person who shall sue for the same, together with full costs of suit." In that 23rd section the word "corruptly" is not used, and though that section does not mention the word "candidate," it applies as well to acts done by the candidate or his agent as to acts done by any other person. Upon those two sections of that statute what is the reasonable conclusion? That the same act of a candidate which, if it fell within the 4th section (as having been done corruptly) would disqualify him from being elected, would, if it only fell within the 23rd section, render him only liable to a 40*s.* penalty. There must therefore be a difference between the acts of the candidate, which were legislated against by those two sections. As it could not be reasonably supposed that the Legislature intended to subject the candidate to different penalties by the two sections for the same act; I think the difference is, that to bring the act within the fourth section so as to disqualify the candidate from being elected, the act should be done corruptly. I have attentively considered the authorities which were referred to by counsel during the trial, and the first I shall mention is the case of *Cooper* v. *Slade*, 6 H. of L. Cas. 746, and previously in 6 E. & B. 447, when before the Court of Exchequer Chamber. That case was an action for penalties under the 2nd section of the Corrupt Practices Prevention Act, which, by the first paragraph, provides that every person shall be guilty of bribery "who shall, directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration, to or for any voter, or to or for any person, on behalf of any voter, or to or for any other person, in order to induce such voter to vote or to refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted, or refrained from voting at any election." The questions in that case arose upon the 7th and 8th counts of the declaration. The 7th count proceeded on the first part of that first paragraph, and alleged defendant's promise before the election of money to induce the voter to vote. And the 8th count proceeded on the 2nd clause of that first paragraph, and alleges that the defendant, after the election, corruptly gave money to the voter on account of his having voted. The money given was for the purpose of paying the expense of conveying the voter. The case was tried before Lord Wensleydale, then Baron Parke. The verdict was had for the plaintiff on both counts, and the case came before the Court of Exchequer Chamber on a bill of exceptions, alleging (amongst other grounds of error), that there was no evidence to support the charge contained in the 8th count, namely, that the act was done corruptly. The Court of Exchequer Chamber held that there was no such evidence; and Alderson, B., in delivering the judgment of that court, makes the following observations with respect to the 4th and 23rd sections of the Act. In pp. 456 and 457, he says, "the 4th section only prohibits the corruptly giving of meat, &c., for the purpose of corruptly influencing a voter to give a vote. It does not prohibit the *bona fide* giving of such meat, &c., unconditionally, while sect. 23 absolutely prohibits any giving of refreshment to any voter on the day of nomination, or day of polling, on account of his having polled, or being about to poll, without using any such words as 'in order to induce'"; now, a giving of refreshment might clearly be within sect. 23, and not within sect. 4, because not given in order to induce the voter to vote. Again, in p. 459, he says, "We think the word 'corruptly' has a definite meaning. If, for instance, there had been a previous unlawful promise conditional on the voter voting, or if there had been a previous understanding to that effect, or a corrupt bargain, for the future, we think the case would have been within the statute." Alderson, B then observes upon the consequences that would result from not giving to the word "corruptly" the meaning he contended for. Upon that case coming before the House of Lords, the judgment of the Court of Exchequer Chamber was reversed; but Mr. Rogers states in his work on Elections p. 351, last edit., that the decision was reversed without impugning the law laid down; and, upon looking at the report of the proceedings in the House of Lords, I find, that, so far as the construction of the 4th section is concerned, there is no *decision* of the House of Lords opposed to the construction put upon that section by Alderson, B. The case before the House of Lords arose upon the word "cor-

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ruptly" in the 2nd section, and Alderson, B. had, in the course of his judgments in the Exchequer Chamber, referred to sect. 4 for the meaning of the word "corrupt." It has been urged that the majority of the judges in answering the questions put to them by the House of Lords expressed their dissent from the decision of the Court of Exchequer Chamber, but they did so upon the ground that there was, in their opinion, evidence to go to the jury that the act was done corruptly. It will be found that Channell and Watson, BB., and Williams and Wightman, JJ., in their judgments, referred to the fact of the promise having been made before the vote, as evidence that the subsequent performance of it was corrupt. It is true that Willes, J. goes somewhat further, and expresses his opinion that if a man purposely does an act which the law forbids as tending to corrupt voters, then he does that act "corruptly." But, as he has since observed, in giving that opinion, he was dealing with the case of bribery, and with the word "corruptly," as used in sect. 2. And Coleridge, J. in pp. 784 and 785, states his opinion that, in case of payment to a voter after the election, it was material (in order to bring that act within the second section) that it should have been done corruptly. He also observes, that the statute expressly made the operating motive in the mind of the party material, and required that that motive must be "corrupt"; and he further observes, that it would be against the proper construction of the statute to make the act of itself evidence of corruption. The judgment of the House of Lords in that case was given by Lord Cranworth and Lord Wensleydale. It is true that Lord Cranworth, in his judgment (p. 788), states that he could not give to the word "corruptly," as used in the 2nd section with reference to a payment after voting, any other meaning than a payment in violation of that which the statute was passed to prohibit. But Lord Wensleydale, in his judgment pp. 790 and 791, referring to the construction which he had put at the trial upon the word "corruptly," stated, that "he did not exactly understand the meaning of that word as used in that Act;" and that he was not perfectly satisfied with the correctness of the opinion he had expressed as to its construction. In a further part of his judgment (page 797), he also says, "I have, however, very great doubt whether I was right in my construction of the obscure terms of the Act, &c., in holding, that if a candidate, after the election, pays a voter money, the moving cause of his doing so being that the voter has given him his vote, the payment is 'corrupt.'" The final decision of the House of Lords was, that upon plaintiff entering a *nolle prosequi* upon the eighth count he obtained judgment upon the seventh count; which did not raise the question at all. I have referred so fully to this case, being one of such importance and high authority, and because it was so much relied on by counsel during the trial as bearing upon the meaning of the word "corruptly," in the fourth section. With regard to the acts that have been held to constitute the offence of treating, Mr. Kisbey, in his very able address, has referred to two cases decided by committees of the House of Commons. One was the *Roscommon case*, 1 Wolf. & Bris. 107, in which the election of Captain Gough was voided, it appearing that voters had, when they came in from the country the night before the polling, been kept and accommodated in various refreshment houses in the district. That was held to amount to treating. The other case referred to by Mr. Kisbey was the *Peterborough case*, 2 P. R. & D. 250, in which the election was also held void upon the ground of treating, because on the morning of the declaration (and, of course, after the election was over) cards were issued announcing that a public dinner would be given to the successful candidate, and because the successful candidate going to the dinner paid for the wine. This case certainly goes very far; but, with every respect for the decisions of committees of the House of Commons, and admitting that so far as practice goes, and where a case is without precedent, they are decisions to be regarded, it will be seen that those decisions are by no means uniform upon the subject of treating. Thus in the *Carlisle case*, which is also reported in 1 Wolf. & Bris. 95, immediately preceding the report of the *Roscommon* case, it appeared that the petition was for bribery and treating. It was proved in that *Carlisle* case that the agent of the sitting members had invited about twenty out voters to breakfast at his house on the day of the election, that the voters came there in conveyances provided for that purpose by the agents of the sitting members, and that the solicitor of one of the sitting members had also invited four other voters to breakfast. But the ground relied upon by counsel for the sitting members, as disproving the charge of treating and corruption, was that all the persons so invited had long before promised their votes to the sitting members, and were all supporters of the political party to which the sitting members belonged (a fact to which there is something similar in the present case), and the committee adopted the view pressed by the counsel for the sitting members, namely, that what was done was done *bonâ fide*, and that the treating was not corrupt, and accordingly the election was held good. Mr. Kisbey also relied on the *Fulkirk case*, 1 Wolf. & Dew, 170, in which case the member was unseated on the ground of treating, it appearing that not only on the polling day, but on previous days, eatables and drinkables were supplied to voters without payment or stint at several inns in the town, and that the treating went on at the committee-rooms on the polling day; and that the agent of the sitting member, for election expenses, ordered some of the refreshments supplied on the polling day to be put down to the committee; but, in the very same book, pp. 111 and 113, the *Tewkesbury* case, relied on by Mr. Law, is reported, in which the committee held that the charge of treating was not sustained, although it appeared that on the polling day, from early in the morning until evening, refreshments (not certainly considerable in quantity), were supplied in the house of the sitting member's agent for election expenses, and were partaken of by some voters and others. I shall also refer to the *Aylesbury case*, 1 Wolf. & Brist. 13 and 15, in which it appeared that refreshments were supplied at the hotels to various voters; that the agent of the sitting members was "in and out of the inn during the whole day," which would imply his sanction of what was done; and yet the committee found that the charge of treating was not proved. I refer to these cases, to show that the decisions of the House of Commons cannot be said to be uniform upon this question of treating; they are decisions which it would be difficult to reconcile one with the other, and therefore we must consider each case upon the facts proved in evidence. I shall now refer, in the first instance, to the alleged treating at Gray's house. It is clear, in my opinion, that Gray should be regarded as the agent for Mr. Dalway. That has not, indeed, been controverted; and what I have to consider is, whether the act of supplying drink there was done "corruptly" within the meaning of the 4th section. If it was it would subject the parties to a severe penalty, and under the 36th section the sitting member would be subject to the further penalty of disqualification for sitting for this borough during the present Parliament. I feel, therefore that I should not come to such a conclusion except upon satisfactory and sufficient evidence. I need not go in detail through all

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the evidence on this matter, which could not be done within any reasonable limits, and it has been already very ably commented on by Mr. Kisbey in his reply. But it appears to me that the result of such evidence is, that all the voters who partook of drink in Gray's house had come there with the express determination to vote for Mr. Dalway; that all of them, with the exception of some ten or twelve, had their voting cards with them; that the great majority of them were country voters who had left their houses very early; and that the principal part of the drink supplied upon that occasion (namely, that supplied by Adamson and Logan) was not got till the election was virtually decided, namely, about half-past eleven o'clock, when, it appeared upon the evidence, that Mr. Dalway's majority was one that could not be got over, and that his return was morally certain. It is not shown that previous to that day there had been any promise or announcement that such drink or refreshment would be supplied. Gray states that nothing was said to any of the voters about their votes at the time of their getting the drink, and he also swears that what he did was of his own motion; and that in giving the people drink he had no intention whatever of influencing their votes. This is not similar to cases found in the reports of some election proceedings in England, in which it appeared that the treating was going on during the canvass, and that the candidate before the election had solicited the votes of the electors at public-houses, or other places where drink was supplied, and in which cases the elections on various occasions have been properly voided upon the ground of treating. So far as the drinking at Gray's is concerned, I do not consider it necessary to refer to the evidence more minutely. I think I have stated the fair result of it; and upon these grounds and considering that the charge of corruption should be clearly made out, I cannot come to the conclusion that the drink in that place was given corruptly, or constituted the offence of treating within the 4th section. Before I consider the other cases of treating relied on, I think it convenient to refer to the charges of bribery which have been brought against Mr. Dalway and his agents. I refer to the transactions with Thomas Boyd and John M'Dowell, who were examined yesterday. The transaction as to Boyd is that Mr. Dalway canvassed him, that the man said, "Come to my house and I will give you a promise," and that on the way he asked Mr. Dalway, not for employment or for money, but for liberty for his son to have a day's coursing with a young dog over the property of Mr. Dalway's father. The case as to M'Dowell is that Mr. Dalway met M'Dowell, that the man came over to him, was canvassed by Mr. Dalway and immediately promised him his vote; that the man afterwards asked Mr. Dalway to give him work at the mines, and that Mr. Dalway said that he could not tell him anything about it; that he did not know whether there was work for him or not; but that he should go to Mr. M'Cartney who was employed by Mr. Dalway over the works at the mines which were several miles distant, and that he (M'Cartney) would tell him whether he wanted any hands, or had work to spare. Mr. Dalway further states that, in this conversation with M'Dowell about work, he had not in his mind the slightest reference to the man's vote at the election, and that he thought so little of the matter that he never spoke to M'Cartney about it, and did not, until some time after M'Dowell was employed, know that he had been so employed. Now can it be seriously contended that either the one or the other of these cases will support a charge of bribery? With regard to the case of Boyd I pass by the singularity of the inducement alleged to have been held out; and even assuming that it comes within the definition which Alderson, B. is stated, in Rogers on Elections, p. 341 (n), to have given of the words "valuable consideration" in the Bribery Act, namely, that they mean valuable consideration estimated in money, it seems almost a waste of time to dwell further upon this case for the purpose of showing it is not a case of bribery. The liberty of coursing was one which Mr. Dalway states he had given to several; and was in the habit of giving on various occasions. With respect then to the employment of M'Dowell, I am at a loss to know if that be considered a case of bribery, what a person who was a candidate for a city or other place, and happened to be engaged in business could do, if any voter came and asked him for employment; can it be held that he should employ no voter? I may refer on this matter to the observation of Willes, J. in the *Windsor* case, in which a sovereign was deposited by the sitting member, with a clergyman who was opposed to him, for the relief of a voter whom the sitting member had asked for his vote. Willes, J. said the question was whether the depositing of the sovereign was a corrupt Act or an act of humanity, and he held that it was not, under the circumstances, an act of bribery. I may also refer to the *Carlisl.* case already mentioned, in which the agent for the sitting member, on the day of the election gave a pound to a voter named Macpherson, who had asked for his travelling expenses; which only amounted to a few shillings; but the agent said that he gave it more out of charity than anything else, the voter having stated that he was a struggling man. The counsel for the sitting member insisted that the payment had been made *bonâ fide*, and did not amount to bribery, and so the committee decided. Upon these grounds I have no doubt that neither of these charges of bribery against Mr. Dalway has been sustained. His Lordship then declared that the sitting member was duly elected, and that corrupt practices had not extensively prevailed. He added:—It now remains for me to dispose of the last, and not unimportant, matter, namely, the cost of these proceedings. The 41st section of the Parliamentary Elections Act 1868, provides that "all costs, charges, and expenses of and incidental to the presentation of a petition under this Act, and to the proceedings consequent thereon, with the exception of such costs, charges and expenses, as are by this Act otherwise provided for, shall be defrayed by the parties to the petition, in such manner and in such proportions as the court or judge may determine, regard being had to the disallowance of any costs, charges, or expenses, which may, in the opinion of the court or judge, have been caused by vexatious conduct, unfounded allegations, or unfounded objections, on the part either of the petitioner or the respondent, and regard being had to the discouragement of any needless expense by throwing the burden of defraying the same on the parties by whom it has been caused, whether such parties are or are not on the whole successful." As a general rule, the object of this Act was to assimilate, to a certain extent, the practice as to costs, with the rule of law that costs should follow the result. But a discretion is left to the judge, and it is perfectly clear that, under the Act, such general rule might be displaced by special circumstances. Mr. Law relied, very properly, on the unfounded allegations of bribery made in the petition; and if it was not for the other circumstances in the case, these allegations, unsustained by evidence and inconsiderately made, would be ground for adhering to such a general rule. In my opinion, however, there are circumstances in this case which exempt it from the operation of that general rule. The giving of the drink on the polling day at Gray's house, though, as

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I have already stated, it was not done corruptly, and was not a ground, under sect. 4, for avoiding the election, was still a proceeding much to be reprehended, and was clearly illegal under the 23rd sect. of the Act. This transaction, and some of the others to which I have referred, with respect to drinking, were of a character calculated to excite suspicion of undue practices, and not unreasonably calculated to invite inquiry. It is true that the giving of drink in the committee-room was the act of Mr. Gray himself, and was not done with Mr. Dalway's concurrence, and that the only knowledge brought home to Mr. Dalway of any such thing having been done was a circumstance that might have struck him, and did strike me, as immaterial—namely, that he saw some whisky in two bottles in the room. But it must be recollected that, under the election law of Parliament, a candidate, however morally innocent of any charge, is legally answerable for the practices of his agents; and though the case, either as to Mr. Gray or Mr. Dalway, does not come within sect. 4, yet I cannot but hold that, so far as regards the costs of this petition, Mr. Dalway is responsible for the drink having been given. It is a matter to be deplored that habits of drink should prevail upon the occasion of elections. They prevail unfortunately upon many occasions, but the indulgence in them is far more dangerous at an election, when hostile and antagonistic political feelings are excited, and people naturally feel more interest than ordinarily in the result. In the present case it certainly does not appear that the assaults upon Mr. Wilson and Mr. Cornwell arose from drink, or that the drinking on the polling day was otherwise productive of any injurious consequences so far as outrages were concerned. But when drink is once given, those who give or sanction it cannot know or form an opinion of the consequences to which it may lead. I think it should be discouraged, and that not only candidates, but their over zealous friends and partizans should be apprised of the risks they run, and of the consequences to which they expose the candidate by such a practice, and that it might be attended with positive loss to him. Upon these grounds I think I should, in this case, do what I clearly have authority to do under the Act of Parliament—namely, refuse to give the respondent the costs of these proceedings. A similar decision has, I see, been recently made by Willes J. in the case of the *Guildford Petition*, 19 L. T. Rep. N. S. 729, in which, because he considered there were reasonable grounds for inquiry, and for presenting the petition, he would not award any costs to the respondent, though he declared his election valid. I shall, therefore, make the order that each party should abide his own costs of these several proceedings.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

July 7 and 19.

(Present: The Right Hon. Sir JAMES W. COLVILE, Sir JOSEPH NAPIER, and Lord Justice GIFFARD.)

THOMAS CHERRY and JOHN MCDOUGALL (apps.) *v.* THE COLONIAL BANK OF AUSTRALASIA (resps.)

Victoria—Company—Personal liability of directors—Misrepresentation of authority, without fraud—Implied warranty.

The appellants, two directors of a company, wrote a letter to the respondents' bank, stating that they, as directors, had appointed C. to be legal manager, and had authorised him to draw cheques upon the account of the company. The appellants were not empowered to give C. this authority. On the faith of the above letter, advances were made by the respondents' bank on cheques drawn by C., purporting to bind the company.

There was no imputation of fraud in the transaction.

In an action by the respondents against the appellants to recover the amount so paid on C.'s cheques:

Held (affirming the judgment of the Supreme Court of Victoria), that the law implied a warranty to the bank, on the part of the appellants, that C. had authority to bind the company, so as to make the appellants responsible to the bank for the advances on the cheques.

If a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with a knowledge of its falsity or not.

Collen *v.* Wright (8 *E. & B.* 647) *followed and approved.*

The warranty which the law implies in such cases depends on the position of the parties and on the nature and effect of the representation, but when ascertained, as a matter of fact, the legal effect is the same as if the warranty had been express.

The remedy by special action where there is fraud or deceit is a distinct matter.

This was an appeal from a decision of the Supreme Court of the Colony of Victoria, upon a rule *nisi* to set aside the verdict for the plaintiffs, and instead thereof to enter a nonsuit in an action wherein the said Colonial Bank of Australasia were the plaintiffs, and Thomas Cherry and John M'Dougall were the defendants; and also from a judgment of the court for the plaintiffs, upon demurrers to the defendants' fourth, fifth, and sixth pleas in the same action. The court refused to make the rule absolute, but reduced the amount of damages recovered by the plaintiffs.

The respondents were a banking corporation, carrying on business at Melbourne, and had branch banks at Matlock and Wood's Point, in the Colony of Victoria.

The appellants were two of the directors of the Loch Fyne Quartz Mining Company (a company registered under the Mining Companies Limited Liability Act 1864 (27 Vict. No. 228), engaged in mining for gold at the Loch Fyne Quartz Claim, near to Matlock, in the Wood's Point district.

An action was commenced by the respondents against the appellants in Feb. 1867 to recover 4127*l.* 18*s.* 5*d.*, being the amount paid by the bank on cheques drawn by Charles Ernest Clarke.

The declaration stated that in consideration that the plaintiffs, at the request of the defendants, would honour and pay, on account of the company, the cheques of Charles Ernest Clarke, the defendants promised that he was duly authorised by the said company to make cheques for them as their agent, and the plaintiffs alleged, that relying on such promise they did honour such cheques on account of the company, but that the said Charles Ernest Clarke was not authorised by the company to make the same. There were also money counts.

The defendants pleaded to the special count. 1. That they did not promise. 2. That the cheques were not honoured on account of the company. 3. That the said Charles Ernest Clarke did not make any cheques on account of the company. 4. That the promise was in the words and figures following:

The manager of the Colonial Bank of Australasia, Matlock.

Sir,—We have to inform you that we, as directors of the Loch Fyne Quartz Mining Company, have appointed Mr.

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Charles Ernest Clarke, to be the legal manager of the company, and have authorised him to draw cheques upon the account of the said company.—We remain, Sir, yours truly,

THOMAS CHERRY, } Directors Loch Fyne Q. M.
JOHN M'DOUGALL, } Company, Regd.

And that the said Thomas Cherry and John M'Dougall therein mentioned were the defendants, and the Colonial Bank of Australasia therein mentioned were the plaintiffs, and the said Charles Ernest Clarke was the person of the same name in the declaration mentioned. 5. That (repeating the several allegations in the fourth plea, with the exception of the words "And the Colonial Bank of Australasia mentioned therein are the plaintiffs") the said Colonial Bank of Australasia, Matlock, mentioned therein was a branch bank established at Matlock of the Colonial Bank of Australasia, the plaintiffs, who had their principal establishment in Melbourne, and several branch banks thereof throughout the colony. 6. That as to 4000*l.* parcel of the money claimed, cheques of the said Charles Ernest Clarke to that amount were drawn by him on the bank by way of overdraft, and there was not at the time of their being drawn any money standing to the credit of the company in the bank, out of which the same were payable. 7. To the money counts that they never were indebted.

The plaintiffs joined issue on the first, second, third, and last pleas, and demurred to the fourth, fifth, and sixth pleas. The defendants joined in demurrer.

The cause came on to be tried on the 4th June 1867, before Barry, J., and a jury, when the following facts were proved:—

That the appellants were directors of the Loch Fyne Gold Mining Company. That previous to the month of Dec. 1865 the company had opened an account with the respondents' branch bank at Matlock. That at the commencement and before the 4th of that month, the account of the company with the branch bank was overdrawn, of which the appellants had notice. That on the 4th of that month the appellants wrote and signed the letter set forth in the fourth plea, and sent it to the respondents.

That thereupon Clarke drew cheques, which were honoured by the bank, which increased the overdraft. That the account was then, by consent of the appellants and respondents, transferred to the branch bank at Wood's Point. That Clarke drew a cheque for 2336*l.* 19*s.* 3*d.* on the Wood's Point branch of the respondent's bank, in order to pay off the overdraft of the Loch Fyne Gold Mining Company at the Matlock branch. That the pass book was regularly furnished to Clarke; that he subsequently drew several cheques, which were all duly honoured, the amount of the overdraft being finally the amount claimed in the action. It was further proved that the appellants did not form a quorum of the directors of the Loch Fyne Gold Mining Company, and were not empowered to give Clarke the authority mentioned in their letter to the respondents, or to authorise him to draw cheques on account of the company.

Upon these facts the jury found a verdict for the plaintiffs for the full amount of their claim.

On the 27th June 1867 a rule *nisi* was obtained by the appellants to set aside the verdict obtained by the plaintiffs and to enter a nonsuit, on the following grounds:—First, that the authority given to Charles Ernest Clarke was a limited one, and that he was not justified in exceeding such authority. Secondly, that there was no evidence of any authority to Charles Ernest Clarke to pledge the credit of the company or overdraw, but only to draw on the funds of the company in the bank. Thirdly, that the authority given to Charles Ernest Clarke was not as stated in the declaration, but limited to drawing cheques on the plaintiffs' branch bank at Matlock. Fourthly, that there was no evidence of personal responsibility of the defendants. Fifthly, that there was no such promise as that declared on, and the letter produced, signed by the defendants, substantially varied from the allegation in the declaration, setting forth that the defendants promised the plaintiffs that Charles Ernest Clarke was authorised by the company to make drafts or cheques for them, as their agent. Sixthly, that there was no evidence of a promise by the defendants that Charles Ernest Clarke was duly authorised and empowered by the company to make drafts or cheques for them, as their agent. Seventhly, that there was no evidence of the consideration stated in the declaration. Eighthly, that there was no evidence to support the plaintiffs' issue on the second plea. Ninthly, that there was no evidence that Charles Ernest Clarke made any drafts or cheques on account of the company, or any drafts directed to the plaintiffs, as stated in the declaration,

On the 6th Sept. 1867 the Supreme Court gave judgment in favour of the respondents, on the points raised by the rule, but ordered the damages to be reduced by 2245*l.* 8*s.* 9*d.*, being a portion of the total advance of 4127*l.* 18*s.* 5*d.*, which had been overdrawn before the date of the said letter, the judgment being that the verdict should stand, and that the damages be reduced by the amount of 2245*l.* 8*s.* 9*d.*; on the demurrers the judgment was for the respondents. Final judgment was accordingly entered in favour of the respondents for 1882*l.* 9*s.* 8*d.* and costs.

Against this judgment the present appeal was brought.

Mellish, Q.C. (*Griffits* with him) for the appellants.—The action is founded on contract, but no contract was proved. The letter relied on contains no words of contract, stipulates for no consideration, and there was no intention on either side to make a contract. Assuming there is any contract, there is merly a contract that Clarke was manager and had power to draw such cheques as a manager might legally draw, and there is no contract that he had power to draw cheques for the purpose of borrowing money contrary to the provisions of the Colonial Statute (26 Vict. No. 228, s. 21). The letter says only that the directors had authorised Clarke to draw cheques, and not that the company had authorised him. The power of directors to bind the company by giving such an authority to Clarke was a matter of law not particularly within the knowledge of the appellants. The reasons for implying a warranty of authority in the case of contracts made by one person on behalf of another, do not extend to notifications of acts done by directors of a public company in the exercise of their own powers or supposed powers as directors. The letter does not purport to authorise Clarke to overdraw. There was no evidence that the alleged loss was consequent upon any contract contained in the letter, and the respondents would have sustained the same loss if the letter had been accurate. There was no evidence of any warranty of power to draw on the respondents except at their Matlock branch. The following cases were referred to:

Rashdall v. *Ford*, 14 L. T. Rep. N. S. 79; L. Rep. 2 Eq. 750;
Chambers v. *The Manchester and Milford Railway Company*, 10 L. T. Rep. N. S. 715; 5 B. & S. 588;
Wilson v. *Goodman*, 4 Hare 54;
Collen v. *Wright*, 8 E. & B. 647;
Behn v. *Burness*, 8 L. T. Rep. N. S. 207; 3 B. & S. 751;
Ricketts v. *Bennett*, 4 Q. B. 686;
Fuller v. *Wilson*, 3 Q. B. 58.

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Sir *J. B. Karslake*, Q.C. (*Macnamara* with him) for the respondents.—The appellants having incorrectly represented Clarke to be the duly authorised agent of the company, were personally liable to the bank for such damage as occurred to them through acting upon such representation. The sum for which the verdict now stands was money paid by the respondents for the appellants at their request and for their benefit. On the facts proved there was evidence to maintain the action, and the judgment on the hearing of the rule was right. The pleas demurred to afforded no answer to the action. The following cases and authorities were referred to:

Hughes v. *Græme*, 33 L. J., Q. B., 335;
Marzetti v. *Williams*, 1 B. & Ad. 415;
1 Taylor on Evidence, part 1, c. 3, s. 36;
Thomson v. *Davenport*, 2 Sm. L. C., 6th edit., 327 and notes;
Lewis v. *Nicholson*, 18 Q. B. 511;
Grant on Banking, 41.

Cur. adv. vult.

July 19.—Judgment was delivered by Sir JOSEPH NAPIER.—This was an action of assumpsit brought by the Colonial Bank of Australasia against the defendants who were two of the directors of the Loch Fyne Quartz Mining Company (Registered). The declaration states that in consideration that the plaintiffs, at the request of the defendants, would honour and pay on account of the Loch Fyne Quartz Mining Company, &c., the drafts or cheques of one Charles Ernest Clarke, to be directed to the plaintiffs, the defendants promised the plaintiffs that the said Charles Ernest Clarke was duly authorised and empowered by the said company to make drafts or cheques for them as their agent; and that the plaintiffs, relying on the promise of the defendants, did honour and pay on account of the said company, divers drafts or cheques of the said Charles Ernest Clarke, directed as aforesaid. It also states that Clarke was not authorised by the company to make the said drafts or cheques as their agent, by reason whereof the plaintiffs lost the amount advanced upon them. To this declaration defences were pleaded, in which the making of the promise by the defendant, the drawing of the cheques, and the payment on account of the company as alleged, were respectively denied, and issue was joined thereon. The statement of the consideration was not expressly traversed, nor the allegation that Clarke was not authorised by the company to make the drafts or cheques as their agent. There were other pleas pleaded by the defendants, which were demurred to on the part of the plaintiffs, but it was conceded that it was not necessary to notice these more particularly. It appears from the evidence given at the trial that, before the month of December 1865, the company had opened an account with the branch bank of the defendants at Matlock, and that cheques were from time to time drawn upon the bank by the then manager of the company, which were duly honoured and paid by the bank on account of the company. The account was overdrawn to the knowledge of the defendants at the time when they signed the following letter, and handed it to Clarke, who gave it to the manager of the bank; "The Manager for the Colonial Bank of Australasia, Matlock. Wood's Point, Dec. 4, 1865. Sir,—We have to inform you that we as directors of the Loch Fyne Quartz Mining Company have appointed Mr. Charles Ernest Clarke to be legal manager of the company, and have authorised him to draw cheques upon the account of the said company. We remain, &c., THOS. CHERRY, JOHN McDOUGALL, Directors, Loch Fyne Quartz Mining Company (Registered)." After this letter was deposited by Clarke with the manager of the bank, advances were continued by the bank on cheques drawn by Clarke, purporting to bind the company. These cheques were duly honoured by the bank on the faith of this letter. Under the 21st section of the Colonial Act the credit of the company could have been pledged for advances on overdrafts, provided the borrowing had been authorised by a majority of the shareholders, but not otherwise. No evidence was offered to prove that such authority was given. The case proceeded on the assumption that Clarke had not authority to bind the company by the cheques which he drew. There was no imputation of fraud in the transaction. It was contended by Mr. Mellish, that on the face of the letter it appeared that the defendants acted merely as directors of the company, and never meant to bind themselves otherwise than as directors; that, therefore, they cannot be made personally liable. If the question was, whether the defendants in fact intended to bind themselves personally, it might be admitted that such was not their intention. But it remains to be considered whether upon the view which the jury were entitled to take of the evidence, the law does not imply a warranty to the bank, on the part of the defendants, that Clarke had authority to bind the company so as to make them responsible to the bank for the advances on the cheques. In the case of *Downman* v. *Williams*, 7 Q. B. 111, Tindal, C. J., in delivering the judgment of the Court of Exchequer Chamber, states, that where a contract appears upon its legal construction to have been entered into by an agent on behalf of his principal, the only ground on which the agent could become personally liable thereon is that which has been stated by Story, J. in his commentaries on the law of agency (7th edit. p. 311, c. x., s. 264). The ground therein stated is said to be "a plain principle of justice; for every person so acting for another, by a natural if not by a necessary implication, holds himself out as having competent authority to do the act, and thereby draws the other party into his reciprocal engagement." According to the opinion of that eminent jurist, if a person represents himself as having authority to do an act when he has not, and the other side is drawn into a contract with him, and the contract becomes void for want of such authority, he is liable for the damage which may result to the party who confided in the representation, whether the party making it acted with a knowledge of its falsity or not. "In short," says Story, J. "he undertakes for the truth of his representation" (*ubi sup.* p. 312, note). This doctrine of an implied warranty in such cases seems to have met with the approval of the learned judges who decided the case of *Lewis* v. *Nicholson*, 18 Q. B. 511, 513, &c., although expressed with some reserve, as it was not necessary for them to decide the question. It became necessary to decide it in the case of *Collen* v. *Wright*, and the decision of the Court of Exchequer Chamber in that case (8 E. & B. 647) must be considered to have settled the law upon the subject, in conformity with the view of Story, J. The remedy by a special action, where there is fraud or deceit, is a distinct matter, upon which no question is made. It appears to their Lordships that there was evidence upon which it was open to the jury to find that the defendants, professing to act on behalf of the company, had led the plaintiffs to believe that Clarke had authority to draw cheques as the agent of the company, and thereby induced the bank to make advances on the cheques, on the supposition that, as between the bank and the company, the latter was bound. It can make no difference that the engagement into which the plaintiffs were thus drawn by the defendants has to be collected by inference from the evidence laid before the jury. When it has been ascertained, as a matter of fact, the legal effect is

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the same as if it had been express. The warranty which the law implies depends on the position of the parties, and on the nature and effect of the representation. The representation in this case was admitted on the record to be untrue. Their Lordships agree with the judges of the Supreme Court in thinking that, in this state of things, the law implies the warranty or undertaking on the part of the defendants, as stated in the declaration, and that there was no ground for entering a nonsuit. Their Lordships will therefore humbly recommend to Her Majesty that the judgment of the Supreme Court should be affirmed with costs.

Judgment affirmed.

Attorney for the appellants, *W. Thistlethwaite.*

Attorney for the respondents, *W. S. Paine.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Feb. 2 and April 25.

TAYLOR *v.* CHESTER.

Money handed to another for an immoral purpose—Action to recover it back—Maxim of "In pari delicto potior est conditio possidentis."

The law will not assist a party to recover back property which he has paid or handed over in pursuance of an illegal or immoral contract. Where, therefore, the plaintiff declared upon a bailment of the half of a 50l. bank-note, to which the defendant pleaded and justified the detention of the note as a security for payment of 20l. due from the plaintiff; to which the plaintiff replied that the alleged debt to the defendant was for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch to incite them to riotous, disorderly, and immoral conduct:

Held, that the maxim of "In pari delicto potior est conditio possidentis" applied, and that the plaintiff was not entitled to recover.

This was a demurrer to a replication. The declaration stated that in consideration that the plaintiff, at the request of the defendant, delivered to the defendant the half of a promissory-note of certain bankers for the sum of 50*l.*, to be safely kept and taken care of by the defendant, and to be redelivered by the defendant to the plaintiff on request, the defendant promised the plaintiff to safely keep and take care of the half note and redeliver the same to the plaintiff on request. The breach alleged was the non-delivery of the same to the plaintiff on request. There was a second count in detinue.

The defendant pleaded, first, the general issue.

Secondly, as a plea to the first count, that the alleged agreement was subject to the term or condition that the half note was to be kept by the defendant as a pledge or security for the payment of 20*l.* then due from the plaintiff to the defendant, and that the defendant received the half note for this purpose, and that the plaintiff would not pay the defendant the sum of 20*l.*, and that the defendant was prevented from performing her agreement by the neglect and default of the plaintiff.

The defendant pleaded a similar plea to the second count.

The plaintiff replied to both pleas that the alleged debts in respect of which the defendant justified the non-delivery and detention of the security claimed by the plaintiff, were due for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch, to incite them to riotous, disorderly, and immoral conduct, and for money knowingly lent for the purpose of being expended in riot and debauchery and immoral conduct in a brothel.

To this replication the defendant demurred.

Hopwood (*Holker*, Q. C. with him) appeared for the defendant in support of the demurrer.

Herschell (*Pope* with him) appeared *contra.*

The judgment of the court is so copious that it is unnecessary to give the arguments of counsel at length.

Cur. adv. vult.

April 25.—MELLOR, J.—On the trial before me at Manchester, the case of the plaintiff was, that the note had not been deposited at all with the defendant, but had been fraudulently taken and appropriated by her. The jury, however, did not adopt that view of the facts, but found that the note was deposited by way of security as alleged by the defendant, and they further found upon the evidence that the debt was incurred, and the money advanced as alleged in the plaintiff's replication to the special pleas. On these findings the verdict was entered for the defendant, with liberty to the plaintiff to move to enter the verdict for him for 50*l.*, to be reduced to nominal damages in case the note should be restored to the plaintiff. A rule was accordingly obtained to enter the verdict for the plaintiff on the ground that the jury had found all the issues tendered by the plaintiff in his favour. This rule and the demurrer to the replication came on together for argument at the sittings in banco after last Hilary Term before my brother Hannen and myself, and at the close of the argument we took time to consider our judgment. It was argued on the part of the defendant in showing cause against the rule, and in support of the demurrer to the special replication of the plaintiff, that upon the finding of the jury and the facts, as admitted by the demurrer, the plaintiff and defendant were "*in pari delicto*," and that therefore upon the whole record judgment must be entered for the defendant. On the part of the plaintiff it was urged that it was the defendant who was relying on the illegality of the transaction as an answer to a claim of the plaintiff founded on his ownership of the note, and his right to recover back the same, and many startling consequences were pointed out to us as likely to result from a decision that the plaintiff could not recover. We have fully considered the case, and are satisfied that the plaintiff cannot recover under the circumstances found by the jury, and admitted on the record. The maxim that "*In pari delicto potior est conditio possidentis*," is as thoroughly settled as any proposition of law can be. It is a maxim of law established not for the benefit of plaintiffs or defendants, but is founded on the principle of public policy which will not assist a plaintiff who has paid over money, or handed over property in pursuance of an illegal or immoral contract to recover it back; for the court will not assist an illegal transaction in any respect. Lord Ellenborough in *Edgar* v. *Fowler*, 3 East, 22; *Collins* v. *Blantin*, 2 Wils. 34; Lord Mansfield in *Holman* v. *Johnson*, Comp. 343.) The true test for determining whether or not the plaintiff and defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to

which he was himself a party: (*Simpson* v. *Bloss*, 7 Taunt. 246; *Fivaz* v. *Nicholls*, 2 C. B. 501, 512.) It is to be observed that in this case the illegality is not in a collateral matter as in the case of *Feret* v. *Still*, 15 C. B. 207, which was cited for the plaintiff, but is the direct result of the transaction upon which the deposit of the half note took place. Mr. Herschell's argument was based upon the hypothesis that, in spite of the findings of the jury, the plaintiff was entitled to recover by virtue of his property in the half note, and that it was the defendant alone who set up an immoral transaction as the answer to the plaintiff's claim. This argument appears to us to be founded upon an entirely erroneous view of the facts. The plaintiff no doubt was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for and money advanced to him by the defendant. Had the case rested there and no pleading raised the question of illegality, a valid pledge would have been created and a special property conferred upon the defendant in the half note, and the plaintiff could only have recovered by showing payment or a tender of the amount due. In order to get rid of the defence arising from the plea which set up an existing pledge of the half note, the plaintiff had recourse to the special replication in which he was obliged to set forth the immoral and illegal character of the contract upon which the half note had been deposited. It was therefore impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances the maxim "*In pari delicto potior est conditio possidentis*" clearly applies, and is decisive of the case. It would also appear, from the case of *Scarfe* v. *Morgan*, 4 M. & W. 281, per Parke, B., in delivering the judgment of the court, p. 282, that, notwithstanding the illegality of the transaction itself out of which the deposit in this case arose, the lien would exist, because the contract was executed, and the special property had passed by the delivery of the half-note to the defendant, and the maxim would apply. It is, however, difficult in the present case to determine it on the ground that the plaintiff could not recover without showing the true character of the deposit, and that being upon an illegal consideration, to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. It is not necessary to consider what might have been the effect of a tender of the amount for which the note was pledged, as there is nothing to raise any such question in this case. The result, therefore, will be that the verdict must stand for the defendant on the issues taken in the special pleas, and for the plaintiff on the issue taken on the replication; but as upon the whole record it is manifest that the plaintiff cannot recover, judgment will be entered for the defendant.

Judgment for the defendant.

Attorney for the plaintiff, *A. T. Evans*, Manchester.

Attorneys for the defendants, *Edwards*, *Layton*, and *Jaques*.

Thursday, Nov. 4.

SALTER *v.* WALKER.

Seduction—Relationship of master and servant—Plea of "not guilty"—Evidence of pecuniary means.

In an action for seduction, the plea of "not guilty" does not put in issue the relationship of master and servant. If, therefore, it is intended to dispute the existence of this relationship it must be specially pleaded.

Quære, whether in such an action evidence is admissible of the defendant's specific pecuniary means:

Held, however, that general evidence of his condition in life is unobjectionable.

This was an action for seduction tried at the last assizes for Devon, before Keating, J., when the jury returned a verdict for the plaintiff with 50*l.* damages, the learned judge having reserved to the defendant leave to move to enter a nonsuit or for a new trial, on the ground of the improper reception of evidence. The defendant pleaded "not guilty" only.

It appeared upon the trial that Mary, the eldest daughter of the plaintiff, carried on the business of a dressmaker, and that her mother (the plaintiff) and Sarah, the second daughter of the plaintiff, lived with her and assisted in the household duties. The house in which they lived was taken by the mother, but the rent and all the expenses were paid by the eldest daughter, who acted as the head of the family. There was no evidence to show any services performed for her mother by the second daughter Sarah, in respect of whose seduction the action was brought. This daughter having been debauched by the defendant, and having been delivered of a child, her mother brought the present action.

Prideaux, Q. C. now moved pursuant to leave as aforesaid. To sustain this action, the relationship of master and servant must exist. Here the plaintiff was herself in the capacity of a servant to her eldest daughter, and the second daughter, Sarah, also was serving her sister and not her mother. In *Manley* v. *Field*, 29 L. J. 79, C. P., it was held that, in order to support an action by a father for the seduction of his daughter, it is necessary that the relationship of master and servant should subsist between them at the time of the seduction, and the fact that the daughter rendered services in the sense of conferring benefits upon the father is not, of itself, sufficient to constitute such relationship. In that case the defendant pleaded, 1st. Not guilty; 2nd. That the daughter was not the servant of the plaintiff. In giving judgment, Erle, C. J. said: "I think the nonsuit was quite right. There was no evidence that the daughter was the servant of the plaintiff in the sense in which the word 'servant' is used in this declaration. She was herself the head of an establishment of her own, and though she conferred benefits on her father's family, she was not a subordinate member of it, and did not render the plaintiff services for the loss of which this action can be maintained." So, too, Williams, J. says: "I am of the same opinion, and however I may regret that the maintenance of this action should depend upon the question of service or no service, I must abide by the law which makes the relationship of master and servant the foundation of it." In *Grinnell* v. *Wells*, 7 Man. & Gr. 1033, Tindall, C. J. says, "The foundation of an action by the father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed from the earliest time hitherto not upon the seduction itself which is a wrongful act of the defendant, but upon the loss of service of the daughter, in which sense he is supposed to have a legal right or interest." In *Eager* v. *Grimwood*, 1 Ex. 61, it was also held that an action for seduction cannot be maintained without some proof of a loss of service thereby. Therefore where it appeared that the defendant had debauched the plaintiff's daughter, and that she was delivered of a child, but the jury found that the child was not the defendant's, it was held that they were rightly directed to find a verdict for the defendant. [HANNEN, J.—If the relationship of master and servant exists, the inability to perform services must be assumed.] Here it was in evidence that the daughter was not the servant of her mother, for

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she was really the servant of her elder sister. [COCKBURN, C. J.—It has been decided that if you wish to put in issue the relationship of master and servant, you must do so by plea, and that it is not sufficient for that purpose to plead the general issue. The case of *Torrence* v. *Gibbins*, 5 Q B. 297, is an authority for that.] The defence certainly may be pleaded, but as a loss of service must be proved under the plea of the general issue, it would seem that if it turns out that there is no relationship of master and servant there can be no loss of service. This objection having been taken at the trial, the learned judge was asked to amend by adding such a plea, which he refused to do, and in so refusing, it is submitted that he was wrong. In addition to this, the learned judge improperly admitted evidence of the defendant's circumstances in life. Questions were asked as to the business he was carrying on, and as to his keeping servants and a horse and trap, &c.: (*James* v. *Biddington*, 6 C. & P. 589.)

COCKBURN, C. J.—I am of opinion that there should be no rule. In order to let in evidence of the non-existence of the relationship of master and servant that fact should be specially pleaded. *Torrence* v. *Gibbins* is an express authority upon the point, and is a decision binding upon us. It appears, however, that the learned judge at the trial was applied to for leave to add a plea to that effect, and he refused permission, and I think very properly, for when you come to look at the matter in its real substance it will appear that the relationship of master and servant is a mere inducement, and that the real question is the loss of service. If therefore it is intended to traverse the relationship it must be put on record. I think the learned judge was quite right in refusing to add such a plea since it was a mere technicality. The real question was whether or not the daughter became pregnant, and so became a burden. The other question is as to whether it was right to allow evidence to be given of the means of the defendant to pay damages. It is really not necessary in this case to decide whether or not such evidence would have been admissible, for, according to the established practice such general evidence as was given in this case is always admitted. There was no evidence given of precise pecuniary means. It was merely general evidence of the defendant's condition in life.

The other learned judges concurred.

Rule refused.

Attorneys: *Davy; Wellington.*

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Thursday, Nov. 4.

GODWIN v. FRANCIS.

Agreement in writing—A telegram—The 4th sect. of Statute of Frauds (29 *Car.* 2, c. 3).

A valid contract for the sale of lands may be made by means of a telegraphic message.

The defendant held himself out to the plaintiff as having authority to sell an estate on behalf of the owners. The plaintiff, by letter, offered a price for it. The defendant gave and signed written instructions to a telegraphic company to send a message to the plaintiff accepting his offer. The company accordingly transmitted the message by their wire, and delivered a copy of it as from the plaintiff to the defendant, and signed by their clerk, to the defendant:

Held, that this message, coupled with the plaintiff's letter, constituted a valid contract within the Statute of Frauds (29 *Car.* 2, c. 3).

The declaration stated that the defendant, by warranting the plaintiff that he was authorised by certain others, to wit, &c., who were interested together with him in a certain estate known as, &c., to sell the same to the plaintiff for a certain sum, to wit, 10,500*l.*, agreed with the plaintiff as for himself and the said others, and procured the plaintiff to agree as with himself, the defendant and the said others, that the defendant and the said others should sell to the plaintiff, and the plaintiff, should purchase from the defendant and the said others, the said estate for the sum of 10,500*l.*, and the plaintiff did all things necessary, &c. Yet the defendant was not authorised by the said others to sell, &c., whereby, &c.

The defendant pleaded, 1, a denial of the warranty; 2, a denial that he agreed or procured the plaintiff to agree; and 3, that at the time, &c. he had authority to sell, &c.

The case was tried at Salisbury, at the last summer assizes, before Lush, J. It appeared that the defendant had held himself out to the plaintiff as having authority to sell an estate, and thereupon a correspondence ensued between the plaintiff and the defendant, in the course of which the plaintiff offered to buy the estate for 10,500*l.* In answer to this offer, the defendant sent the following message to the plaintiff: "From B. Francis to Chas. Godwin. Your offer for the L. estate is accepted. Confirm yours by next post" The defendant had taken the usual course in sending this message, having written it out and signed it, and the telegraphic company delivered to the plaintiff a verbatim copy of the message, signed by their clerk. It afterwards turned out that the defendant had not power to sell the estate for 10,500*l.*, and the proper owners of the estate repudiated the bargain that he had made. The plaintiff accordingly brought this action against the defendant for his breach of contract. It resulted in a verdict for the plaintiff for 726*l.* 9*s*, leave being reserved to the defendant to move to enter a nonsuit, on the ground that the defendant had not entered into any agreement with the plaintiff for the sale of the estate that was valid within the Statute of Frauds.

Lopes, Q. C. (*Bowen* with him), moved accordingly.—No agreement in writing was signed by the defendant himself. It is true that he signed his name to the instructions given by him to the telegraph company, but the paper to which he so signed his name was a contract between him and the company to send a message, and was not a contract between him and the plaintiff. The signature, to be binding, must be intended to govern the contract, and this had no such intention. Then, again, the copy of the message that was delivered by the telegraph clerk to the plaintiff may have been signed by the clerk, but the clerk was not the "lawfully authorised" agent of the defendant, nor did he assume to sign as such. Then, again, the defendant only held himself out as the agent for the sale of this estate, and as *delegatus non potest delegare*, the signature of the clerk was certainly inoperative. [BOVILL, C. J.—That is hardly so. If the defendant had had a general authority to sell for what he thought fit, he could not delegate that authority to another to sell for what that other might think fit. But the case is different here. WILLES, J.—What he did was to give authority to the telegraph company, and the action is brought against him for giving that authority without himself possessing it.] He cited

Pitts v. *Beckett*, 13 M. & W. 743.

BOVILL, C. J.—I am of opinion that there should be no rule. This action is brought for a breach of warranty. The declaration alleges that the defen-

dant represented himself to the plaintiff as having authority to sell an estate, whereas in point of fact he had no such authority. In order to maintain the action it lies on the plaintiff to show that the defendant contracted with him for the sale of this estate in such a way that, if he had had authority from the vendors to act on their behalf, the vendors would have been bound by his acts. This being so, it is objected on behalf of the defendant that no contract within the Statute of Frauds was entered into between the plaintiff and the defendant for the sale of this estate. It appears that certain correspondence took place between the plaintiff and the defendant in which the sum of 10,500*l.* was mentioned as the price that the plaintiff was ready to give for the estate. Under these circumstances the defendant telegraphs to the plaintiff to tell him that he accepts this offer. We must assume that at the trial both the original instructions for the telegram, furnished by the defendant to the telegraph company, and the copy of the telegraphic message, actually delivered by the company's servant to the plaintiff, were put in evidence. This being the case, the point was reserved at the trial, whether these documents constituted an agreement or memorandum of agreement in writing within the 4th section of the Statute of Frauds. There is no question as to the terms of the proposed contract being in writing, or as to the telegram referring to the terms which had been proposed in the letters that had passed between the parties. We have then first of all the instructions given by the defendant to the telegraph company. These were signed by him. They directed the company to do what is usual in such cases, to transmit the message by the wire, copy it out, and deliver it to the person to whom it is addressed. We have it then that the company is lawfully authorised by the defendant to write out this message and deliver it to the plaintiff, as from the defendant, and the company does this by means of its servants. I am of opinion that this constituted a binding contract between the parties. Independently of all other circumstances, as the telegram was written out and signed by the telegraph clerk acting under the written instructions of the defendants, that is certainly sufficient to satisfy the statute. Under these circumstances, I am of opinion that there should be no rule.

WILLES, J.—I am of the same opinion. The question is, whether there was a sufficient contract to bind the vendors of the estate, assuming that the defendant had authority from them to sell? It appears that the terms of the proposed contract were fully set forth in the correspondence that passed between the plaintiff and the defendant prior to the sending of the telegram. Instructions for the telegraphic message were signed by the defendant and left by him at the office of the telegraph company. This telegraphic message purported to bind the owners of the estate to sell it to the plaintiff on the terms mentioned in the correspondence that had taken place between the plaintiff and the defendant. A copy of this message was sent by the company to the plaintiff, authenticated by the company in the usual way, and signed by their clerk. If this same message had been sent by the plaintiff by letter through the post, there would be no doubt about the matter. Why, then, should there be in this case? The message is sufficiently stamped with the character of part of the correspondence to make it part of an agreement by which both parties are bound. Justice must be halt, indeed, if it cannot adapt itself to the altered circumstances of the day.

BRETT, J.—We must take it that both the instructions for the telegram and the telegram itself were put in evidence at the trial. This being so, the substance of this action is, that the defendant entered into a contract with the plaintiff so as to bind certain parties to sell an estate to the plaintiff, the defendant warranting that he had authority from those parties to sell the estate, and that this contract could not be enforced against these proposed vendors, because the defendant had no authority to bind them. It is then objected, on behalf of the defendant, that he entered into no such contract. The only evidence of the contract is the telegram, and the instructions for the same, and it is objected that this is not sufficient to satisfy the Statute of Frauds. The signature of the defendant on the instructions for the telegraphic message is not the signature to a contract, it is only mandatory to the telegraph company. But we must take it as against the defendant that he intended this signature as his signature to a contract, and what he did was to deposit a message with his signature at the telegraph company's office, with instructions to the company to deal with it in the ordinary course of their business. The company accordingly transmitted and delivered a copy of the message, signed by one of its clerks, to the plaintiff. Under these circumstances it appears to me that the defendant had made the company his agent to sign this message for him, and as it was signed by the company's servant on behalf of the defendant, nothing more is required to make a binding contract. If, then, the defendant had no authority from the owners of the estate to enter into this contract, the action will well lie against him.

Rule refused.

Attorney for the defendant, *C. T. Foster.*

Nov. 10 *and* 14.

VIVIAN *v.* THE MERSEY DOCKS AND HARBOUR BOARD.

Ship sunk in the port of Liverpool—Expenses of removing obstruction—Liability of owners of cargo.

By the Mersey Dock Acts Consolidation Act 1858 (21 *&* 22 *Vict. c. xcii.*) *s.* 59, *the defendants are empowered to destroy wrecks or vessels sunk within the port of Liverpool that are obstructions to navigation; and they may also remove any stone, timbers, anchors, or other obstructions or impediments to such navigation that may be found or arise therein; and in case the master or owner of such vessel or other obstruction shall refuse or neglect to pay the charge of removing the same, the board may sell the same, and out of the proceeds of such sale, retain the expenses incurred in raising, destroying, and removing such wrecks or other obstruction, rendering the overplus to the person entitled to the same:*

Held, that if the cargo in a sunken ship be included in the terms of this section (of which the court expressed some doubt), the power to detain for the expense of removing an obstruction is to be read distributively, and the owners of cargo, the plaintiffs in this case, could be liable only for the cost of raising their goods, and not of destroying the hull of the ship.

This was an action which was commenced on 17th June 1868, and was brought by the plaintiffs against the defendants to recover damages for the refusal of the defendants to deliver up to the plaintiffs certain goods of the plaintiffs', which formed part of the cargo of a vessel called the *Swansea*, and by the consent of the parties and by order the following case was stated for the opinion of the court without pleadings:

On the 21st Dec. 1867 the steamship *Swansea* came into collision with a steamer called the *Mag-*

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netic, and was sunk in the Mersey, within the port of Liverpool, and was, and continued to be, when so sunk, an obstruction to the safe and convenient navigation of the port.

The *Swansea*, at the time she was sunk, belonged to Mr. John Bacon, of Liverpool, and had on board a cargo consisting, amongst other goods, of silver and copper ores, and barilla, a portion of which belonged to the plaintiffs.

The defendants are a corporate body, constituted under the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii, Local Act), to which either party is to be at liberty to refer on the argument of this case.

By sect. 59 of the said statute it is provided:

The board may raise, destroy, remove, and take away any wrecks of vessels, and any vessels that shall be sunk in any dock or elsewhere within the port of Liverpool, or any of the sea channels leading thereto, and be in their judgment an obstruction to the safe and convenient navigation or use thereof, and may also remove any stone, timbers, anchors, or other obstructions or impediments to such navigation that may be found or arise therein; and in case the master or owner of such vessel or other obstruction shall refuse or neglect to pay the charge of removing the same for the space of three days after demand, or in case any such master or owner cannot be found, then the board may sell the same, and out of the proceeds of such sale retain the expenses incurred in raising, destroying, and removing such wrecks or other obstructions, and the charges of such detainer and sale, tendering the overplus to the person entitled to the same; and if from such proceeds sufficient to pay all the aforesaid charges shall not be recovered, then the deficiency shall be recoverable from the master or owner of such vessel or articles so raised, destroyed, or removed, in like manner as penalties are by this Act authorised to be recovered.

Shortly after the sinking of the *Swansea* arrangements were made on the part of the plaintiffs with the Liverpool Steamtug Company for the recovery of their goods by removing and raising them from the wreck of the *Swansea*. Under these arrangements, 218 bags of barilla being a portion of the plaintiffs' goods, were raised and landed, and a further portion might have been raised and recovered under the aforesaid arrangements, when the defendants took possession of the wreck, and claimed the exclusive right of dealing with the *Swansea* and the cargo on board of her.

The said 218 bags of barilla have been delivered to the plaintiffs.

The defendants so intervened and took possession of the wreck as after mentioned with a view of removing with all possible despatch the obstruction which the wreck of the *Swansea* caused to the safe and convenient navigation of the port of Liverpool.

In answer to the complaints of the plaintiffs with reference to these proceedings of the defendants, the following letter was written and sent to the plaintiffs on behalf of the defendants:

Marine Surveyor's Office, 28th Dec. 1867.
Swansea.

Dear Sir,—Referring to the subject of our interview this morning, I beg to inform you that, after full consideration of the circumstances of the case, I feel that I cannot properly delay any longer the making of such arrangements as may be necessary for the removal or destruction of the wreck. Referring to your mention of the Messrs. Vivian, I beg to say that I cannot regard their interest in the matter. The cargo as one of the incidents of the wreck is liable along with the rest for the expenses of removal. Incidentally to such removal, I may find it necessary to raise some part of the cargo in the first instance, and if any persons claiming to act for owners or consignees of cargo wish to interfere, they must furnish me with a sufficient indemnity to cover all expenses that I may eventually incur in the removal or destruction of the hull.—Yours truly,

GRAHAM H. HILL.

The Messrs. Vivian mentioned in this letter are the plaintiffs. The indemnity mentioned in this letter was not given by the plaintiffs.

A few days after, the defendants took possession of the wreck of the *Swansea* as aforementioned. They ordered a survey to be held, and as it was found that the sand had banked round the vessel to such an extent that it was impossible to get chains under her so as to raise her, the defendants determined to lighten her of some of her cargo. Accordingly, on or about the 1st Jan. 1868, the defendants proceeded to remove portions of the cargo from the wreck and to bring them ashore, and continued doing so until the 22nd day of that month.

Between the 1st and the 22nd Jan. the defendants raised and landed, as aforementioned, a certain portion of the plaintiffs' goods, namely the goods which are the subject matter of this action; and the expenses which they incurred in so doing amounted to 294*l.* 14*s.*

On the 22nd Jan. the tides no longer suited for the raising of cargo, on account of its being low water at night. On the 30th Jan. the tide again answered, but it was found that the hatchway, from which the goods had been previously removed, was filled up with sand, and the defendants, who expected that if they opened another hatchway it would likewise in a very short time fill with sand, resolved to abandon, and did abandon all attempts to remove and raise any more cargo.

After having wholly abandoned as aforementioned all attempts to remove any more cargo, the defendants proceeded, in Feb. 1868, to make attempts to raise the wreck by means of chains which were placed under the vessel, and these attempts were continued until the following July, but met with no success.

In the month of May 1868 the plaintiffs applied to the defendants for the delivery of such of their goods as had been raised and landed as aforementioned by the defendants between the 1st and 22nd Jan., and at the same time tendered to the defendants the sum of 294*l.* 14*s.*, being the expenses which the defendants had incurred as aforementioned, in raising and landing those goods.

The defendants refused this tender, and also refused to deliver the said goods to the plaintiffs, but made to them the proposal contained in the following letter:

Mersey Docks and Harbour Board.
Marine Surveyor's Office, Liverpool, 4th May, 1868.
Wreck *Swansea.*

Sir,—Your letter of the 7th March, offering to pay charges on certain cargo removed from the wreck of the steamer *Swansea*, sunk in the channel of the Mersey, or to guarantee whatever may be found to be due (together with the several representations made to me on your behalf by Capt. Edgell), has been considered by the Marine Committee of the Mersey Docks and Harbour Board, and I am instructed to reply thereto.

Your letter states generally your authorisation as representative of owners and underwriters of Swansea cargo, without specifying the particulars of cargo subject to such authority, therefore it is assumed, subject to your correction, that you represent the owner's interest in the whole of the cargo shipped for the Messrs. Vivian, which, according to the best information I can obtain was nearly as follows:—

	Tons	Cwts.
Copper ore in bulk	285	0
Do. barilla in bags	29	0
Silver ore	5	18
Total	319	18

And of this cargo the portion removed from the wreck, and now in the custody of the board is,

Copper ore in bulk, estimated at	0	1¾
Do. barilla in bags, do.	16	12
Silver ore do.	3	5
Total estimated	19	18¾

So that of the whole cargo included in your ownership only about 1-15th has been removed, and 14-15ths still remain as an obstruction in the channel.

Under these circumstances it is impossible at present to render account of what may be found to be due from the owners of the cargo, but as further proceedings must necessarily be tedious, the marine committee have instructed me to say that they are anxious to meet as far as possible the wishes of the owners, and that, provided public funds intrusted to their administration are properly protected, they will not object to the delivery up to you of a portion of cargo in their custody. By inquiry of the agent of Messrs. Vivian and others interested, the value of the Swansea cargo has been approximately ascertained, and it appears

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that the portion now in custody of the board for which you claim is worth nearly 1200*l.*

The portion of expenses already incurred, calculated ratably according to that value, amounts to 294*l.* 14*s.*, or in round numbers 300*l.*, and the committee are of opinion that if in addition to that sum a like amount were paid down to cover the risk of deficiency in removing and realising the remainder of the property which you claim to represent, the justice of the case would be met; and upon such payment they would be willing to release from all lien the cargo now in the board's custody; the proposed sum of 600*l.* to be carried to account to be ultimately dealt with according as the final result may show either surplus or deficiency.—I am, Sir, your obedient servant,

GRAHAM H. HILL, Marine Surveyor.

The plaintiffs did not accept this proposal.

On the 26th May 1868 Mr. Squarey, the solicitor of the defendants, wrote and sent to the solicitors of the plaintiffs the following letter:

Mersey Docks and Harbour Board.
Solicitor's Department, Liverpool, 26th May 1868.
Copper, *Ex Swansea.*

Dear Sirs,—In this case the board removed from the sunken hull of the *Swansea* a quantity of ore, of which a portion is, as I am informed, the property of Messrs. Vivian. The board are still working upon the hull, which is believed still to contain a further quantity of ore also belonging to Messrs. Vivian, forming part of the same shipment with that which was removed from the hull in the first instance, and it is quite possible that further quantities of Messrs. Vivian's ore may be removed from the hull. Under these circumstances, I submit that the operation must be regarded as still pending, and that the board cannot reasonably be required to give up the portion already removed until they have finished the work, and are in a position to render a statement of the entire charges properly applicable to the cargo removed.

You will, I think, agree with me that where the process of removing cargo is going on day by day, it would not be reasonable that the owner should, at the end of any day, be able to come to the board and say, "Here is the money you have spent to-day in removing this particular bit of my cargo, which is very valuable; give it to me," when on the following day the cargo removed might not be worth half the sum expended in getting it. I will admit that a tender of 300*l.* was made to the marine surveyor of the board in respect of the expenses incurred in removing a portion of Messrs. Vivian's cargo which had been obtained up to that time. If you determine to sue, yor may issue your writ against the Mersey Docks and Harbour Board, and send it to me.—Yours truly A. T. SQUAREY.

Messrs. Waltons and Bubb, Bucklersbury, London.

All the attempts which were made as aforesaid between February and July 1868 to raise the wreck by means of chains proved wholly ineffectual.

Between the 22nd Jan. and the 13th July 1868 no cargo whatsoever was raised by the defendants. In fact, they did not during that time make any attempt, or contemplate making any attempt, to remove from the wreck, or raise separate from the wreck, any goods whatsoever, and no inference to the contrary is to be drawn from the afore-mentioned letter of the 26th May 1868.

In July 1868 the attempts to raise the *Swansea* by means of chains having wholly failed, the defendants determined to blow up the wreck, and accordingly commenced blasting operations on the 13th July 1868. These operations were continued as the weather and tides permitted, until the 9th of the following November, by which time the whole of the wreck including cargo was blown up, with the exception of certain goods which were during the blasting operations removed from the vessel as hereinafter mentioned.

During the aforesaid blasting operations, as parts of the vessel were blown up, and as portions of the cargo on board became exposed, such goods as could be readily got at were removed from the vessel and brought ashore. These goods, amounting in value to about 212*l.*, included some of the plaintiff's goods, which, however, are not the subject-matter of this action. The whole of the expenses incurred by the defendants in blowing up and removing the wreck of the vessel and cargo amounted to 4485*l.* 12*s.* 10*d.* No part of this expense was incurred separately or specifically in and about the recovery of the goods which were brought ashore during the blasting operations; but if the defendants had not saved these goods by removing them from the *Swansea* and bringing them ashore, the total expenses incurred by them as aforementioned would have been less than the said sum of 4485*l.* 12*s.* 10*d.* by a sum of about 40*l.* or 50*l.*

On the 20th Nov. 1868, after the whole of the wreck had been blown up and removed as aforementioned, the defendants wrote and sent the following letter to J. Bacon, Esq., the owner of *Swansea:*

Marine Surveyor's Office, Liverpool,
20th Nov. 1868.

Sir,—I beg to inform you that subsequently to the notice which I gave you on the 21st Dec. 1867, of the danger caused to navigation by the sinking of your steamer *Swansea* in the Crosby Channel; as no steps were taken by yourself for the removal of the obstructions, the water bailiff of the Mersey Docks and Harbour Board proceeded under my direction, and with the sanction of the commissioners for the Mersey Conservancy, with the operations necessary for the safety of navigation. These proceedings have now been completed by the total destruction of the vessel.

For the charges incurred in abating this obstruction to the navigation of the Mersey, the owners are liable to this board.

The charges incurred, including an estimated per centage to be paid to the Liverpool Steam Tug Company, and the value, when ascertained, of a quantity of ore saved from the wreck, amount to 456*l.* 15*s* 9*d*, which has been reduced by a payment made by the underwriters of a part of the cargo on a cask of silver ore, and by sale of some old materials recovered from the wreck, to 4515*l.* 5*s.* 8*d.*

A tender has also been made by owners of the greater part of the cargo saved of salvage on the said cargo to the amount of 300*l.*, by which the balance is reduced to 4215*l.* 5*s.* 8*d.*

I may add for your information that this board has claimed to hold the whole of the cargo saved against the entire charge incurred, but the parties interested in such cargo are contending that cargo is only liable for expenses actually incurred in raising it, and not for expenses incurred on the wreck of the vessel.

This question is now in course of decision; and if the position taken by the board is sustained, the sum payable by you will be reduced by the nett proceeds of the cargo saved.

The value of the cargo involved in the question to which I have referred, may be estimated at 1000*l.*, leaving 3215*l.* 5*s.* 8*d.* which will in any case be payable by you to the board.

I have, therefore, to request that this amount may be paid at your convenience to the treasurer, leaving the remainder of the claim open pending the result of the proceedings in respect of the cargo.

Besides the cargo above referred to, chain cable broken in pieces about ninety fathoms, three anchors, and some other articles of trifling value, estimated to be worth altogether about 35*l.*, are lying at the Toxteth Dock, and will be given up to you on your payment of the sum now due and demanded, but otherwise will be sold; the amount credited to the wreck after three days from the date of this notice.—Your obedient servant, GRAHAM H. HILL,

J. Bacon, Esq. Marine Surveyor.

It is agreed that the court shall have power to draw all such inferences of fact as a jury ought to have drawn.

The question for the opinion of the court is, whether the defendants were entitled, under the powers conferred upon them by the said Mersey Docks Acts Consolidation Act, to refuse to deliver to the plaintiffs the said goods of the plaintiffs which were raised and landed as aforementioned between the 1st and 22nd Jan. 1868.

Sir *G. Honyman*, Q. C. (with him *J. C. Mathew*), argued for the plaintiffs.—The point in dispute between the parties turns entirely upon the 59th section of the Mersey Docks Act, and in that section no power is given to the board to raise the cargo at the expense of the owners of cargo. It may be that the power to remove obstructions authorises the board to raise the cargo in the ship, but the expense of getting it out must by that section come from the proceeds of the vessel. Here the plaintiffs were willing to raise their cargo themselves, or to pay the defendants for doing it, and the amount tendered was sufficient to cover any amount for which they might have been liable for salvage.

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Quain, Q. C. (with him *Maclachlan*) for the defendants.—The objects of the section are two, first, to give power to the board to remove obstructions to navigation; secondly, to recoup the board for their expenses in so doing. By the two cases, *Brown* v. *Mallett*, 5 C. B., 599, and *White* v. *Crisp*, 10 Ex. 312, the liability for injury occasioned by a sunken ship is devolved upon the owner; in this particular port a duty is imposed upon the board to prevent any injury from being caused by such obstructions. The word "wrecks" in the section must mean more than the hulk of the ship; it includes the cargo also. "Wreck of the sea in legal understanding is applied to such goods as after shipwreck at sea are by the sea cast up on the land." Coke, 2nd Inst. 167. The word obstruction throughout the section includes cargo as well as ship.

Honyman, in reply, referred to the 326th and 328th sections of the Act, which give penalties for not removing obstructions within three months.

Nov. 11.—BOVILL, C.J.—In this case, which was argued yesterday, I am of opinion that the plaintiffs are entitled to our judgment. The question argued was whether the defendants, the Mersey Docks and Harbour Board, were entitled to refuse to deliver to the plaintiffs the goods belonging to them, which the defendants had raised from the *Swansea*, a ship which had sunk in the Mersey and become an obstruction to the navigation. The goods were detained by the defendants as security for the expenses incurred by them, not only in raising the cargo, but also in destroying the ship. I am of opinion that the defendants were not entitled so to refuse to give up the plaintiffs' goods. The case was argued entirely upon the construction of the 59th section of the Mersey Docks Consolidation Act 1858, and it was contended that under and by force of that section the defendants were entitled to a lien upon the cargo saved, for the expenses not only of recovering the cargo, but also of recovering or destroying the ship. No doubt there is considerable difficulty in interpreting the section so as to make the different parts of it consistent, but there is nothing in it, from beginning to end, in my opinion, to support the argument of the defendants. Assuming they are right in their argument, that cargo is included in the first branch of the section, and the board has authority to remove cargo which is an obstruction or impediment to the navigation, it is not necessary to hold that the board are entitled to detain and sell the cargo to pay the expenses of removing or destroying the whole obstruction. I think those expenses, if the owner of cargo be liable for them at all, must be limited to the expenses of raising the cargo itself. The section was probably framed with some relation to the general law; it seems to refer to vessels and obtructions in a portion of the navigation where there would be some impediment created to that navigation, and where, consequently, there would be some means of removing the impediment. A vessel, therefore, may well be in a position in which the owners might exercise control, and be liable, in accordance with the cases in this court and the Exchequer, to which reference has been made, *Brown* v. *Mallett*, and *White* v. *Crisp*, which decided that the owner of a sunken ship is liable for the injuries she may cause other ships, if he continues in possession and control of his ship; and with regard to the cargo, we have to consider the right which is frequently exercised against the owners, viz., the claim for salvage; this, however, is covered by the sum of money which has been tendered by the plaintiffs and refused by the defendants. Many arguments were brought before us to establish that "other obstructions or impediments to navigation" included cargo sunk in ships. Without expressing any opinion on this point, but assuming that cargo is within the meaning of this part of the section, it seems to me that in any view the expenses for which the owner of cargo is liable should be confined to the cost of raising the cargo. I am of opinion, therefore, that our judgment should be in favour of the plaintiffs.

WILLES, J.—I am of the same opinion. The plaintiffs insisted that cargo was not within the terms of the section at all, but if they were wrong in that they further maintained that at all events the power given to the board to sell and detain must be read against the owner of the cargo only so far as the board incurred expenses in raising the cargo itself; and that the expenses of raising or destroying the ship, after the cargo had been recovered, could not be obtained from the owner of cargo. On the other hand, two propositions were necessarily contended for by the defendants; first, that cargo came within the terms of the section; and secondly, that the power to sell and detain was general against all owners of ship and cargo for the removal of the whole obstruction. But even if we treat the ship and cargo as one obstruction, so as to create what we may call without pedantry a *solidarité* between all the owners of ship and cargo, yet it does not follow that the defendants' contention is right, for the plaintiffs who are owners of cargo here offered to pay the expenses of raising their goods, but the defendants refused to give up the cargo without receiving from the plaintiffs the expenses of raising or destroying the ship. Assuming the section to refer to cargo, and if not there is immediately an end of the defendants' case, I think the power to detain for expense of removing obstructions should be read distributively, and the plaintiffs are liable only for the cost of raising their goods, and upon the payment of that cost should be entitled to their property. If this be the true construction of the section, I am of opinion that our judgment should be entered for the plaintiffs.

KEATING, J.—I am entirely of the same opinion. No doubt there is some difficulty in construing the section, but it is unnecessary to decide the main question raised, for assuming, with the defendants, that cargo is within the section, the power to detain the cargo would be limited to a lien for the expense of raising the cargo only. Mr. Quain suggested a difficulty which might arise if there were a variety of owners of cargo; no doubt it might be a complicated matter to distribute the expenses, but it would not present difficulties greater than others which are frequently overcome by public staters in the ordinary proceedings of settling contributions. This, therefore, can be no objection to the conclusion we have arrived at, which seems to me to be in accordance with the equitable view of the case.

BRETT, J.—I should be very sorry to come to a decision which should limit the board's control over the navigation of the Mersey, because I believe they have always exercised their powers for the benefit of the public. It may be difficult to see how cargo is within the terms of the section at all, but it is impossible to hold with the defendants that it is included in the latter part of the section. Besides being in accordance with the words of the Act, it seems to me that the construction we put is the most equitable way of dealing with the matter.

Judgment for plaintiffs.

Attorneys for plaintiffs, *Waltons, Bubb*, and *Walton*.

Attorneys for defendants, *Gregory, Rowcliffe*, and *Rawle*, for *A. T. Squarey*, Liverpool.

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COURT OF EXCHEQUER.

Reported by H. Leigh and E. Lumley, Esqrs., Barristers-at-Law.

Saturday, Nov. 6.

Luckin v. Hamlyn.

Bill of sale—17 & 18 Vict. c. 36—Occupation—Sufficient description of.

The "occupation" of the person making or giving a bill of sale within the 1st section of the 17 & 18 Vict. c. 36, means the ordinary business or calling in life of such person, by reference to which he may be identified:

Held, therefore, that a woman who, at the time of giving a bill of sale, carried on a farm, which had belonged to her deceased husband, merely as his executrix, and not with a view to taking permanently to it, and had no other occupation, need not be described as a "farmer" in the affidavit filed under 17 & 18 Vict. c. 36, s. 1, but was sufficiently described as a "widow."

This was an interpleader issue between the plaintiff, the assignee under a bill of sale, and an execution creditor. At the trial the verdict was entered for the plaintiff, subject to leave to move to enter it for the defendant, on the ground that the maker of the bill of sale had been insufficiently described in the affidavit required by 17 & 18 Vict. c. 36, s. 1 (The Act for Preventing Frauds upon Creditors by secret Bills of Sale of Personal Chattels).

That section enacts that every bill of sale of personal chattels, &c., and every schedule or inventory annexed thereto, or therein referred to, or a true copy thereof and of every attestation of the execution thereof shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale, otherwise, &c.

The maker of the bill of sale was described as a "widow," and the contention of the defendant was that she should have been described as a "farmer." It appeared that her husband and she had been master and matron of a workhouse, and that three months before her husband's death, which occurred in 1868, he had taken a farm. The widow was left by his will executrix and universal legatee. The bill of sale was made to the plaintiff, who had supplied the widow with goods, in Jan. 1869.

It appeared from the evidence of the widow herself and her bailiff, that she had come to the farm, which was a little distance from the place where she lived, at intervals of about a fortnight, and stayed there a day or two; that she had paid wages to persons employed on the farm, caused winter crops to be sown, and given general directions, but up to March she said she had no intention of permanently carrying on the farm, but had only carried it on as executrix until it might be disposed of. One of her neighbours stated in evidence that she carried on no business at the time of the giving of the bill of sale.

Parry, Serjt. now moved for a rule *nisi*, in accordance with the leave reserved. He contended that the provision of the Act of Parliament had not been complied with, inasmuch as the word "widow" did not describe an occupation, and that the maker of the bill of sale ought to have been described as a farmer, as she was at the time of the making of the bill engaged in carrying on the farm. He cited, *Allen* v. *Thompson*, 25 L. J. 249, Ex.

Kelly, C.B.—This is a question of the meaning to be put upon the word "occupation" in the Act of Parliament. In my opinion, it means the trade or calling by which the maker of the bill of sale ordinarily seeks to get his livelihood. In this case the maker of the bill of sale had been married a short time to the master of a workhouse, who, a month or so before his death, had taken a farm, and who died leaving the farm as part of his assets. It thus came into her hands as executrix of his will, and she was put to the alternative of abandoning it altogether, or sowing it with seed and cultivating it till disposed of. She did not do this personally, her previous life and habits rendering her incapable of so doing; but she employed a bailiff to carry on the farm for her. I do not think she could be, with the least propriety, described as a farmer; she did not carry on the business of farming as her ordinary means of livelihood, and that, I think, is what the Act means by the term "occupation."

Martin, B.—The word "occupation" in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is, that such a description should be given that if inquiry be made in the place where the person resides, he may be easily identified. I am quite sure if this woman had been inquired for in her place of residence as a farmer, that it would only have tended to mislead. One of her neighbours himself said in his evidence that she did not carry on any business. I am quite satisfied on the evidence that this woman was no more a farmer within the meaning of Act than I am.

Channell and Cleasby, BB., concurred.

Rule refused.

COURT OF PROBATE.

Reported by W. Leicester, Esq., Barrister-at-Law.

Tuesday, June 29.

In the Goods of S. Garbett.

Will—Bequests identical with trusts of marriage settlement.

A testatrix bequeathed all her estate on the same trusts as those contained in her marriage settlement. The court dispensed with the necessity of incorporating the whole of the settlement in the probate, and required only such extracts as would explain the nature of the bequests.

Sarah Garbett, late of Allenswick, near Hereford, widow, died 20th March 1868, having duly executed her last will and testament, bearing date March 28, 1863. She bequeathed all her freehold, copyhold, and leasehold estates to which she was entitled as devisee on the same trusts as her marriage settlement, bearing date Aug. 22, 1863.

Searle now moved for probate of the will without incorporating the settlement.

Lord Penzance.—There have been cases before in which the court has directed so much of the settlement only to be incorporated as was necessary, to show how the residue was disposed of. If your client will turn his attention to making such extracts from the settlement as may be necessary, I will make an order that you shall receive probate without setting out the deed at length, on your giving such a suffi-

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cient description of the trusts as shall satisfy the registrar.

Attorney, *Shephard.*

ROBERTS v. COWMEADOW.

Testamentary suit—Nude executor—Costs.

A nude executor who propounds a testamentary paper, of the validity of which there is no reasonable primâ facie probability, cannot escape from the liability of being condemned in costs by the fact that he takes no interest under the paper.

Eliza Meek, late of the Victoria Hotel, in the Forest of Dean, died leaving a will dated Dec. 1864, and a codicil dated June 1868. By the will she divided her property equally among her grandchildren, but by the codicil she gave a considerable preference to the family of one of her daughters, Mrs. Tyler. She was upwards of seventy years of age when she died, and very infirm. The will and codicil were propounded by the plaintiff as executor, who took nothing under either. The will was not disputed, but in opposition to the codicil the defendant pleaded incapacity, and that the testatrix did not know and approve of the contents.

The case was tried before Lord Penzance on June 30th, and the court pronounced for the will and against the codicil, and condemned the plaintiff in the costs.

Webster, on behalf of the plaintiff, applied for an order directing the costs to be paid out of the estate. He submitted that there was reasonable ground for propounding the codicil, and that under such circumstances the court never condemned a nude executor in costs. He cited

Rennie v. *Massey*, L. Rep. 1 P. & M. 118;
Dodge v. *Mees*, 1 Hagg. 112;
Critchell v. *Critchell*, 32 L. T. Rep. 108.

Lord PENZANCE.—I think this application must be refused. The circumstances of the case showed that there was no reasonable ground for litigation—for the deceased was plainly insane when the codicil was made, and the person who benefited by the codicil knew perfectly well what her state of mind was. She does not come forward and propound the codicil herself, but puts the executor forward to do it. If he has not taken the precaution to get an indemnity from the legatee behind him he must take the consequences. It is his own fault; but he is plainly liable to be condemned in the costs of a litigation for which there was no reasonable ground. If it were otherwise, wills might be successfully litigated every day as regards costs, for all a legatee would have to do would be to put forward the executors to propound a paper which had no pretence to validity. This is what the court held in *Rennie* v. *Massey*, and this application, therefore, must be dismissed.

Attorney: *Dyke.*

Tuesday, July 27.

INGALL v. DRAYTON.

Supposed intestacy—Administration granted to wife—Will subsequently discovered and admitted to probate, although prior grant not brought in.

A deceased died as was supposed intestate, and letters of administration were granted to his wife. She realised as much as she could of the estate, and left the country. A will was subsequently discovered, and a citation was issued, calling on her to bring in the letters of administration, which she did not obey.

The court admitted the will to probate, notwithstanding that the letters of administration had not been brought in, but directed the fact that the administration was outstanding to be recited on the probate.

J. Ingall died June 1867. No will was forthcoming, and in July 1867 his wife took out letters of administration of his estate. She realised all the property she could lay her hands on, and shortly afterwards went away to Mexico, without having paid the deceased's debts, or furnished any residuary account. Shortly after her departure, on more diligent search being made, a will was found. There was no property at the time, but on further investigation it turned out that there were between 600*l.* and 700*l.* due to the estate in outstanding accounts. The executors desired to prove the will, and a citation was issued calling on the administratrix to bring in the letters of administration for the purpose of being revoked, but she had not obeyed it.

Bayford now moved that probate might be granted of the will, notwithstanding that the letters of administration had not been brought in.

Lord PENZANCE.—I think it is impossible that your hands should be tied because this woman in Mexico does not bring in the grant of administration. It is inconvenient that there should be two grants out, but that must give way to the consideration of doing justice. The probate when made out will recite on it the fact that the grant of administration is outstanding.

Attorney: *Devonshire.*

August 3 and 5.

In the Goods of GAYNOR.

Will—Chain of representation—Will of testator and executor both proved in Ireland—Irish grant resealed in Court of Probate in England—20 & 21 Vict. c. 79, s. 95.

The will of A. was proved by his executor B. in Ireland. B. died, and his executor C. proved his will in Ireland, but had the grant resealed in this country:

The court held that this did not continue the chain of representation, and that C. was not entitled to a grant of administration in this country of the goods of A.'s wife, who died before A.

Bridget Gaynor died at Athlone, in the county of Westmeath, Ireland, June 1841, intestate, leaving Wm. Gaynor, her lawful husband, surviving, who died in 1848, without having taken out letters of administration to his deceased wife. He left a will, which was proved by his executor and residuary legatee, John Gaynor, in the Prerogative Court of Armagh. John Gaynor died in 1865, leaving a will by which he appointed James John Gaynor, George Atkinson, and Wm. Stanley, his executors. They proved this will in the Prerogative Court of Armagh, and subsequently a copy of the Irish probate was resealed in the principal registry of the Court of Probate in England. Bridget Gaynor at the time of her death was not possessed of any property, but she was entitled to sum of 200*l.* at the death of a relative, which happened in 1863.

McMahon, on behalf of William Stanley, the surviving executor of John Gaynor, moved for a grant of administration to the effects and personal estate of Bridget Gaynor, contending that the chain of representation was complete. He cited

Wms. on Exors. vol. 1, p. 274, 5th edit.;
In the Goods of Owen, 2 Robert. 561;
Wankford v. *Wankford*, 1 Salk. 299;
Fowler v. *Richards*, 5 Russ. Ch. Cas. 39;
In the Goods of Powell, 5 Hogg. 195;
M'Mahon v. *Rawlings*, 16 Sim. 429;
Twyford v. *Trail*, 7 Sim. 92;

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In the Goods of Jucker, 2 S. & T. 123;
Williams v. *Bland*, 2 Col. 575;
Jossaume v. *Abbot*, 15 Sim, 127;
Jernegan v. *Baxter*, 5 Sim. 568.

Aug. 5.—Lord PENZANCE.—An application was made to the court on Tuesday last for a grant in this case. The intestate, Bridget Gaynor, was the wife of William Gaynor. She predeceased him, and William Gaynor died in 1848, before this court was established. William Gaynor made a will, whereof he appointed John Gaynor executor. John Gaynor proved the will in the Prerogative Court of Armagh in Ireland, but did not prove the will in England. He died, having made his will, by which he appointed three persons his executors. They have proved and they now represent him, and this is an application on their part for a grant of administration of the estate of the deceased wife of William Gaynor, the first testator. The objection which was made to the grant in the registry was in conformity with the practice of the court. The applicant being the executor of John Gaynor, and John Gaynor never having proved the will of his testator in this country, it was said that the chain of representation was broken. It was insisted upon the other side that the effect of John Gaynor having proved the will in Ireland, although it gave him no power over assets in England, was yet sufficient to continue the chain of representation; and that is the question for the court to consider. Now, after the best consideration that I have been able to give to the case, I have come to the conclusion that the applicant is not entitled, and that the chain of representation is not continued. The matter may be simplified by considering it as if it arose during John Gaynor's life. Mrs. William Gaynor having died, her property passed to her husband. He died and made his will, whereof he appointed John Gaynor executor. John Gaynor proved the will in Ireland. Question: Can he take a grant of administration to the goods of Mrs. William Gaynor without first proving William Gaynor's will in this country? And it seems to me that he cannot; for, after all, this system of taking the grant of probate to form the chain of representation is, in fact, nothing but following the interest. Under the Irish probate John Gaynor had no interest or control over the effects of William Gaynor, his testator, in England. That grant gave him no power to deal with such assets, and could certainly give him none. At the time of William Gaynor's death he was possessed of assets in England, namely, his wife's assets; and, therefore, if John Gaynor wished to possess himself of those assets, he must have taken a grant of probate of his testator's will in this country. Having obtained no such grant he was entitled to no control over them. His executors cannot stand in a better position than he stood in. Whatever rights they have are transmitted rights. But if he had no rights himself—if he could not come to this court and ask for this grant, *à fortiori*, those to whom he has transmitted his rights cannot do it. There are a great many cases that throw considerable doubts upon the matter, but it seems to me that in principle the case of *Twyford* v. *Trail*, 1 Sim. 12, the marginal note in which runs thus—"A. died in India, B., one of his executors, proved the will in India. B. died, and C. his executor proved his will in England. C. is not the personal representative of A.," decides the question with which we are now dealing. It was suggested that some sort of difference existed between the full rights of an executor, with which it was conceded the party here was not clothed, seeing that he had only taken the grant in Ireland, and a certain sort of partial rights sufficient to continue the chain of representation. The court, with a view of rendering superfluous grants unnecessary, has very much considered that view of the case, to see if it rests upon any solid foundation, but I am unable to ascertain that it does. Therefore I think that in this case the grant cannot go as moved for. The applicant, however, will have no difficulty in getting a grant, because it turns out that John Gaynor, as well as executor, was also residuary legatee, and therefore through that interest he will be able to get a grant in the ordinary way.

Attorney: *J. P. Murrough.*

COURT OF BANKRUPTCY.

Reported by A. A. DORIA and JOHN FONBLANQUE, Esqrs., Barristers-at-Law.

Thursday, Oct. 28.

(Before Mr. Commissioner WINSLOW.)

Re THE DUKE OF NEWCASTLE.

Adjudication—Privilege—4 Geo. 4, *c.* 33—*B. A.* 1849, *ss.* 66 *and* 87—*B. A.* 1861, *s.* 69.

A non-trader, having privilege of Parliament, cannot be made bankrupt.

The Duke of Newcastle moved to set aside an adjudication in bankruptcy made against him.

Reed, for the bankrupt, after some formal objections, referred to in the judgment, contended that the bankrupt's person was privileged from arrest; it would be useless to enforce process against the estate unless the bankrupt could be committed in case of his failing to make the necessary disclosures. In such a case as the present a bankruptcy would be in effect a nullity.

Sargood, Serjt. (with him *Bagley*), counsel for petitioning creditor, relied upon a dictum of Lord Hardwicke, in *Ex parte Meymot*, 1 Atk. 20, that a peer who had traded might be made a bankrupt, and upon the abolition of the distinction between trader and non-trader by the Act of 1861, s. 69.

Mr. Commissioner WINSLOW said: This is a petition to adjudge his Grace the Duke of Newcastle bankrupt, and two preliminary objections are taken by Mr. Reed, the counsel for the duke, to the hearing of the petition, and one to the manner in which the petitioner proposes to proceed at the hearing. Although it is not usual to dispose of applications for adjudication in open court on account of the effect it may have upon the parties, yet, as the question now to be decided is one of some public importance, but entirely one of law, and as it has been notorious for some time that these proceedings have been instituted, a departure from the usual course will not, I think, injure the parties in any way. The third objection I do not consider important. The mode of procedure is that provided in the case of a person not a trader. It has been the practice to require a petitioner against a person not a trader to produce some evidence of a debt and act of bankruptcy before the court appoints a day for hearing; otherwise a debtor might be called from the antipodes to answer a petition issued without the proper requisites, and the inconvenience and hardship might be very great. I can conceive cases in which a man might even submit to pay an unjust demand rather than come a long distance to dispute it. The respondent insists that the petitioner should be confined to this evidence, and should not be allowed to produce any other. But this precautionary measure was never intended to prevent a petitioner from producing at the hearing of a petition any evidence he may be able to get in proof of his debt, or of any act of bankruptcy

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on which the petition can be sustained. It is true that, the petition having been served on the alleged debtor, the petitioner cannot withdraw therefrom, and, by substituting another petitioner, hand the proceedings over to another person. He can no more do that than a plaintiff, having served his writ for the recovery of his debt, can substitute another plaintiff; but the petitioner may at the hearing produce all the evidence in his power. The objections to the hearing the petition are much more important, and are, first, that the duke is not within the jurisdiction as a person capable of being made a bankrupt; secondly, that if he be so, the proper manner of proceeding has not been adopted. These two objections appear to me necessarily to resolve themselves into one proposition, namely, that a person having privilege of Parliament cannot be adjudicated bankrupt unless he be a trader; for I am of opinion that, if the petitioner has not pursued the proper course in this case, there is no other course open to him to obtain adjudication. In determining this question, it will be necessary to consider the law as it stood before the Act of 1861, and the alterations then made. Prior to the 11th Oct. 1861 there was no mode of procedure by which a hostile creditor could have obtained an adjudication of bankruptcy against a person having privilege of Parliament except as a trader. The law as applicable to traders entitled to the privilege was contained in the 66th and 87th sections of the Bankrupt Law Consolidation Act 1849, which are as follows: "That if any such trader having privilege of Parliament shall commit an act of bankruptcy, he may be dealt with under this Act in like manner as any other trader; but such person shall not be subject to be arrested or be imprisoned during the time of such privilege, except in cases made felonies or misdemeanors by this Act." "That if any creditor or creditors of any such trader having privilege of Parliament to an amount hereinafter declared to be requisite to support a petition for adjudication of bankruptcy shall file an affidavit in any court of record at Westminster that such debt is justly due to him, and that such debtor as he verily believes is such trader, and shall sue out of the same court a writ of summons in the form contained in Schedule E to this Act annexed against such trader, and serve him with a copy of such summons, if such trader shall not within one month after personal service of such summons, pay, secure, or compound for such debt to the satisfaction of such creditor or creditors, or enter into a bond in such sum and with two sufficient sureties as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same, and within one month next after personal service of such summons cause an appearance to be entered to such action in the proper court in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons." Such being the state of the law, the Act of 1861 was passed, one of the objects of which was to make all persons, whether traders or not, liable to be made bankrupt. The provision by which that was sought to be obtained was as follows: As to persons subject to this Act (sect. 69) thus provides "all debtors, whether traders or not, shall be subject to the provisions of this Act; but no debtor who is not a trader shall be adjudged bankrupt, except in respect of some one of the acts of bankruptcy hereinafter described as applicable to non-traders." It is then provided that if certain things be done by persons who are not traders, they should be acts of bankruptcy, and it is upon one of these that this petition is grounded. The petitioner contends that the general words of sect. 69 will include all persons who are entitled to the privilege of Parliament, whether traders or not; while for the respondent it is argued that there must be some special enactment in order to bring persons having the privilege within the bankruptcy law, or at least something to show an intention to include them in the general words. This involves a consideration of previous decisions and legislation upon the subject. The earliest, and, as far as I can ascertain, the only case in point is in a dictum of Lord Chancellor Hardwicke in the year 1747, reported 1 Atk. 201, which is as follows: "A commission of bankruptcy formerly issued against a peer, an Earl of Suffolk, for trading in wines; and though there may be some particular powers that commissioners of bankruptcy could not exercise against a peer, yet, notwithstanding this, he may be liable to a commission of bankruptcy if he will trade, and so may a member of the House of Commons, though while he continues a member there are some particular powers of commissioners that cannot be exercised." It is singular that this case has continued to be cited in most of the books of practice, down to the present time, as an authority for the proposition that a peer could be made a bankrupt if he traded; but in the year 1764, the statute 4 Geo. 3, c. 33, was passed, the preamble to which Act shows the reasons the Legislature had; and, as it appears to me, removes all weight which would otherwise have attached to this case. "Whereas merchants, bankers, brokers, factors, scriveners, and traders within the description of the statutes relating to bankrupts having the privilege of Parliament are not compellable to pay their just debts or to become bankrupts by reason of the freedom of their persons from arrests upon civil process; and some doubts have also arisen whether, in cases of bankruptcy, a commission can be sued out during the continuance of such privilege, to remedy which inconveniences, and to support the honour and dignity of Parliament, and good faith and credit in commercial dealings, which require that in such cases the laws should have their due course, and that no such merchants, bankers, brokers, factors, scriveners, or traders in case of actual insolvency should by any privilege whatever be exempted from doing equal justice to all their creditors—be it enacted, &c." The remedial measures for the first time passed in that Act are substantially the same as those I have mentioned as being contained in sect. 66 and 87 of the Act of 1849; namely, that a creditor was entitled to proceed by filing an affidavit and suing out a summons from a Superior Court, and might thus compel the debtor to commit an act of bankruptcy—a proceeding rendered necessary, because an act of bankruptcy could be obtained by arrest; and in case any other act of bankruptcy had been voluntarily committed, then the creditor might issue a commission of bankruptcy; but the statute provided that in every case the bankrupt should be privileged from all arrest except for a felony, and the Act was limited to creditors whose debts were contracted after 8th March 1764, and to traders who should commit an act of bankruptcy after the last day of that session. Now the Legislature having thus stated the reasons for enacting those laws, it must be presumed, in the absence of anything appearing to the contrary, that the same reasons influenced Parliament in re-enacting them from time to time, down to the year 1861, when, though the bankruptcy laws were extended, by the general words of sect. 69 which I have cited, to all persons, whether traders or not, yet it was considered necessary to retain the special enactment which extended bankruptcy to persons having privilege of Parliament, if they were traders. But this shows, upon the ordinary rules of construction,

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that Parliament did not consider that non-traders, having the privilege of Parliament, would be liable to bankruptcy without a special enactment, and that such persons were not intended to be included in the general words of sect. 69. If it had been otherwise, Parliament would no doubt have provided some means in these cases for compelling such a person to commit an act of bankruptcy, and would also have extended to such person that privilege from arrest, except for criminal acts, which it has provided for traders. The Bankruptcy Act of last session may, I think, be referred to, in order to ascertain the intention of the Legislature, although it has not yet come into operation; and by that Act, "If a person, having privilege of Parliament (without any other limitation), commits an act of bankruptcy, he may be dealt with under the Act in like manner as if he had not such privilege." Parliament, which always claims to be the judge of its own privileges, thus still considers a special provision necessary to enable a creditor to proceed in bankruptcy against a person possessing the privilege. For these reasons, I am of opinion that the petition cannot be sustained, and must be dismissed.

Reed applied for costs, as the petition was no doubt an experiment.

Bagley objected.

His HONOUR said, however, that as the duke had been brought before the court upon a petition which had failed, he was entitled to his costs.

House of Lords.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Feb. 23 and June 11.

(Present: The LORD CHANCELLOR (Hatherley); Lords CHELMSFORD, WESTBURY, COLONSAY, and CAIRNS.)

PARTINGTON *v.* THE ATTORNEY-GENERAL.

Letters of administration—Stamp duty—Accretions of interest—Husband dying without having administered to his wife—Property to be distributed abroad—Construction of fiscal statutes—55 Geo. 3, c. 184, s. 38—Domicile.

In 1819 S., a widow, died intestate, and the Solicitor of the Treasury took out administration to her estate, and received under it 23,821l. In 1823 I. C., the wife of E. C., applied to the Crown, claiming to be next of kin of S., but died in 1825, without establishing her claim. In 1830 E. C. died intestate without having taken any steps to recover the money, and without having administered to his wife. In 1855 administration, by two several grants, was granted to P. in respect of the estates of I. C. and E. C., on behalf of their children. P. instituted a suit in equity to administer to the estate of S., when it was found that J. C. (the son of I. C. and E. C.) was the sole next of kin of S., and it was ordered that the Solicitor to the Treasury should pay to P., as the representative of J. C., the money in his hands, with interest at 4 per cent. I. C., E. C., and J. C. were all resident and domiciled in the United States of America.

Held (affirming the judgment of the Exchequer Chamber), First, that stamp duty was chargeable on the accretions of interest; for the interest, as an accretion, merged into and became a part of the sum which had to be paid, and the whole amount taken together became the estate in respect of which the administration was granted; and

Secondly (Lord Westbury dissentiente), that letters of administration having, in fact, been granted to both I. C. and E. C., the stamp duty must be paid on each administration.

Fiscal statutes must be construed strictly.

Per Lord Westbury dissentientem, the double duty was payable only on the assumption that the estate was twice distributed in this country; an assumption incorrect, because, regard being had to the domicile of the parties, the distribution of the estate was governed exclusively by American law; and, the administration to E. C. being unnecessary, the Stamp office ought not to take advantage of a mistaken form of proceeding.

This was a writ of error brought upon a judgment of the Exchequer Chamber, partly affirming and partly reversing a judgment of the Exchequer upon a special case stated between the parties by order of Bramwell, B. for the opinion of that court. The special case will be found in 6 L. T. Rep. N. S. 900; shortly the facts stated therein were as follows:—

In 1819, Mrs. Shard, widow, died intestate, and on her death the Crown, by Mr. Maule, the then solicitor to the Treasury, took out administration to the estate, and received under it 23,821*l.*

In 1823, Isabel Cook, the wife of Ellis Cook, both of whom were resident and domiciled in the United States, applied to the Crown, claiming to be next of kin to Mrs. Shard, but died in 1825, without establishing her claim. At this date the estate of Mrs. Shard, legacy duty being deducted, amounted to 22,403*l.*

In 1830, Ellis Cook died intestate without having taken any steps to recover the money, and without having administered to his wife.

In 1855, the children of Ellis and Isabel Cook, who, like their parents, were resident and domiciled in the United States, applied to Mr. Partington, the plaintiff in error, to take proceedings to recover the money from the solicitor to the Treasury, which he proceeded to do, and a personal representative to Isabel Cook's estate being necessary, a power of attorney was made by James Cook, one of the said children, authorising Partington to take out administration to the estates of both Ellis and Isabel Cook. Accordingly grants of administration to both those estates were, in July 1855, severally made to Partington for the use and benefit of James Cook, by virtue of which grants the claim of Partington, as representing James Cook, the representative of Isabel Cook, was allowed by Kindersley, V. C., in a Chancery suit, instituted under the title of *Partington* v. *Reynolds:* (see 31 L. T. Rep. 7; 27 L. J. 505, Ch.; 4 Jur. N. S. 200.)

The chief clerk's certificate found that the sum due from Mr. Reynolds, the successor to Mr. Maule, as solicitor of the Treasury, was 23,885*l.*, and Kindersley, V. C., by an order dated June 26th 1858, subsequently declared that 34,124*l.* should be added thereto, as interest at 4 per cent. per annum on the above sum, and that the whole amount should be paid over to Partington.

The Commissioners of Inland Revenue thereupon claimed that the stamp duty should bear a value including all accretions, from the death of Isabel Cook to the date of administration in 1855, and also claimed that the grant of administration for the effects of Ellis Cook, who survived his wife, should be stamped at the same rate.

Judgment was to be entered for the Crown, without costs, for such an amount of duty as should appear to be due, according to the opinion of the court upon the above facts, the questions for the opinion of the court being: First, what probate duty is payable in respect of the estate of Isabel Cook? Secondly, whether any, and if any what, probate duty is payable in respect of the estate of Ellis Cook?

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The case was argued in the Exchequer on June 12, 1862, and on June 17th following, the court (Pollock, C. B., and Bramwell, B.; Martin, B. *dubitante*) answered the first question by deciding, on the authority of *Doe d. Richards* v. *Evans*, 16 L. J. 305, Q. B., and *Attorney-General* v. *Brunning*, 3 L. T. Rep. N. S. 36; 30 L. J. 379, Ch., that the value of the estate, at the time of obtaining the letters of administration, was that on which the stamp duty should be calculated, and that Partington was therefore liable to pay duty on the whole amount of principal, increased by the subsequent addition of interest: (6 L. T. Rep. N. S. 900; 1 H. & C. 457.) The second question was not noticed in the above judgment, but in the following term, Nov. 12, counsel for the Crown (Sir F. Kelly, Q. C.), asked the court whether judgment was to be entered for the Crown for the duty claimed upon both the estates, and the court, on a subsequent day, April 30, 1863, said that judgment should be entered for the amount claimed in respect of the estate of Isabel Cook only, and that no duty was payable in respect of the estate of Ellis Cook: (1 H. & C. 477.)

Error on the above judgment was then brought in the Exchequer Chamber and that court (Willes, Byles, Blackburn, Keating, Mellor, and Shee, JJ.), on May 16, 1864, affirmed the judgment of the Exchequer on the first, and reversed it on the second of the above questions; holding, as to the latter, that it was necessary for the next of kin of Ellis Cook, in order to enforce the right of the wife and reduce the property into possession for their benefit, to take out letters of administration to both Ellis and Isabel Cook, and to pay stamp duty upon each grant, each grant being in respect of a distinct devolution of property: (10 L. T. Rep. N. S. 751; 3 H. & C. 193.)

Cotton, Q. C. and *Holl*, for the plaintiff in error, contended, first, that duty was not chargeable on both grants of administration, but that duty should be charged only on the grant of administration to Isabel Cook. As to the distribution of the property the law of England did not affect it. The parties were domiciled in America, and the law of America governed the distribution. It was a mistake to take out two grants of administration, but such a mistake would not create a liability to which the property, but for it, would not have been liable. The following cases and authorities were cited on this point:

Guttridge v. *Stilwell*, 1 My. & K. 487;
Loy v *Duckett*, 1 Cr. & Phill. 305;
Fielder v. *Hanger*, 3 Hagg. 769;
Enohin v. *Wylie*, 10 H. of L. Cas. 1.

Secondly, duty was not payable on the accretion of interest, for the value of the property on which duty is payable is to be estimated according to the value at the date of the death of Isabel Cook. On this point the following cases and authorities were cited:

Attorney-General v. *Hope*, 1 Cr. M. & R. 530; 2 Cl. & Fin. 84;
Attorney-General v. *Dimond*, 9 L. J. 90, Ex.; 1 Cr. & J. 356;
Attorney-General v. *Kohler*, 5 L. T. Rep. N. S. 5;
Doe d. Richards v. *Evans*, 16 L. J. 305, Q. B.; 10 Q. B. 476;
Attorney-Genral v. *Brunning*, 3 L. T. Rep. N. S. 36; 30 L. J. 379, Ch.;
Edgar v. *Reynolds*, 4 Dr. 269;
Re Ewin, 1 Cr. & J. 151; 9 L. J. 37, Ex.;
55 Geo. 3, c. 184, s. 38;
Pitt v. *Woodham*, 1 Hagg. 250;
Hunt v. *Stevens*, 3 Taunt. 113;
Butler v. *Hunter*, 2 Phill. Eccl. Cas. 39;
In the Goods of Wyckoff, 7 L. T. Rep. N. S. 565; 9 Jur. N. S. Prob. 84; 3 Sw. & Tr. 20;
Attorney-General v. *Malkin*, 2 Phill. Eccl. Cas. 64; 16 L. J. 99, Ch.;
Ex parte Krause, 1 Sw. & Tr. 146.

The *Attorney-General* (Sir R. P. Collier, Q. C.), Sir *Roundel Palmer*, Q. C., and *Hutton*, for the defendant in error, *contra*, cited the following cases:

Cur. adv. vult.

June 11.—The LORD CHANCELLOR.—My Lords, this writ of error is brought in respect of a judgment of the Court of Exchequer Chamber, which in part affirmed, and in part reversed, a previous judgment of the Court of Exchequer, the question being one with reference to the duty payable on certain letters of administration under circumstances which I shall presently refer to. There were two points originally raised, namely, first, whether or not considerable delay having occurred between the death of the intestate, and the taking out the letters of administration, the duty should be chargeable upon the accretions of interest which had occurred in the interval; and the second point, being one of more importance, and requiring more consideration, namely, whether or not a double duty was payable, there having been a lady entitled, in the first instance, to administer to the intestate, and entitled also to the beneficial interest in the property of the intestate, and she having predeceased her husband, and the husband also having died before taking out letters of administration to her, and before any were taken out by Mr. Partington. With regard to the first point which was here raised, there was no difference of opinion on the part of any of your Lordships, namely, with respect to the duty being chargeable upon the accretions of interest. Upon that point we all entirely concurred in the view which had been taken by both the courts below, that the duty was so chargeable upon the accretions of interest. I do not go into the reasons for that decision, because they were sufficiently explained in the judgment in those courts. To these judgments I adhere, and for the reasons which are there assigned for the decision. With regard to the other point the facts are very short. [His Lordship stated them and proceeded.] Now it is important, as it seems to me, to see the exact form in which those letters of administration were granted. They were in the form used in the course of procedure in the Ecclesiastical Courts, because it is now well known, and it is so laid down in Williams on Executors, 5th edit., p. 360, and perfectly in consonance with all the authorities, that the course now in the Ecclesiastical Court is, in all cases where the wife has predeceased her husband, to grant to the representative of the husband alone letters of administration to the wife. There was a time when the Ecclesiastical Courts thought themselves justified, and even bound, to give letters of administration to the next of kin of the wife; but it was determined that the next of kin of the wife in that case, holding such letters of administration, were only trustees for the administrator of the husband, and it was finally concluded, I think in the time of Sir John Nichol, that the right and proper course in all such cases was to grant the letters of administration only to the person who invested himself with the character of administrator of the husband. That course was followed in this case, which appears by the form of the letters of administration. [His Lordship stated the form in each case.] So that in those letters the administration is not only granted to Partington because he had already clothed himself with the character of representative of Ellis Cook, but, in noticing that he is acting as attorney to James Cook, there is this reservation made of James Cook's right, that he is to have the benefit of coming in and claim-

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ing as the representative of Ellis Cook if so minded, but not until he has clothed himself with the character of the representative of Ellis Cook. That being so, it appears to me that if this had been a case in which the parties were residing and domiciled in this country no question could have arisen about the payment of the duty upon administration. In regard to the administration of Ellis Cook, the husband, the administration is, of course, taken out in respect of all his property. His property at that time included his beneficial interest in the estate of his deceased wife; and, of course, therefore, the stamp duty payable on it, being the stamp duty that must be paid upon all that was his at the time of his decease, would include that interest which he took in the estate of his predeceased wife. Then, with regard to Isabel Cook's estate, the representative of the husband, who has clothed himself with that character, and who applies for administration to her, must pay duty upon all which was hers at the time of her decease. In that way it appears to me to be plain, and beyond all dispute, that a double duty must be payable upon it. Nor, as was observed in the courts below, is there any injustice in such a conclusion, because had Ellis Cook done that which was perfectly competent to him to do in his lifetime, namely, had he applied for letters of administration to his wife, he, of course, would have had to pay the duty in respect of her estate at her decease, and then when he himself died those who represented him would have had to do exactly the same thing which they are now called upon to do, namely, they would have had to pay duty upon his estate, which, of course, would include (unless he had spent it in the interval) the property which he had so derived from his deceased wife. We are referred to one case in which Lord Brougham thought it proper that payment should be made to the administrator of the deceased wife, without having any regard whatever to the position of those who were entitled to represent the interest of the deceased husband. It was the case of *Gutteridge* v. *Stilwell*, 1 M. & K. 487, in which Sir John Leach had refused to direct any payment to be made to the representative of the deceased wife, except in the presence of the representative of the deceased husband. Lord Cottenham, on having that case called to his attention in the case of *Loy* v. *Duckett*, Cr. & Phill. 312, intimated that the view of Sir John Leach was the preferable view, and that the payment to the representative of the wife alone ought not to have been so made. But, without considering that question at all, it appears to me that the administration was so granted upon the grounds that I have stated, namely, that the person entitled to administer to the deceased wife should be the person who had the right and interest in the property, and that that would be the administrator of the deceased husband. Certainly it is not a course of proceeding which, it appears to me, we are called upon or justified in finding any fault with, as having thrown improperly any burden upon those parties who made application for, and acquired in the usual manner, the representation of the estate of Isabel Cook. The Ecclesiastical Court would not have granted it to them unless they had first of all clothed themselves with the character of the representatives of Ellis Cook. That being so, it became necessary for them to take out administration, and they did take it out; and, that being done, the duty was charged in the usual mode in which it ought to be charged in a case of this description. But then there arises in this case the circumstances of the parties having been domiciled in America. I have been favoured by the kindness of one of your Lordships (Lord Westbury) with the view which was partly thrown out in the course of the argument by that noble and learned lord upon this part of the case, which created considerable doubt in his mind. He doubted whether or not, under the circumstances of the case, the duty ought to have been payable in respect of the interest which Ellis, the father, acquired by surviving his deceased wife, and upon this ground, namely, that Ellis the father being domiciled in the United States of America, and all the parties interested in the estate being also there domiciled, when the payment was directed by Kindersley, V.C. in this case to be made by the Solicitor of the Treasury to Mr. Partington, after Mr. Partington had clothed himself with the character of representative of Isabel Cook, and had made out his title in that character to the fund, the matter was placed in this position—that he, as the representative of Isabel Cook, would be entitled to receive the fund, and to carry with him that fund and to distribute it according to the rules and regulations of the country where the parties interested in it as beneficiaries were domiciled. Under such circumstances it appeared to my noble and learned friend that the Ecclesiastical Court in this country had nothing to do with the administration of the property, and that the property, having to be administered in America, the course of proceeding ought to have been simply to make payment to Partington, as the representative of Isabel Cook, leaving him afterwards to distribute the property as the law of the United States, the country of the domicile of the parties beneficially interested, should require. Now, whatever weight there may be in the observation, as to what ought to have been the course of proceedure of the Ecclesiastical Court, namely, whether or not it might not have been proper and reasonable for that Ecclesiastical Court, if duly informed of all the circumstances, to grant to Partington letters of administration to Isabel Cook without requiring previous letters of administration to be taken out to Ellis Cook, I think that those letters having been taken taken out, the parties having, and I think with reason, chosen to adopt that course, it is not for your Lordships to say that there is error in the judgments which have been pronounced. The sole question before us whether or not certain letters of administration having been taken out both to the one party and to the other, the proper amount of duty must not be paid in respect of the property, to which both the one and the other are entitled. It is true that where it is made out plainly in the Ecclesiastical Court, that the husband has no right or interest whatever in the wife's estate (a case which is not of very uncommon occurrence where, under a marriage settlement, the property passes directly to the children, and the husband takes no interest in it), the court does not require, according to its rule in making the grant of administation, that the grant should be made to the representative of the husband, the husband taking no interest. But it would not be so where he did take an interest in the property. I have thought very much upon the subject, in consequence of having been furnished with my noble and learned friend's view upon that point, and have felt that it was a matter deserving of very deep and anxious consideration. It has occurred to me that it might have been possible here for the representative of Ellis Cook in America, one who had taken out representation to Ellis Cook (for it appears upon the proceedings that representation was taken out in the United States to Ellis Cook), to come over here and satisfy the Ecclesiastical Court that, being the representative of Ellis Cook in America, he was entitled in that right to ask for letters of administration to Isabel Cook to be granted to him. I need not further follow up the supposition, because what has been *de facto* done is this, that Mr. Partington, acting according

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to the best advice that could be obtained, feeling the difficulty and doubt which might have arisen if he had so made an attempt to take out administration in that course of proceeding, has not done so. He thought it expedient to take out the administration in the usual and only mode in which it is granted in this country, unless it can be shown either that the husband's representative has no interest, or that some other person has an interest which would enable him to take out representation to the wife without previously taking out representation to the husband. Feeling there might be difficulties in not adopting the usual course he has adopted that course which is usual and regular with regard to the administration of property situated within the jurisdiction of the Ecclesiastical Court, and therefore the court having followed the usual course, it appears that all that your Lordships can say upon the present occasion is, that the duty upon these several letters of administration must be the duty payable in all ordinary cases in which letters of administration are taken out, namely, that there must be full payment of duty upon the husband's estate, it being in respect of that estate that the letters are taken out. And so, of course, when the representative of the husband approaches the court, requiring administration to the wife, the duty must be paid upon the same principle, namely, full payment upon all that which, at the time of the wife's decease was her property, upon which the charge imposed by the Legislature falls. It does not appear to me that there is any ground for saying that any mistake or misconception has arisen. The case is simply this, that Partington, having had two courses open to him (as to one of which I cannot pronounce decisively, because I cannot say what might have been the case if he had come forward in the other form, namely, as a foreign representative claiming directly the estate of Isabel Cook), but, he having taken the ordinary course, it appears to me that it necessarily follows that the duty payable upon the property which he so acquired is payable in the present instance upon each estate. I come, therefore to the conclusion that in this case your Lordships ought to affirm the decision of the Court of Exchequer Chamber, and, consequently, with costs.

Lord CHELMSFORD.—My Lords, I agree with my noble and learned friend on the woolsack upon both the questions raised by the special case. With respect to the liability to the full duty upon both the administrations taken out by the appellant, it was admitted by his learned counsel that, if the question had arisen with respect to subjects of this country, no doubt would have existed as to the double duty being payable. But it was contended that as Isabel Cook and her husband Ellis Cook were domiciled Americans, it was not necessary to take out administration to Ellis Cook in order to obtain administration to Isabel Cook; that the husband was not an interested party; that the wife's administrator might give a sufficient receipt and discharge; and that the whole of the duty of the administrator was to remit the money received by him under the administration to America, to be distributed to the persons entitled. I must confess my inability to follow this reasoning, or to understand how the question of domicile can enter into the consideration of the grant of letters of administration in this country. If it could, I do not see, in the absence of evidence upon the subject, how we can assume that the law of America differs from our law as to the right of succession to the estate in question. Upon the facts stated in the special case, it appears that the power of attorney, given by James Cook to the appellant, was to take out administration to the estates of Ellis Cook and Isabel Cook respectively. There is nothing stated in the special case which would render this course unnecessary. It is not shown that upon Isabel Cook's dying intestate her husband, surviving her, would have been entitled to his wife's interest in Mrs. Shard's estate without taking out letters of administration; or that upon his death, without having obtained administration to his wife, the right to this administration and to the property to which it would give a title, would not pass to his personal representative. If administration had been granted to Isabel Cook alone, her administrator would have held the property in trust for the representatives of Ellis Cook. Therefore, the administration to Ellis Cook was not a mere formal proceeding, much less an unnecessary act, but it was an essential step in order to obtain a title to the property as to which Isabel Cook died intestate. In the case cited, *The Goods of Jane Elizabeth Crause*, 1 Sw. & Tr. 146, it was held, that where the husband has survived his wife and died intestate, without administering to her estate, his next of kin must constitute themselves the legal personal representatives before they can have any claim to administer his estate. In that case, the Judge Ordinary quoted the words of Sir John Nichol in a former case (*Fielder* v. *Hanger*, 3 Hagg. 770), where the learned Judge of the Prerogative Court said: "On the principle, the grant ought to follow the interest, and that the whole interest is vested in the husband's representatives, I shall decree this grant. I should have done the same if the husband had not taken out administration, unless it could be shown that he had no interest, but that the property belonged to the wife's next of kin." But it was said, that even assuming two administrations to have been necessary, yet that one duty alone ought to be payable, because they were administrations to one and the same property. But although the property is the same, the right to the property claimed by the administrator was different. The administrator of Isabel Cook represents her right to the estate of Mrs. Shard as next of kin; the administrator of Ellis Cook represents his, as entitled, *jure mariti*, to his wife's property. If Ellis Cook had taken out administration to his wife and afterwards died intestate, there would, of course, have been two probate duties payable in respect of the same property; and what differnce can there be in principle between the duties payable under the supposed circumstances and those which are in question in this case, where in order to reach the property it was necessary to take out two administrations simultaneously, to vest distinct and different rights to that property in the same administrator? With respect to the question whether the probate duty payable ought to have been calculated on the value of the estate at the time of the death of Isabel Cook, or upon the increased value it had acquired at the time of the grant of the letters of administration, I have no difficulty in agreeing with the judgment of both the Courts of Exchequer and of Exchequer Chamber. The appellant's counsel contended that the duty is assessable upon the estate and effects for or in respect of which the administration is granted, and that the administration granted is of the goods, chattels, and credits of the intestate at the time of his or her death. When the grants of letters of administration were made, the estate to be administered had increased by the accumulation of interest accruing since the death of the intestate. The estates of the intestates at the time of their death were, however, interest-bearing estates; and what the administrator was entitled to was those estates ascertained to have become of a certain value. I consider this question to have been settled in the case of *Doe d. Richards* v. *Evans*, 16 L. J. 305, Q. B., because the counsel there having quoted a passage from Gwynne on the Law relating

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to the Duties on Probates and Letters of Administration, 3rd edit. p. 25, which states "that the Commissioners of Stamps require all rents, interests, and dividends, from the death of the testator or intestate to the date of the probate on letters of administration to be included in the estimate upon which duty is to be paid, but there had been no judicial decision upon the point, and that counsel of great eminence had held a different opinion." Lord Denman said, "The improvement is inseparably part of that which the deceased had, and of which administration was granted." I think the judgment of the Exchequer Chamber ought to be affirmed.

Lord WESTBURY.—My lords, the facts of this case are few and simple. (His Lordship stated them, and proceeded.) On this order being made in the Court of Chancery, directing the payment to Partington, "as the legal personal representative of the said Isabel Cook," the Crown has claimed a double *ad valorem* duty—that is to say, it has required that the letters of administration to Isabel should be stamped with an *ad valorem* duty to the extent of the estate directed to be paid to Isabel's personal representative, and it has required the same amount of duty to be paid on the letters of administration of the estate of Ellis Cook. It is contended for the Crown that there have been two distinct devolutions of the beneficial ownership—one on the death of Isabel, and the other on the death of Ellis; and that two administrations, therefore, are necessary, as if there were two distinct estates. In the judgment of the Court of Exchequer Chamber, it is said (10 L. T. Rep. N.S. 754), "So, in respect of the letters of administration to the estate of the husband, the stamp duty is equally chargeable, as they are necessary to establish the devolution of the property upon James Cook, and to entitle him to receive it." The case for the Crown, therefore, is founded on the transmission of beneficial ownership. The Crown assumes to follow the estate from the hands of the administrator of Isabel into the hands of the administrator of Ellis, and claims two duties, upon the ground that the estate is twice distributed or administered in this country under the two administrations. One *ad valorem* duty is claimed in respect of the administration of Isabel; but inasmuch as the property, when received by the administrator of Isabel, will (according to the assumption of the Crown) belong beneficially to the estate of Ellis, the Crown claims the second *ad valorem* duty in respect of the new character or quality which the same property receives by transmission in the second place, namely, the character of personal estate of Ellis. In short, the Stamp office regards the estate as undergoing two processes of distribution in this country, first as the personal estate of Isabel, and secondly as the personal estate of Ellis. The first duty on the administration to Isabel is necessary to enable the administrator of Isabel to give a valid discharge to the administrator of Mrs Shard; but there is no ground whatever for claiming the second duty, except the contention that the money, when received by the administrator of Isabel, belongs to Ellis, and, therefore, must be distributed as his personal estate. That the beneficial interest in the estate of Isabel belongs to Ellis is laboriously proved by the Court of Exchequer chamber upon the principles of English law, and by the authority of English decisions. The answer to this assumption, and the conclusions founded upon it, lies in the fact that by law neither the personal estate of Isabel, nor the personal estate of Ellis, is to be distributed or administered in this country, and that the assumption on which the Crown's claim is founded, is untrue both in law and in fact. The case has been decided in the court below as if the ownership and distribution of the personal estates of Isabel and Ellis were to be regulated entirely by the law which would be applicable if Isabel and Ellis had been domiciled in England. The fact that English law and the jurisdiction of English courts are excluded by the circumstance that the ownership and the distribution of the estates of Isabel and Ellis are governed exclusively by the laws of a foreign country was not adverted to in the judgment of the court below. But, when regard is had to the law of the domicile, which the courts here were bound to take notice of, the true grounds for the decision of the case seem to be clear. Mrs Shard at her death was domiciled in this country. The forum for the administration of her estate was therefore in England. The personal representative of Mrs. Shard is entitled to have such a discharge for the clear residue of the estate paid over by him under the decree as is valid according to the law of the forum of his administration. Consequently, as Isabel Cook, the sole next-of-kin, was dead at the date of the order, it is the right of Mrs. Shard's administrator to have a discharge from a personal representative of Isabel, constituted in this country. It was therefore necessary to take out letters of administration to Isabel, but solely for the purpose of giving a discharge; and for that purpose it was necessary that the letters of administration to Isabel should, in conformity with the fiscal law of this country, be stamped with a stamp corresponding to the amount of the estate to be received by virtue of them. So far the right of this country, as the forum of administration of Mrs. Shard's estate clearly extends, but it extends no farther. English law has nothing to do with the distribution of the estate of Isabel, nor with the regulation of her succession, nor with the transmission of the beneficial right to her estate, subjects which belong exclusively to the foreign tribunals. The English law furnishes no other rule than this, that the English letters of administration, which the administrator of Mrs. Shard has a right to have produced to him, ought to be granted to the person entitled to represent Isabel by the law of her domicile. By that law her succession is wholly governed; and, therefore, it follows that the person entitled to represent Isabel Cook, and the person beneficially entitled to her personal estate, fall to be ascertained by the law of the United States. They are matters foreign to the law of England, and to the jurisdiction of her tribunals. The course that ought to have been adopted by the parties was this, namely, they should have duly constituted a personal representative of Isabel Cook in the proper court in America, and such person, by himself or his attorney, should have applied to the Court of Probate in this country for ancillary letters of administration of the estate of Isabel. In this mode of proceeding, as has been already observed, no question of the devolution of the beneficial interest of the estate of Isabel could have arisen. This course, however, was not taken by the parties, and the judgment of the court below proceeds on the application of the case of rules of the English law, to which it was not subject. The application being made by Mr. Partington, not for an ancillary grant, but for original letters of administration, the Court of Probate in this country acted in conformity with the rules applicable to English administrations. According to English law, if a married woman becomes entitled to receive a sum of money, the husband becomes entitled to it *jure mariti*; but if the wife dies before the husband has received it, the husband, although his beneficial right remains the same, must, in order to receive the money, take out administration to his wife; and if he dies without having done so, it is necessary that letters of ad-

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ministration should be taken out to the wife's estate (for such is still the legal character of the money), but the wife's administrator is only a trustee for the representative of the husband. On this ground, looking at the succession as a subject for English law to determine, it was supposed to be necessary that letters of administration to Ellis should be obtained. Two distinct letters of administration were therefore granted on the same day and to the same person. For the reasons already given, the mode of proceeding was a result of mistake and misapprehension on the part of Mr Partington or his advisers. If the proper course had been taken, no letters of administration to Ellis, the husband, were needed in this country. This mistaken form of proceeding does not affect the justice of the case, nor the rights of the parties, nor ought the stamp office to attempt to avail itself of the form of the application in order to claim a second duty on grounds which are not applicable to the circumstances. For the claim of the Crown is founded on the assertion that there have been two devolutions of the beneficial interest in the same property—that is, two successions; and the Court of Exchequer Chamber rests its judgment on this—that by English law James Cook would be entitled to the property as administrator of his father, and not as administrator of his mother; and they have put their decision on matters which were *coram non judice*. There is but one succession of which the English Court could take cognisance, namely, the succession of Isabel to Mrs Shard, and this it has done; but as Isabel died domiciled abroad, English law has no right to make any inquiry or pronounce any judgment touching the succession to Isabel, still less to treat the succession to Isabel as governed by its own laws of transmission, and to insist on imposing a tax on the assumed subsequent devolutions of that estate. The injustice of the claim as against the foreigner is obvious. Even if Isabel and Ellis had both died in England, the claim of the Crown to double duty would, as appears from the judgment of the Court below, and the last reason of the respondent's case, have rested on the merest technicality. But when the foreign domicile being adverted to, it becomes clear that the courts of this country had no power to follow and decide on the alleged transmission of the beneficial interest, it is most unjust to enforce a claim by the Crown founded on the assumption of a jurisdiction which does not belong to its tribunals.

Lord COLONSAY.—My Lords, when this case was argued at the bar I felt no difficulty as to one of the points, namely, that relating to the accretions to the estate of Mrs Shard. But at that time I certainly did participate much in the doubts which have been expressed by my noble and learned friend who has last spoken. It appeared to me that there might be a very considerable difference between the case of a wife succeeding to a property, she being a foreigner and dying abroad, and the case of a wife succeeding to a property, she being a domiciled Englishwoman and dying here. I did not see very clearly how the Ecclesiastical Court here was entitled to arrive at the conclusion that the succession to the estate of Isabel Cook was the same as if she had been a domiciled Englishwoman and had died here. But when I come to consider the rule that prevails in England as to the succession in such a case, the party possessed of the property being English, and her property and her domicile here, it appeared to me that the matter comes very much to this: That when James Cook, the representative of Isabel Cook, came forward to ask for letters of administration to obtain the property, the Ecclesiastical Court here was entitled to inquire who was the representative of Isabel Cook. And then I do not understand that there is any question as to this—that if it had been inquired into it would have appeared that there was in that respect no practical distinction between the succession that did occur and that which would have occurred if the party had been domiciled here. But the consideration that most strongly prevails with me now is, that the parties themselves well and fully advised as they must have been, came forward and claimed letters of administration in regard to both estates—that is, letters of administration with reference to the estate of Isabel Cook, and letters of administration with reference to the estate of Ellis Cook. Treating the matter in that way, first, as to the letters of administration to Ellis Cook, and then as to the letters of administration to Isabel Cook, as if tracing *retro*, as it were, the successions that have occurred in the devolutions of this estate, and the parties having taken the benefits, whatever they were, of the course which they had adopted, I think we must now treat the matter as one in which the rule that prevails in such cases in the Ecclesiastical Court must be held to prevail here. It may be that, by following a different course, by following the course in America, pointed out by my noble and learned friend, the parties might have brought about a different result. They may, perhaps, not have taken the course that was most beneficial to themselves. I cannot say how that may be. But, at all events, they have not taken that course. They have taken a different course, and we must deal with the case with reference to the course that has been taken; and viewing it in that light, I cannot but concur in the judgment which has been proposed by my noble and learned friend on the woolsack.

Lord CAIRNS.—My Lords, upon one part of this case I think there is no difference of opinion between any of your Lordships—I mean that with regard to the interest. The interest is clearly payable as damages or compensation for the withholding of the principal. Whoever is entitled to the principal is entitled also to the interest as an accretion. It merges into and becomes part of the sum which has to be paid; and the whole taken together becomes the estate in respect of which the administration is granted. On the other part of the case, I should be far from saying—especially after what has fallen from my noble and learned friend opposite—that no doubt can be entertained. I have had an opportunity, through his kindness, of considering very carefully the strong and powerful arguments which he has addressed to your Lordships; but I am bound to say that I myself have arrived without hesitation at the conclusion that the judgment ought to be affirmed. I do so both upon form and also upon substance. I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient, because as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute. Now, upon the form, how does this case stand? I put aside the name of Mr Partington, who is only acting as attorney. Take the name of James Cook. James Cook comes to this country. He applies to the proper forum for the grant of two letters of administration. These two separate grants of letters of administration are made to him

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in entire accordance with the practice of the forum in this country. According to the Act of Parliament, they are to be granted "for or in respect of certain property." And in this case, beyond all doubt, the property "for or in respect of which" they are granted is, in the first instance, the personal estate of Isabel Cook, which is within the jurisdiction, and in the second place the personal estate of Ellis Cook, which is also within the jurisdiction. And in both these cases before the grant can be made an affidavit must be given in, and for the purposes of this argument it does not alter the matter, that from the difficulty of ascertaining the truth the affidavit has to be made afterwards, and not before. If the truth is known before, the affidavit must be made on the part of the person applying for probate, that the estate and the effects of the deceased for and in respect of which letters of administration are to be granted, exclusive of trust estate, without deducting anything on account of debts, are under a certain value to be therein specified. Now no person disputes that there was, both in the case of Isabel Cook and in the case of Ellis Cook, at the time of the death of each, the property within the jurisdiction in respect of which duty is sought. There is no dispute that if the letters of administration are to be granted, that is the property in respect of which they are granted. Therefore it appears to me that we have nothing more to consider in this case than this: It being admitted that there are two grants of letters of administration, what is the proper stamp to be affixed upon those letters of administration? I think, therefore, that in point of form these considerations would be quite sufficient to dispose of the case. But I am quite willing to look also at the substance. It appears to me that in respect of substance also the judgment is right, and for this reason. What is the privity which James Cook coming here is able to establish between himself and those in respect of whom the letters of administration are granted? Could James Cook come here and establish any privity between himself and Isabel Cook? Could he say, "At the death of Isabel Cook the whole of her personal estate devolved upon me, and I now ask for letters of administration to administer it?" He clearly could not, because at the death of Isabel Cook her personal estate did not pass at all in any shape or form to James Cook it passes to a wholly different person. Therefore, *ex necessitate*, James Cook must come to the court in this country and say, "I admit that I have no connection whatever directly with Isabel Cook. I admit the property, which passed from Mrs. Shard to Isabel Cook, passed from Isabel Cook to some one else." If he came without any intermediate link between himself and Isabel Cook he would be obliged to confess that he has no right to the estate. Therefore he says, "My right is not to the estate of Isabel Cook, my right is to the estate of Ellis Cook. I am the son of Ellis Cook, and the person entitled to his estate. I want and I must have letters of administration to the estate of Ellis Cook in this country." And then, when he has obtained letters of administration, it does not matter that they were both granted *uno flatus*. They must be marshalled according to their proper order. When he has obtained letters of administration to Ellis Cook, he goes further and says, "Now I have the same right that Ellis Cook would have had if he had been alive, namely, a right to ask a further grant of letters of administration to the estate of Isabel Cook;" and the process is performed, after the death of Ellis Cook, just in the same way as if Ellis Cook had first obtained letters of administration, and then, before taking the property in this country, had died, and James Cook had come forward and obtained letters of administration to his father. My Lords, it might be tested in another way, and it would come to the same result. Suppose Isabel Cook had, by a proper testamentary disposition in America, bequeathed the whole of her property, coming to her as next of kin of Mrs. Shard to a stranger, say to John Smith, and that then before any of the money was recovered, John Smith died, leaving his sole next of kin, and that son came over here, he could not have established any privity between himself and Isabel Cook. He would have been obliged to confess that he claimed as the son of John Smith, who was the universal devisee and legatee of Isabel Cook. And in that way he would have first to take out letters of administration to his father, John Smith, and then, as administrator of his father, to prove the will of Isabel Cook. It does not matter that it is done through the medium of letters of administration. The result is the same. I therefore entirely agree in the motion that this appeal should be dismissed.

Cotton, Q.C. stated that there was an arrangement with the other side that there should be no costs.

Judgment affirmed.

Attorney for the plaintiff in error, *Ewobank.*

Attorney for the Crown, the *Solicitor to the Inland Revenue*, Somerset House.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by Thomas Brooksbank and E. Stewart Roche, Esqrs., Barristers-at-Law.

June 25 and 26.

(Before the Lords Justices.)

Re Lush's Trusts.

Married woman—Her fraud—Influence of husband—Her reversionary interest—Assignment by her—Subsequent sale of her interest—Declaration by her to purchaser that she had duly assigned—Bonâ fide purchase.

A married woman may, by fraud, preclude herself not only from her equity to a settlement, but also from any right to a reversionary interest falling due after the death of her husband.

Under the will of L., a lady became absolutely entitled to a sum of money, subject to a prior life interest therein. She married, and soon after marriage she, under threats from her husband, who was in embarrassed circumstances, executed a very informal document written out by herself, purporting, in contemplation of her marriage, to give up to him all her interest, and requesting the trustees of the will to pay it over to him. This instrument was dated two days before the marriage; it was signed by the lady alone, using her maiden name; it was unattested, and no notice of it was ever given to the trustees. The husband soon after contracted to sell the reversion to C., who was a clerk to the husband's solicitor; the purchase was not completed, and a suit, held by the court to be conclusive, was instituted by the husband against C. to compel performance; C. appeared by another clerk of the husband's solicitor; the cause was heard as a short cause, the alleged assignment was admitted by both parties, and there was no evidence. A decree was made by consent, declaring that the husband was entitled to his wife's late interest. Nothing more was done in the suit, and the contract for the sale was abandoned. A month later, the husband, on the strength of this declaration, put up the interest for sale by auction, when it was bought by the Law Rever-

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sionary Interest Society, who had no notice of the fraud; but before completion they obtained from the lady, who was then living apart from her husband, and consequently not liable to his influence, a letter stating that before her marriage she had assigned her interest to her husband. The purchase was completed, and the price paid to the husband. He afterwards deserted his wife, and had not been heard of for several years. On the death of the tenant for life, the trustees paid the fund into court, and the society petitioned for payment to themselves.

The Master of the Rolls refused payment to them, holding that it was their duty to have inquired into the circumstances under which the decree had been obtained; and further, that, in signing the documents mentioned, the lady had been under her husband's influence; therefore, he retained the fund in court, but ordered payment of the dividends to her. But, upon appeal,

Their Lordships reversed this decision, considering that the lady had been guilty of fraud, and could not receive benefit from it, and ordered payment to the society.

This was an appeal of the Law Reversionary Interest Society against an order of the Master of the Rolls made upon a petition by them for payment of a fund bequeathed by the late Charles Lush, and paid into court under the Trustee Relief Act, by his trustees. The circumstances fully appear in the judgments which follow:

Jessel, Q. C. and *Bristowe* supported the appeal.

Sir *Richard Baggallay*, Q. C. and *Cutler* for the respondent, Mrs. Bowren.

The authorities cited were
Derbishire v. *Home*, 3 De G. M. & G. 80;
Vaughan v. *Vanderstegen*, 2 Drew. 363;
Johnson v. *Gallagher*, 3 De G. F. & G. 494; 4 L. T. Rep. N. S. 72;
Clive v. *Carew*, 1 J. & H. 199;
Savage v *Foster*, 9 Mod. 36;
Field v. *Sowle*, 3 Russ. 112;
Nail v. *Punter*, 4 Sim. 474;
May v. *Roper*, 4 Sim, 360.

The Master of the Rolls, in giving judgment, said: "I am of opinion that the case of the petitioners fails altogether. In the first place, I consider that a more suspicious document than this was never produced. Totally independent of everything else, it is obviously not the composition of Mrs. Bowren, the lady, herself. It is, 'I, Ellen Louisa Buckland, of Shaftesbury, Dorset, spinster, being about to marry Edward Bowren (and upon his marrying me), I, in consideration of such marriage, give up to him, the said Edward Bowren, for his own sole use and benefit, the whole of my interest under the will of Charles Lush, Esquire, late of Hoxton, Middlesex, and, in case of such marriage, I hereby request and direct the trustees of the said will to pay over to the said Edward Bowren, in case of such marriage, the whole of such interest of me, the said Ellen Louisa Buckland, under such will.' And then it goes on with a very singular sentence: 'And I, Ellen Louisa Buckland, have assigned my interest under the said will to the said Edward Bowren before my marriage,' looking exceedingly like a sentence written after the marriage, 'As witness my hand this 1st Feb. in the year of our Lord Christ one thousand eight hundred and fifty-eight. (Signed) Ellen Louisa Buckland,' with a great flourish at the end which I do not see to others of her signatures.

"Now, I proceed upon the assumption that that is really her signature; I believe it to be her signature, and I believe the whole of the document to be in her handwriting. She swears positively that it was not written before her marriage; she gives a detailed account where she was before her marriage, and no cross-examination upon that subject has shaken it at all, or shows that she was anywhere else. There are no witnesses to the document. It is a very singular thing that the husband to whom money was important should have obtained a document of this sort from his wife without having witnesses to it, or giving any notice of it to the trustees The result is that I believe this document is correctly described by her when she says it was written after her marriage, and I believe her evidence on that subject.

"The rest of the story is one of the most singular that, I think, you could ever meet with in a court of justice. The thing itself is as plain to a person who has a little experience in Chancery matters as a thing well can be. The husband says: 'I want to raise money; how shall I do it?' 'Well, have you got a document assigning that property to you before marriage; either you have or have not; if you have not, of course you must get it. Then if you attempt to sell it by auction to an ordinary purchaser, he will look at these documents very sharply, and you will never be able to get any person to take the property upon that evidence. But get a decree of the Court of Chancery, and you will do it immediately. Now I have a clerk in my office, or one who was in my office, who will enter into a contract to buy it. I have another clerk, who is a solicitor, in my office, who will act for him; file a bill for specific performance against the clerk who buys; I will appear for you, and the other clerk shall appear for the clerk who buys. Let him admit the document; don't have it proved at all, let it be admitted in evidence; you will get a decree in the course of a few months, then if he will give up the purchase you will get a decree for sale; sell it by auction; there is the decree of the Court of Chancery for sale, and at a sale under a decree of the Court of Chancery persons don't look so sharply at these documents as they otherwise would look.' I declare that this is as plain to me upon the evidence as anything I ever saw.

"Then the interest no doubt is put up to auction, and the Reversionary Interest Society buy it; they do not look into it. It is true that this lady was a party to the suit; she put in no answer; the document itself was not proved in the suit, it was merely admitted, and thereupon a decree was obtained from the courts. I must say that the court has been made an instrument of fraud for the purpose, and I am grieved to say that it is a decree of my own; that, though without any knowledge on my part of the facts, it is a decree of mine, with a most careful and attentive registrar present, Mr. Latham, than whom there is no gentleman more careful and cautious. Nothing is more certain than that if I or Mr. Latham had had the slightest intimation of what was being done, or what was intended to be done, that decree never would have passed the Court of Chancery.

"Then the Reversionary Interest Society purchases; I am bound to say that they are perfectly innocent in the matter; but there is this to be said, they make no inquiry into the matter at all, they are satisfied with the decree of the Court of Chancery; they do not look into the document, they do not require any distinct evidence as to the document, they are not struck by the circumstance that it was not proved in the cause. I suppose it was delivered over to them, as they now produce it.

"Mr. Bristowe says, What more could be done? A great deal more could have been done. If they had any doubt upon this document, they might have required that this lady should have gone before a magistrate, and made a judicial declaration respecting the accuracy of it, or said something to her about it, and inquired something about it.

"In this state of the case the matter comes before me. Now I have to consider, no doubt, the question of fraud, which is a very important question. But there is this essential distinction at the foot of all these transactions by a married woman. No doubt a married woman may be guilty of a fraud, as an infant may, as was decided in the cause of *Vaughan* v. *Vanderstegen*; but you must always consider that the Court of Chancery treats, according to the law of England, the influence of the husband as paramount over the wife. In the case of *Vaughan* v. *Vanderstegen* the lady was living alone according to my recollection; she was living as a *feme sole*, and she undertook as a *feme sole*, her husband having nothing to do with it, to pay a certain sum of money; that was a charge upon her property. But that is quite different from joining with her husband. So also in the case of *Derbishire* v. *Home*; there the representations were made to the trustees, and it is a perfectly different thing where the *cestui que trust* keeps a thing back from the trustees, and, making them commit a breach of trust, turns round upon them and says, 'You shall be answerable for that breach of trust to me,' and writing a document at the instance of her husband, making no representation to the actual purchaser, but writing a document at the instance of her husband which is to be made use of for the purpose of deceiving the court, and cheating the purchaser. That is what it really amounts to.

"Now just consider the case. There is a husband who wishes to borrow money, and insists upon his wife (I am assuming to be true what my belief is on the subject, namely, that this document was written after the marriage) signing the document. What is the wife to do? Conceive what power the husband has over the wife when he says to her 'Copy that document for me, and sign it; it is true I intend to raise money upon it, but I insist upon your copying that document for me and signing it.' I ask any man who considers the circumstances of the relation between husband and wife, in which a married woman is very properly protected by the English law, what species of defence has she against her husband in such a case, unless it is the defence which the law gives her, and which compels all persons who take advantage of a transaction of that description to pry into it with the most careful scrupulosity?

"Now what is the distinction between this species of fraud, and that species of fraud which a married woman commits, I am sorry to say, constantly at the instance of her husband, when after her marriage she assigns her reversionary interest to a purchaser, gets money upon it, and promises that she will never resist that contract afterwards? Will the court allow such a transaction? It is not as if her husband had rejected her, and that she was living alone as a *feme sole*, and, from her own motion, had made that representation; for here she was under the influence of her husband, and that species of relation is such that she has not the moral power to resist an influence which the law recognises, and which the court is bound to excuse. That really is the reason why the court does things of that description, or else the same argument would apply in every case. Will the court of equity allow a married woman to dispute her own signature upon every occasion, and say that she may now dispute it? She says, 'What could I do? I was under the influence of my husband, I was obliged to do it; I myself did not get the money.' Can anybody say that the law is wrong when it says there shall be that species of protection about a married woman? Observe what the rule is in cases which occur in court every day, where the separate examination of the married woman is required, to be quite sure that she is away from the influence of her husband. I remember taking the evidence of a married woman who had agreed to join in a settlement with her husband to allow a man to have some money. I believe it was in my own room. She said, 'It is very hard upon me, but I did it, and I do not depart from my promise.' Of course the court cannot deal with such a case. I told her she was not bound by that promise; but she insisted upon keeping it. She told me at the time that she could not resist her husband, and that he compelled her to do it.

"I do not see the distinction between the fact of her copying a document (for I have not the slightest doubt that this was not composed by her) set before her by her husband, and executing a deed in favour of another person. In this state of things, I am of opinion that she is not bound by what she did, and that she has been, in point of fact, one of the victims of the plot that was laid for the purpose of obtaining a decree from the Court of Chancery in order to raise money upon this settlement.

"I agree with Mr. Jessel in thinking it is a case for equitable settlement, but I shall do as I have done on former occasions; I shall give her the dividends on the corpus, and then I shall know hereafter something about the husband; but at present I shall not do anything more. I treat the fund as the reversionary property of a married woman, and her husband having deserted her I give her the interest until further order. I treat it as the property of a married woman which has not been disposed of by her."

The Law Reversionary Society having appealed against this decision, the case was argued by the counsel above stated, and, at the conclusion of the respondent's argument,

Lord Justice SELWYN said:—Mr. Bristowe, I think we need not trouble you to reply in this case. Although I cannot concur in the conclusion at which his Lordship the Master of the Rolls has arrived in this case, I do not think there is any difference of opinion between that learned judge and this court with respect to the law which is applicable to cases of this description; for I observe that in his judgment his Lordship refers with approbation to the decision of Kindersley, V.C. in the case which has been so often referred to of *Vaughan* v. *Vanderstegen*. In that case the Vice-Chancellor stated in a very few words a proposition of which, I apprehend, at the present time, no doubt can be entertained, viz., that it is well established that a married woman is capable of committing a fraud, and is liable to be visited with the consequences of the commission of that fraud. Then he refers to the case of *Savage* v. *Foster*, which was a case in which the husband and wife concurred in the fraud, and where there was not such an active participation in the fraud as that which we find on the part of the lady in the present case. In *Savage* v. *Foster* it was a case of standing by and allowing the purchase to take place in ignorance on the part of the purchaser of the real state of the title, which the husband and wife were aware of. His Lordship also referred to the case of *Derbishire* v. *Home*, in which Turner, L. J. says, at p. 113 of 8 De. G. M. & G., "There is, I think, strong ground to contend that, as a court of equity creates and models the separate estate, the estate so created and modelled must be subject to the ordinary rules of the court." Now, there is no doubt that in cases of separate estate, and especially in cases where that separate estate is coupled with the restraint upon anticipation, many questions may arise as to how far the court can, in dealing with cases of fraud on the part of married women, overrule a declaration of the settlor or of the testator in respect to the separate estate and the restraint upon anticipation; and

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some cases have gone so far as to say that, although it was very greatly for the benefit of the married woman that that restraint should be removed, still, if the settlor or testator has imposed it, the court has no power to take it away, even for the benefit of the married woman herself. But in the present case we are relieved from any consideration of this kind, because in this case we find that this lady was absolutely entitled in her own right to this reversionary interest. That upon her marriage would pass to the husband, subject, of course, only to the rights which she might have in the event of her surviving him, and to her equity to a settlement; and then that equity to a settlement is certainly an interest which this court will control, and one where the court will not allow, as we have had occasion to say in the very recent case of *Barnard* v. *Ford*, the equity to a settlement to be made an engine of fraud, or, as was expressed in that case by my learned brother, this court will not allow an equity to a settlement to be enforced where it would be contrary to good conscience to do so. I think, therefore, upon all the authorities the question we have now to consider in this case is, whether under the circumstances proved it would be contrary to good conscience to allow this lady to assert the equity to a settlement.

Now with respect to the facts; in the first place we have a document which is entirely in Mrs. Bowren's own handwriting, the document of the 1st Feb. 1858, which bears date two days before her marriage, which took place on the 3rd Feb. That is a document certainly open to the observations which have been pressed upon us with great force by Sir Richard Baggallay, as being a document of a very unusual character, but at the same time it is one which calls most pointedly the attention of any person who writes such a document as this to the circumstance that it was very material indeed to make out that it had taken place before her marriage. Then the representation which the lady now makes with respect to that is, that, in point of fact, it was not written until the month of April; that she did it then under the influence of her husband and under the influence of a threat that, unless she signed it, her husband's circumstances would compel him to leave her and send her home. She says she did it very reluctantly, and only in consequence of the exercise of that influence, and under the pressure of that threat.

Then the first question is, are we to take it as being established that that document was not in fact written until after the date of the marriage? because I think that, supposing it to have been written before the marriage, it is perfectly clear that it would be sufficient to exclude any equity to a settlement in a transaction of this kind. With respect to that I cannot help saying that I agree in the conclusion which his Lordship, the Master of the Rolls, arrived at as to the date of that document; because, although it is no doubt very dangerous to trust to the unsupported testimony of a person who has been an actor in such a transaction, when she comes to say that a document written by herself and signed by herself in her maiden name, and dated on the 1st Feb. 1858, was actually written by her when that was no longer her name, when she had been married several months, and was consequently unfitted for the purpose (which she must have known), although it is very dangerous to listen to such testimony, still I think that there are corroborative circumstances here which induce one to believe that her representation with respect to that is correct. Beyond that there is this very extraordinary suit, which I think I ought not to pass over without some comment; because I entirely agree with the observations which his Lordship, the Master of the Rolls, has made upon that suit as being a means of making the court an instrument of fraud; a suit having for its only proper and legitimate purpose, that of binding the interest of a married lady, by proving as against her a fact which she denies. The bill is filed on the 7th July; the answer is put in on the 14th; the decree is obtained on the 19th, and upon the face of that decree it appears that that which was the only essential thing in the suit at all, viz., the evidence, was omitted altogether. That being so, I am of opinion that it is sufficiently established that this document of the 1st Feb. 1858 was not written until after the marriage of the lady. But the document itself is most material for the purpose of showing that this lady's attention must, at the time when she wrote it, the whole being in her handwriting, have been most pointedly called to the transaction, and her own statements clearly show that, her husband being in great difficulties, she was aware that attempts were being made to raise money upon the footing of this security.

Then that being so, it brings us down to the date of the suit I have already mentioned, then to the transaction in Oct., when the sale by auction took place. Now with respect to that I cannot entertain any doubt that the purchase was a *bonâ fide* purchase, made at a price which seems to me to have been a very fair and reasonable price; it was not at all purchased at an undervalue by this society at the sale by auction, and I cannot help expressing my very strong belief that the matter, so far as they were concerned, was entirely *bonâ fide*, a purchase by auction under ordinary circumstances made by them. Then they proceeded to investigate the title, and although I agree that the document has certain marks of singularity upon it, and although the suit was one of a most singular character, and one which, if the suspicion of the purchasers had been aroused, would have been calculated to increase that suspicion, still I do not think that those circumstances were of such a character as to induce the court to say that the purchasers must have known. I believe they did not know that any fraud or deception had been perpetrated with regard to it. I think that the transaction is very fairly represented in the letter which was written on the 12th Oct. 1858, from Mr. Dalton, writing in the name of his firm to one of the trustees, in which he says, "As we thought it would probably be satisfactory to the trustees to have a letter from Mrs. Bowren, stating the fact of her having made over her interest under Mr. Lush's will prior to her marriage, we required the vendor's solicitor to obtain one, and we now enclose it. Perhaps you will be kind enough to put it away with the papers you have relating to the trust. We have not yet completed the purchase, but expect to do so in the course of the week, when we will send you the usual formal notice." I think that letter correctly represents what really took place, and it is, to my mind, quite conclusive that these purchasers were acting *bonâ fide* in this matter, and that they required this letter for the purpose of preventing any possibility of doubt as to it.

Now, of course, in all these transactions we must ascertain whether the lady was in truth acting as a free agent, because although a married lady may be, as I have already said, guilty of a fraud, and may consequently be visited with the consequences of that fraud, on the other hand she is entitled to the same protection as any other person, and to say that she is not to be rendered liable for acts which were not done of her own free will, and in respect of which she was acting under such coercion as prevented her from being a free agent. Now in the first place, even assuming that she was acting under some species of coercion in this transaction, still

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the very fact which she states as to the pressure which was then exercised upon her, must have left an impression upon her mind which would render her exceedingly sensitive with respect to all subsequent transactions relating to the same matter. And then when we find by her own admission that she was aware that money was about to be raised upon the security of the reversionary interest, when she knew that she had written and signed a document which she says herself she wrote and signed with very great reluctance, knowing that it did not express the truth, knowing that it was signed by her in a name which was no longer hers, and that it bore a date which was not the true date, I say that, under these circumstances, an application was made to her to write the other letter, the letter which bears date the 11th Oct. 1858. Now it is true that the body of that letter is not, like the body of the former document, altogether in her own handwriting; but although she originally denied her signature, it is now clearly proved, and in fact is admitted at the bar on her behalf, that that letter was signed by her. At this time she was under no coercion, under no pressure; her husband was in prison, and she was living separate and apart from him, and the question of fact which we have to try —and this is, in truth, the question upon which my opinion differs from that of his Lordship the Master of the Rolls—is whether she was a free agent when she wrote that letter. I say, having regard to the circumstances stated by herself, and to the pointed manner in which her attention must have been directed, so recently as April in the same year, to this transaction, having regard to the fact that she admits that she knew that money was about to be raised upon the security of this reversionary interest, and to the fact that she also admits that she actually herself received some portion of the money which was raised by means of this transaction, I say it is impossible to believe that she could have signed so short a document as that of the 11th Oct. 1858, without being fully cognisant of the contents, meaning and object of that document. Then that being so, what is the representation which she then, four days before the completion of this transaction, makes? It is this: "I beg to inform you that previous to my marriage with Edward Bowren on the 3rd Feb. last, I assigned to the said Edward Bowren all my interest under the will of Chas. Lush, Esq., late of Hoxton, Middlesex." I say that having written that, the parties who were about to advance the money, and who did advance it four days afterwards, were entitled to believe the representations so made by her, and I think she cannot now be heard to say that they ought to have disbelieved those representations, and ought to have said, "We do not believe that you did assign to Edward Bowren, previous to your marriage, all your interest under that will." I think it would be contrary to equity and good conscience to allow a lady who had made under such circumstances a declaration so clear and distinct as that, to set up afterwards a claim to an equity to a settlement so as to defeat the interests of the purchasers who, upon the faith of that representation, have paid the purchase-money in respect of this lady's interest.

Consequently I think that the order made by his Lordship the Master of the Rolls must be reversed, and that there should be an order directing the payment of the costs of the trustees in the usual form both in the court below and here. The remainder of the fund will be paid to the society.

Lord Justice GIFFARD said.—The propositions of law which are applicable to this case are to my mind very simple, and such as are not disputed, and they are these—viz., that a married woman may by fraud preclude herself from her equity to a settlement, and added to that I have no objection to this, although I do not think it necessary for the decision of this case, that she may also preclude herself by fraud from any right to a reversionary interest falling due after the death of her husband. In fact if that was not so it would be contrary to what has been decided over and over again in this court—viz., that a married woman who chooses to commit a fraud may be held responsible for that fraud.

Then the next question is whether in this case there has been fraud in the statements made by the married lady. Taking all the circumstances into consideration I have no doubt that the document which she represents to have been signed on some day after the marriage in Feb. 1858, was in truth signed on the day which she so represents. With reference to that document what she says is, that her husband threatened to leave her if she did not sign it, and she says in her cross-examination, "I think I must have known that he was trying to borrow money upon my property. My husband told me that if I would sign exhibit 1, he could borrow money upon my property, and I signed it with the intention of enabling him to do so." The whole of that document is written in her hand, it is written in a very plain hand, and in a very firm hand, and I can have no hesitation in saying that a married woman who signs a document of that description under those circumstances, if she turns round afterwards and affects to come to this court, and to say that she is entitled to make a claim as against that document, must be treated as having committed a fraud. In this case there is no evidence of any such pressure or influence as would do away with the effect of that act which she did, and there is a very wide difference indeed between a case where it is a matter of contract and a case where it is a matter such as this—viz., a matter of false representation and fraud.

Then that being so, the next question really is whether the society was cognisant of the fraud. It is quite plain that they were not, because this was a sale by auction; they bought it at the auction in the usual way, and paid a fair consideration for it, and indeed that they were cognisant of the fraud has never been suggested.

Then there is this further question, viz., was there any such negligence on their part as would visit the society with the same consequences as if they had been cognisant of the fraud? I think there was no negligence. I think it would be a monstrous thing where property is put up for sale by public auction, and documents of this description are produced which, on the face of them, would lead any person to believe that they were *bonâ fide*, in the absence of proof, full and conclusive to the contrary, that they should be bound to make any further inquiry than that which would appear on the face of these documents. This document itself is not an unusual document; it was no improbable document for a married lady to have executed; it is neither more nor less than this—that this lady, being entitled to a certain sum of money expectant on the death of her mother, gives up her right to a settlement to her husband. There would be nothing very extraordinary in that, nor anything very extraordinary in its being done in a document of this description. Then as to the decree also; to that decree all necessary parties are proper parties. It is true that the decree does not recite that there was any evidence, but you cannot impute to persons that, when a decree is brought to them, because it does not recite there is any evidence, therefore it is put upon them to inquire whether there was evidence or not. When such a document as this is presented to the purchaser, and such a decree as that is presented to a purchaser, I cannot hold him liable for negligence

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because he makes no further inquiry. But here there is an additional fact, that beyond all question this lady must have known perfectly well when her husband was in prison, that Mr. Bowen May, his solicitor, was trying to raise money, and was raising money, upon the footing of the very document which she signed in the month of April. In the course of that transaction, because the trustees had said that they had had no notice, without any suspicion, to my mind, being aroused on the part of the society, a request is made that she would sign a letter stating that she had executed this document antecedently to her marriage. She signs that letter, and although she has forgotten it, I have no hesitation in imputing to her, and in saying that every court must impute to her, a knowledge of the contents of that letter. It would be most monstrous, and in fact the transactions of life could not go on, if, after putting her signature to a document of that description, she could be heard to come into court and assert such a right.

For these reasons I am clearly of opinion that, whether there is an equity to a settlement, or whether it is a reversionary interest, it would be most unjust that this lady should be allowed to come forward, and to assert in this court, contrary to all good conscience, any right of any kind or of any description. I cannot help saying that I think, considering what the acts done were, she ought not to have made this claim in any shape or form, and that it was not an honest thing to do. I quite agree that she is very much to be pitied, because she has contracted a most imprudent marriage, and because she has been deserted by her husband, and because in all probability her husband influenced her more or less; but that is no reason why a married lady, who chooses to commit a fraud, should afterwards come forward and say, notwithstanding that fraud, "I am entitled to property which other persons have been induced to purchase, because I made a misrepresentation, and I made a misrepresentation which I knew at the time I made it to be utterly and wholly untrue."

For these reasons I am of opinion that the order below must be discharged, and that the society must have the money.

Solicitors for Mrs. Bowren, *Cutler* and *Turner*.

Solicitors for the Law Reversionary Interest Society, the appellants, *Capron*, *Dalton*, and *Co.*

Nov. 6, 13, 20.

(Before Lord Justice GIFFARD.)

Ex parte MORRIS; *Re* THE DUKE OF NEWCASTLE.

Bankruptcy—Adjudication—Parliamentary privilege—Non-trader—4 Geo. 3, c. 33—Bankruptcy Act 1849, *ss.* 66 *and* 77—*Bankruptcy Act* 1861, *s.* 69.

A non-trader having privilege of Parliament, is liable to be made a bankrupt under the Bankruptcy Act 1861, *s.* 69.

Accordingly a petition for adjudication of bankruptcy against a peer of the realm, not a trader, which had been dismissed by one of the commissioners in bankruptcy, on the ground that such a person was not liable to be made a bankrupt, was remitted to the commissioner to hear and determine upon the evidence whether an act of bankruptcy had been committed.

This was an appeal from an order made by Mr. Commissioner Winslow, dismissing, with costs, a petition for adjudication of bankruptcy against his Grace the Duke of Newcastle, upon the ground that a person entitled to privilege of Parliament was not within the operation of sect. 69 of the Bankruptcy Act 1861. The judgment of the learned commissioner is reported *ante* p. 368.

Mr. Morris, the petitioning creditor, appealed from his Honour's decision.

De Gex, Q.C., *Sargood*, Serjt., and *Bagley* for the appellant.—We rely on sect. 69 of the Bankruptcy Act 1861, which provides that all debtors, whether traders or not, shall be subject to the provisions of that Act. On the other side it is contended that a person having privilege of Parliament cannot be made a bankrupt, unless he is a trader, and that the only act of bankruptcy on which a petition against such a person can be founded is such as is mentioned in sect. 87 of the Bankruptcy Act 1849. We admit we do not found our petition on such an act of bankruptcy. But sect. 69 of the Bankruptcy Act 1861 is quite general in its terms, and why should it not apply to a non-trader having privilege of Parliament? The case of *Harris* v. *Lord Mountjoy*, 2 Leon. 173, is in our favour, though it is said on the other side to have been overruled by *Cassidy* v. *Steuart*, 2 M. & G. 437, which decided that a *ca. sa.* could be issued against an M.P. in order to found proceedings in outlawry. Then in *Ex parte Meymot*, 1 Atk. 196, 200, there is a *dictum* of Lord Hardwicke, that a person who traded could at that time be made a bankrupt. An argument before the commissioner was, that there a bankrupt gets protection of his person as a condition of giving up his property to his creditors, and that this reason could not apply to the case of a person who does not receive protection from arrest. But in truth the remedy against the person in bankruptcy is only for the purpose of reaching the bankrupt's goods; bankruptcy is a statutory execution. The ground, however, of the commissioner's decision was, that, previous to the Act 4 Geo. 3, c. 33, the only act of bankruptcy which a man could be forced to commit was lying in prison, which of course was not applicable to persons having privilege of Parliament, and therefore, by that statute, a method analogous to the present trader-debtor summons was introduced, of compelling a person entitled to privilege of Parliament who was a trader to commit an act of bankruptcy. This provision is continued by sect. 66 of the Act of 1849. The same method was, by sect. 8 of 1 Vict. c. 110, introduced as to ordinary traders as a compensation for the abolition of arrest on *mesne* process. The stat. 4 Geo. 3, c. 33, it is said, contains a recital that doubts had been entertained, whether a trader having Parliamentary privilege could be made a bankrupt. We say, however, that those doubts were unfounded, and cannot have any weight merely because the Act makes a provision for removing them. This can afford no ground for limiting the construction of the express words of sect. 69 of the Bankruptcy Act 1861, that all debtors, whether traders or not, shall be liable to its provisions. The other side wish to read those words as meaning "all debtors not having privilege of Parliament." In the Act of 1849 the words "trader," "debtor," "bankrupt," are used indiscriminately, because trading was then essential to bankruptcy. But that is not so now, and it does not follow that, because you find the word trader in a particular section of the Act of 1849, and that Act, so far as it is unrepealed, is, by sect. 232 of the Bankruptcy Act 1861, to be construed with the Act of 1861 as one Act, therefore that particular section of the former Act only applies now to traders. That this must be so, is shown by a consideration of sects. 177 and 178 of the former Act, the one of which provides for proof of a contingent debt, the other for the proof of a contingent liability. In sect. 177 the word "bankrupt" is used, while in sect. 178 the word "trader" is used; but it is clear that now a contingent liability is proveable against

a non-trader's estate. The other side rely on the judgment of Lord Cairns in *Re Bristow*, L. Rep. 3 Ch. 247; 18 L. T. Rep. N. S. 222; but the ground of the decision in that case was, that the power to make a non-trader bankrupt was not *ex parte* as in the case of a trader. The case of *Re Hepburn*, 17 L. T. Rep. N. S. 275; 15 W. R. 1065, is in our favour, for there it was held that a non-trader equally with a trader, is entitled to time to show cause against an adjudication of bankruptcy, though sect. 104 of the Act of 1849, upon which it was founded, refers to proof of trading. What the other side have to do, is to show that there is anything to control the meaning of the words, "all debtors" in sect. 69 of the Bankruptcy Act 1861.

Sir *R. Palmer*, Q. C. and *Ernest Reed*, on behalf of the duke.—"Privileges of Parliament," are defined by Blackstone as extending to freedom of speech, person, servants, lands, and goods. Parliamentary privileges have been gradually curtailed by a series of statutes, but if they have not been expressly cut down they remain as they were in ancient times; they cannot be affected by the general words of a statute.

May's Privilege of Parliament, 6th edit., pp. 106, *et seq.*;
Bacon's Abridgment, tit. "Privilege," vol 6, pp. 541, 549.

A *capias ad respondendum* was the only way of compelling the appearance of the defendant to an action, but it could only be issued in cases in which a *ca. sa.* could be issued. Neither was applicable to persons having privilege of Parliament.

Sir W. Jones's Rep. 154.

The note of Mr. Serjeant Manning in the case of *Cassidy* v. *Stuart*, 2 Man. & Gr. 437, gives a full answer to the case of *Harris* v. *Lord Mountjoy*, 2 Leon. 173, which is relied on against us. The remedial legislation against the privilege of Parliament is contained in a series of statutes, 12 & 13 Will. 3, c. 3; 2 & 3 Ann, c. 18; 11 Geo. 2, c. 24; and 10 Geo. 3, c. 50; but they all save the privilege of freedom from arrest, except in cases of felony. Bankruptcy, as to members of Parliament, was dealt with by the stat. 4 Geo. 3, c. 33. It is, however, limited to the traders mentioned in it, and it provides a new species of act of bankruptcy. The dictum of Lord Hardwicke, in 1 Atk. 200, was not germane to the subject before him, and was entirely extrajudicial. The case of *Harris* v. *Lord Mountjoy* (*ubi sup.*) has never been recognised as settling the law. There is something to show that the Legislature considered persons entitled to privilege of Parliament as being outside the bankruptcy laws. For instance, in 34 & 35 Hen. 8, c. 4, the power to deal with the body is inseparable from the rest of the Act, and therefore it could not apply to privileged persons. Then come the Acts 13 Eliz. c. 7, 1 Jac. 1, c. 15, to which a similar argument applies. The statute 21 Jac. 1, c. 19, does not contain any question applying to persons having privilege of Parliament. Then came the statute 4 Geo. 3, c. 33, already referred to, and the statute 45 Geo. 3, c. 124. It is clear that Parliament thought that specific legislation was requisite to make a trader, having privilege of Parliament, a bankrupt, and it has not thought fit to extend that legislation to non-traders having that privilege. That special mode of procedure was continued by stat. 6 Geo. 4, c. 16, which repealed, but in substance re-enacted, the former Acts, and again by the Act of 1849. We have now, remembering the history of the bankrupt laws, to construe the Acts of 1849 and 1861, on which the question really turns. Sects. 66 and 77 of the Act of 1849 are unrepealed, and are to be construed as part of the Act of 1861. So construing that Act the true conclusion is that, as the sections relating to persons having privilege of Parliament are limited to traders, they alone are included in the Act. If this be not so, there is in the Act no saving from arrest of privileged non-traders, though the object of the Act was in some respects to favour non-traders. In this case non-traders would be in a worse position than traders. The powers of arrest under the Act of 1861 are very extensive—sects. 82, 85, 112, 113, 226. The construction of the Act for which we contend is that which was approved by Lord Cairns in *Re Bristow* (*ubi sup.*), and it is not unreasonable, because the object of the Act of 1861 was to blend together the bankruptcy and insolvency laws, and the previous system of insolvency did not apply to privileged persons, for they were not obliged to seek protection as they could not be arrested for debt. It is clear that the words "all debtors" must have some qualification, for they would not include a prince of the blood royal, nor a foreign ambassador. Sects. 161, 165, and others of the Bankruptcy Act 1861, relating to the order of discharge, evidently assume that the bankrupt is a person liable to arrest, and therefore those sections cannot apply to a person having privilege of Parliament.

De Gex, Q. C. in reply.—Serjt. Stone, commenting on the statute of Elizabeth, says that a barony shall not be sold; thereby implying that a peer could be made a bankrupt. In Davis on the Law of Bankrupts, published in 1744, it is said that a commission was executed against John Burridge, an M.P., and it is stated that all persons, even a nobleman, who trade are liable to be made bankrupt. The statute 4 Geo. 3, c. 33, was passed merely to provide a means of compelling a privileged trader to become bankrupt, which could not be done before. The statutes 52 Hen. 3, c. 23; 13 Edw. 1, c. 11; 25 Edw. 3, c. 171; 19 Hen. 7, c. 9; cited by Serjt. Manning in his note to *Cassidy* v. *Stewart* (*ubi sup.*) do not impugn the case of *Harris* v. *Lord Mountjoy* (*ubi sup.*). The sound rule of construction is that the construction of a statute is to be procured by the preamble. The preamble of the statute 4 Geo. 3, c. 33, speaks of the honour and dignity of Parliament being concerned, that the law should have its course against insolvent traders though privileged; surely that honour and dignity are equally concerned in making non-traders pay their debts. The distinction which there existed between traders and non-traders arose from totally different causes. The reference in statute 21 Jac. 1, c. 19, to privilege of Parliament is really an argument in my favour. I really do not require sect. 66 in the Act of 1849, for sect. 69 of the Act of 1861 is quite general in its terms. This accords with the well-known principle of construction of Acts of Parliament laid down in *Stradling* v. *Morgan*, Plow. 205.

Lord Justice GIFFARD.—The real difficulty is how to reconcile sect. 69 of the Act of 1861 with the privilege of Parliament, looking at the powers of arrest in the Act.

De Gex, Q. C.—The way to meet that is to construe the Act of 1861 as substituting the word "debtor" for the word "trader" in the Act of 1849, except when a contrary intention appears. The proviso at the end of sect. 69 would have no meaning, unless but for its insertion the Act of 1849 would have applied as to acts of bankruptcy to non-traders.

At the conclusion of the arguments judgment was reserved, and was delivered on Nov. 20, when

Lord Justice GIFFARD said:—The question in this case is whether the Duke of Newcastle is exempt from the operation of the bankruptcy laws now in force, because he is a peer. In the arguments before me, the bankruptcy laws were traced from their commencement up to the Act of 4 Geo. 3, c. 33, and from that period up to the bankruptcy statutes now in force, being those of 1849 and 1861. The privileges of Parliament were also referred to, as asserted from the year 1610 down, and subsequently, to the date of the 10 Geo. 3, c. 50, and the *dictum* of Lord Hardwicke in *Ex parte Meymot*, 1 Atk. 201, was quoted, as well as the cases of *Harris* v. *Lord Mountjoy*, 2 Leon. 178, and *Cassidy* v. *Stewart*, 2 M. & G. 487. Before referring to the statutes of 1849 and 1861, on which, as it seems to me, the question rests and may well be decided, it is in my judgment sufficient to state that antecedently to the 4 Geo. 3, c. 33, no special reference was made in any of the Bankruptcy Acts to persons having privilege of Parliament; that the enactments were general; that there appears no reason to doubt but that in one instance, as stated by Lord Hardwicke, a commission was issued against the Earl of Suffolk, for trading in wines, and that as stated in page 7 of the Laws relating to Bankrupts, by Thomas Davis, dated 1774, a commission was issued against John Burridge, who was a member of Parliament; that it is to be inferred that there was no contest, at all events in any court of law, as to whether these commissions were or were not rightly and lawfully issued; that there then came the Act of 4 Geo. 3, c. 33, which recited the existence of doubts as to whether commissions could be issued against persons having privilege of Parliament, and contained special enactments relating to such persons; that in every Act from that time, down to and including the Act of 1849, either the Act of Geo. 3 has been continued or special clauses have been enacted having special reference to persons having privilege of Parliament; that I do not well see how the case of *Harris* v. *Lord Mountjoy* can be reconciled with that of *Cassidy* v. *Stuart*; that whatever may have been the real or asserted extent of Parliamentary privilege in times gone by, the goods, lands, and property of a person having privilege of Parliament, subsequently at least to 10 Geo. 3, c. 50, were not, and have not since been, exempt from process; that the dictum of Lord Hardwicke, for it is not a decision, is a direct expression of opinion by him, that "though there may be some particular powers that commissioners of bankruptcy could not exercise against a peer, yet, notwithstanding this, he may be liable to a commission of bankruptcy if he will trade;" that I can see no reason why this opinion should be considered contrary to law or sound reasoning, if at its date the privilege of Parliament did not extend to the goods and property of persons having that privilege; and that in present times at all events Parliamentary privilege does not extend beyond protection of the person. With these observations the material sections of the Acts of 1849 and 1861 may be referred to, bearing in mind first, that it was positively recited in the Act of 4 Geo. 3, c. 33, that that Act was passed to remedy inconveniences, and to support the honour and dignity of Parliament; and, secondly, that not only from the dictum of Lord Hardwicke, but also from the acknowledged canons of construction, the rule to be deduced is that general words will be so construed as to be subject to the exemptions of persons or property specially exempted, and, on the same principle, as subject to the special privileges of persons specially privileged; or, in other words, that they will not be so construed as to destroy special exemptions or special privileges. It is upon these principles we have to deal with the statutes now in force. The first of them, that of 1849, applied, as all previous bankruptcy statutes had, to traders only; and by sect. 65 it enacts "with respect to persons liable as traders to become bankrupt" that "all traders shall be deemed liable to become bankrupt," and by the 66th section, "That if any such trader, having privilege of Parliament, shall commit any act of bankruptcy, he may be dealt with under this Act in like manner as any other trader; but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases made felonies or misdemeanors by this Act." So far the matter is clear, and if the Duke of Newcastle was a trader there would be no question. Then we have the Act of 1861; that Act is entitled "An Act to amend the Law relating to Bankruptcy and Insolvency in England." It had for one of its objects that of making all debtors, whether traders or not, subject to the bankruptcy laws. By the 230th section it repealed several sections of the Act of 1849, and enacted in the 232nd section that the Act of 1861 "should be construed together with so much of the Bankrupt Law Consolidation Act 1849 as remains unrepealed as one Act;" and in the 69th section, "As to the persons subject to this Act: all debtors, whether traders or not, shall be subject to the provisions of this Act." The argument is that the words "all debtors, whether traders or not," do not include persons having privilege of Parliament, because those persons are not specially mentioned. But the Act of 1849 specified as traders who were to be subject to the bankruptcy laws, traders who had not, and traders who had, privilege of Parliament. "Traders," in the 69th section of the Act of 1861 must be as extensive as "traders" in the Act of 1849, and there is no sound reason for holding that debtors having privilege of Parliament should be excluded from the term "all debtors," when they are included in the term "traders" which follows; unless, at all events, there be a context rendering such a construction necessary, and there is no such context. I am of opinion that the words "all debtors" include debtors having privilege of Parliament—first, because the clause, even if taken alone, might well be read and dealt with as being subject, as regards privileged persons, to their privileges, without altogether exempting privileged persons. Secondly, because the term "traders" includes privileged traders, and "all debtors" are substituted for "such traders." Thirdly, having regard to the reference of the one Act to, and the incorporation of the one with, the other, because the word "traders" in the 66th section of the Act of 1849 must be taken as extended by that of 1861 to all debtors having privilege of Parliament. There is at least one other section of the Act of 1849 in which the word "traders" must be taken as extended to all debtors, whether traders or not—that is the 178th; and when the whole of the 69th section is considered, the construction which I have stated to be the true one, is further fortified by this—viz., that where it is intended there should be a difference between traders and non-traders, that difference is specified, for the end of the section is, "but no debtor who is not a trader shall be adjudged bankrupt except in respect of some one of the acts of bankruptcy hereinafter described." True it is, that persons having privilege of Parliament were not within the repealed insolvency laws, but this was because they could not be arrested on ordinary civil process; and the very object of the Act of 1861 was to put traders and non-traders on the same footing as regards bankruptcy, with some specified exceptions, in some matters only; and persons having privilege of Parliament are not among the specified exceptions. If persons having privilege

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of Parliament are omitted from the Act of 1861 it is from inadvertence and not from intention. They are included, quite as a matter of course, in the Act which is to come into operation after Christmas, and though I cannot supply an inadvertent omission, if omission there be, for it is my duty to administer and not to make laws, I have no hesitation in saying that the intention of the Legislature is expressed, and that the case, though perhaps of some importance, is sufficiently plain, and quite free from any real difficulty. The proper course, therefore, will be to discharge the commissioner's order; to remit the petition back to him for hearing; and to direct that the appellant's costs of this appeal, if there be an adjudication on his petition, be added to the costs of his petition; if there be not, that there shall be no costs of this appeal, and that the deposit be returned. I have only to add that the commissioner was quite right in deciding that further evidence could be admitted on the petitioner's part.

Ernest Reed then asked for leave to appeal to the House of Lords.

Lord Justice GIFFARD directed a notice of motion to be given.

Solicitors for Mr. Morris, *Lawrence, Plews, Boyer,* and *Baker.*

Solicitors for the Duke of Newcastle, *Lewis, Munns, Nunn,* and *Longden.*

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Saturday Nov. 20.

Re THE PROVIDENT CLERKS' MUTUAL LIFE ASSURANCE ASSOCIATION: *Re* MOSELEY'S POLICY.

Practice—Petition—Parties—Costs.

An insurance company received from a firm of solicitors a notice not to pay moneys due on a policy to any claimant, as a suit was about to be instituted for the administration of the estate, of which the policy formed part, and that they (the solicitors) would probably act for the person to be appointed to get in the estate. The company thereupon paid the policy moneys into court. On a petition to get the money out:

Held, that the solicitors were not proper respondents to the petition, and were entitled to the costs of it, which, however, to save the expense of taxation, were limited to 3l.

This was a petition presented by the trustees of the settlement and the widow of Robert Moseley, under these circumstances:

In Dec. 1866, Robert Moseley effected an insurance on his life in the Provident Clerks' Mutual Life Assurance Association. In April 1869, Robert Moseley died, and upon his death the secretary of the association received a letter from Messrs. Le Blanc and Torr, solicitors, to the effect that they were concerned for several creditors of R. Moseley, and were taking the necessary steps to obtain a proper administration of his estate, and as they in all probability would represent the person to be appointed by the court to get in the estate, they had to request that the association would not pay the policy moneys to any claimants.

Upon the receipt of this letter, the association paid the money due on the policy, viz., 589*l.* 6*s.* into court.

The petitioners thereupon presented this petition, making the association and Messrs. Le Blanc and Torr respondents. They alleged that there was no ground for the claim set up by Messrs. Le Blanc and Torr, and they prayed (*inter alia*), that Messrs. Le Blanc and Torr might be ordered to pay both the costs incurred by the payment of the money into court, and of the petition.

Bristowe, Q. C., and *Winterbotham,* for the petition.

Dickinson, Q. C., and *Gardiner,* for Messrs. Le Blanc and Torr.

Villiers for the association.

Roche, for other parties.

The VICE-CHANCELLOR said that the money must be paid to the petitioners. It was a mistake, however, making the solicitors respondents, and they must have their costs, but in order to avoid taxation, he would direct that they should be paid 3*l.* for their costs.

Solicitors: *Wood, Street,* and *Hayter*; *Wansey* and *Bowen.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Nov. 4, 5, and 6.

THE LANDED ESTATES COMPANY (LIMITED) *v.* WEEDING.

Specific performance—Exchange—Infant—Acts of Trustee—Acquiescence.

A company was formed to purchase land for building purposes, and having become possessed of the W. Park estate, which was in the vicinity of a railway station, negotiated with the tenant for life of a portion of the intervening land necessary to form a road to the station, and the Inclosure Commissioners were applied to, and the surveyors of those representing the tenant for life, of the company, and of the commissioners, reported favourably for an exchange of two small pieces of land; and the company took possession and made the road, which was publicly used. The tenant for life died; negotiations were renewed with the guardian of the tenant in tail, but he also died, and the acting trustee of the estate, who had hitherto acquiesced, within two months of the next tenant for life attaining twenty-one, objected. Such tenant for life on coming of age at once repudiated the whole transaction. A bill filed for specific performance, and an injunction, dismissed without costs.

This bill was filed for a declaration that an agreement for exchange of two small pieces of land in the immediate vicinity of Worcester-park estate, near Maldon, Surrey, and the Weeding estate, might be specifically performed; for damages, and an injunction to restrain interference with a certain road. The plaintiff company was incorporated under the Act of 1862, for purchasing real estates, and dividing and selling the same, and in 1864 purchased the Worcester-park estate, consisting of 302 acres, of William Wells. It appeared that to make the estate available for the purposes of the company a road should be made to the adjacent station on the South-Western Railway, called the Worcester-park station, through land belonging to a Mr. Farnell and the Weeding estate.

The company purchased a piece of land of Mr. Farnell for the road, and negotiated for the purchase of another piece of the Weeding estate for the same purpose; and in April 1864 an agreement was come to between Mr. Hook for the company and Mr. Lewin on the other side, that, as soon as circumstances would permit, an exchange should be effected of a piece of land, part of the Weeding estate, for another piece, part of the Worcester-park estate,

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and that application should be made to the Inclosure Commissioners to carry it out under the 8 & 9 Vict. c. 118. A correspondence ensued between Mr. Hook and Messrs. Vandercom, Cree, and Law, Solicitors for the Weeding Estate, which was entailed, the tenant for life, Mr. Thomas Weeding being in India, and a draft agreement of exchange was sent by Messrs. Vandercom, Cree, and Law, to Messrs. Thorndike and Smith, the solicitors to the company, and approved of on behalf of the company, and Mr. Wells. It was made between William Wells of the one part, and Thomas Weeding of the other part, and recited the will of Thomas Weeding, deceased, whereby the Weeding Estate was vested in his widow, Mary Weeding, Richard Baggallay, Alfred John Pidgeon, and John Baggallay, upon trust for Mary Weeding for life, with remainder to Thomas Weeding for life, with remainder to his first and other sons in tail male, with divers remainders over. It also recited that the testator died in 1856, and his widow in Feb. 1860, and the proposal to exchange the lands, to make the road, with certain provisions as to its user, and that the Inclosure Commissioners should be applied to. The company took possession of the land after this was determined upon, and set out the road, and on the faith of having the use of it under the proposed agreement, had done other acts involving an outlay of 100,000*l.* by them and subpurchasers. The Inclosure Commissioners were applied to, and a Mr. Beeston appointed surveyor, who made his report that the proposed exchange would be materially beneficial. Meantime Mr. Thomas Weeding died in India, leaving his wife *enceinte*, and a posthumous child was born in March 1865, who became tenant in tail of the estate. The matter was then transacted with his mother and guardian, but he died on the 20th Sept. 1866, before anything was formally signed and agreed to, and the defendant, son of Mr. John Baggallay, came into the estate as tenant for life in possession, and was then eighteen years old.

A correspondence then ensued between Messrs. Vandercom and Co. and Messrs. Smith and Gwilt, the company's solicitors, in reference to the mode in which this road had been made, protesting against anything departing from the plan approved by Mr. Lewin, and meetings took place between Mr. Lewin and Mr. Hook. Matters remained until the 2nd May 1868, when Messrs. Vandercom and Co. wrote to say that Mr. John Baggallay had instructed them to say that if the exchange was not completed within a month, he would direct a trench to be cut across the land so as to stop the traffic on the road. Several letters passed, and on the 27th Messrs. Vandercom and Co. wrote to say they had advised John Baggallay that there was no fiscal agreement binding on him or the company, but as he wanted a good approach he was willing to discuss the question at twenty-four hours' notice. Several more letters were written, and a notice board placed on the land to the effect that the road would be closed on the 12th June 1868. This produced a remonstrance, and ten days' undertaking was given not to interfere with the road; but as the board was again put up and the threat of the trench renewed, this bill was filed, the defendant having come of age a few days only previous to such filing. It appeared that counsel for the Weeding family had approved of this draft agreement, adding that he considered it beneficial to all parties; and the bill contained the following charge as the equity upon which it rested.

The plaintiff company charges that there was a valid, effectual, and binding agreement in the lifetime of the said Thomas Weeding, deceased, between him, with the sanction of the trustees of the Weeding estate, on the one hand, and the company on the other, for the exchange of the said piece of land belonging to the Weeding estate for double the quantity of land in the situation hereinbefore mentioned belonging to the Worcester-park estate, and that such agreement was, after the death of the said Thomas Weeding, adopted and confirmed by the said Elizabeth Weeding, as the guardian of the said infant tenant in tail, and by the trustees of the said Weeding estate, and that the same has been since adopted and acted upon by the said Mr. John Baggallay, as the guardian of the defendant Thomas Weeding Baggallay (now Weeding) until he came of age, and also by the said trustees; and moreover, the plaintiff company, under the faith of the said agreement and its validity, expended large sums as hereinbefore mentioned, and has entered into numerous contracts, under which the company is subject to very heavy liabilities, and will be exposed to very serious loss if the defendant is now allowed to repudiate the said agreement, and to proceed, as he threatens and intends to do, to interfere with the said roadway or traffic thereon.

The will of Thomas Weeding contained the following clause: "And I especially direct that it shall be lawful for the trustees for the time being of my will, to enter into and give effect to any agreement which they may think it beneficial to my estate to enter into with the owners of any land lying adjacent to my lands at Kentish Town or elsewhere, to form a road or roads, with the consent and approbation of the leaseholder of the land through which such road or roads shall be made, and to convey or devote a portion of my land for the purpose, the owner or owners of the adjacent land giving up and devoting a commensurate or reasonable portion of his or their property for the same object." It appeared that Mr. John Baggallay acted under a general power of attorney given to him by the testator; and it was alleged by the plaintiffs that Mr. Richard Baggallay (his father) and Mr. Pidgeon (now dead) took little or no part in the trust matters.

The defendant put in his answer which, as far as is material, was to the following effect:—He either expressed ignorance of, or admitted mere facts; but as to the plaintiffs' case, he submitted that he was an infant at the time when the transactions alleged took place, and not bound thereby. That there never was any agent duly authorised of his, although Mr. John Baggallay might have been agent for Thomas Weeding, but admitted that Mr. Hook and Mr. Lewin acted as agents, the latter subject to the approval of Mr. John Baggallay, but having no power to represent the owners of the Weeding estate; there was not, in fact, any negotiation, nor was Mr. Lewin the agent of the Weeding estate, and the defendant, moreover, called in question the ability of Mr. Lewin to act in such capacity; and denying that he acted under Vandercom and Co.; the only agent, if any, being Mr. John Baggallay. That Mr. Hook was aware also that Mr. Lewin had no power to agree. The answer then denied the value of the road, and that the trustees had any power of exchange. The defendant then denied, in particular the part alleged to have been taken by Mr. Lewin as to plans, &c. That Mr. John Baggallay was ignorant until after 1864 of the particulars of the exchange, and was not acting trustee. That the solicitors were not agents for the estate, nor acted as his (the defendant's) solicitors. The answer then alleged ignorance of the plaintiffs' taking possession, but alleged that any person laying out a road did so wrongfully; and expressed ignorance as to the money laid out by the plaintiffs, but that they knew there was no binding agreement, although the road was dedicated to the public, so far as the plaintiffs had power to do so. A Mr. Henry Curry had been consulted as to the pro-

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priety of the exchange, and it appeared in evidence that he had given an unfavourable opinion.

Glasse, Q. C. and *J. Napier Higgins*, appeared for the plaintiffs, and contended that what had occurred constituted an equity which the court would recognise for the purpose of enforcing the contract against the defendant, Mr. Thomas Weeding Weeding, or, if not, that there was sufficient to entitle the plaintiff company to the injunction. The ground of this equity was that Mr. John Baggallay, having power under the will to arrange to make roads, being the natural guardian of the defendant, and acting under the power of attorney, had not only acquiesced in the transaction, but urged its completion up to a recent period, and that the infant, on the eve of his majority, had been not only cognisant of, but had taken part in what was done, and acquiesced in it all until he was twenty-one, and by himself and Mr. John Baggallay must be held bound in equity. That everything having been done to carry out the exchange by survey, &c., the remainder was mere machinery, and the plaintiff company, having laid out very large sums on the faith of the exchange being carried out, that was such a part performance as the court would consider sufficient to make a decree upon. The defendant's conduct was most unworthy, and, at all events, that alone would, in any event, disentitle him to any costs:

8 & 9 Vict. c. 118, ss. 16, and 20;
Dann v. *Spurrier*, 7 Ves. 231;
Pilling v. *Armitage*, 12 Ves. 85;
Gregory v. *Mighell*, 18 Ves. 328;
Kerr on Injunctions, 41.

Cotton, Q. C. and *F. H. Law*, for the defendant, argued that there was no contract, and that this case was quite distinct from all the authorities, in which the party held to be bound was himself a party to the negotiations, whereas here he was not only no party but under disability. Moreover, Mr. John Baggallay had for a long time acted on the representation of Mr. Hook that there was a concluded agreement binding him hand and foot, and the moment he understood how the matter really was situated he had repudiated it. It was a dry question of law whether there was a contract or not, or something tantamount to it, which bound the defendant, and it was impossible to contend that there was any such thing. It was to be regretted that observations had been made derogatory to the defendant's honour, for there was nothing to compel him, even in honour, to complete what he never agreed to or entertained, and it only prolonged discussion and imported into the case totally irrelevant matter:

8 & 9 Vict. c. 118, ss. 147-8-50;
Blore v. *Sutton*, 3 Mer. 237.

Glasse, Q. C. was heard in reply, and referred to *Jackson* v. *Peter*, 5 Ves. 689.

The VICE-CHANCELLOR (after stating the facts).—The plaintiffs are in possession, as I most unfeignedly hope they will continue to be, and the only question is whether I can decree specific performance. There can be no doubt that the acts of a tenant for life are void against those in remainder; and I am obliged to come to the conclusion that no act of John Baggallay, nor of the Inclosure Commissioners, or the mother of the infant tenant in tail have amounted to a binding contract to bind the estate. Then the only question is, whether that which might have been done under the will has been sufficient to bind it? As to this, after hearing Mr. Cotton's argument, I am of opinion on the evidence of Mr. Lewin, that this road is as advantageous to the Weeding estate as to Worcester Park, and clearly falls within the power in the will. (The Vice-Chancellor read the power.) It was not necessary that a road should be given for a road; and had the parties acted under this power, it could have been done through the Inclosure Commissioners. But there is no evidence that the trustees did so act under the power, although Mr. John Baggallay might have done it, and it might have been adopted by the other two; and therefore I cannot assume it as against the defendant, or hold the estate bound so as to make the decree asked. I am very sorry for this, as all the merits are in the plaintiffs' favour, and I apply the language of Sir William Grant in *Blair* v. *Sutton* (*sup.*), where he says, "I cannot believe that Sir Richard Sutton, when able to judge and act for himself, will think of taking the benefit of the plaintiffs' improvements without making him a compensation for them." Although, therefore, I am obliged, on technical grounds, to dismiss the bill, I do it without costs. After some discussion, the Vice-Chancellor directed the decree not to be drawn up for a fortnight.

Solicitors for the plaintiffs, *Smith* and *Gwilt*.

For the defendant, *Vandercom*, *Law*, and *Co.*

V. C. JAMES'S COURT.

Reported by W. H. BEWNEN, and R. T. BOULE, Esqrs., Barristers-at-Law.

Thursday, Nov. 11.

HUDSON *v.* OSBORNE.

Injunction—Sale of goodwill by assignee in bankruptcy.

There is no substantial difference between the sale of the goodwill of a business by a trader himself, and a sale of it by his assignees in bankruptcy.

A man has no right after the sale of the goodwill of his business by his assignees in bankruptcy to represent himself as carrying on or continuing that identical business.

The defendant Osborne had carried on business as a cheesemonger on premises at Ludgate-hill, known as Osborne House.

In May 1867, Osborne was adjudicated bankrupt. On 1st Aug. 1867, the plaintiff purchased from his assignees in bankruptcy, the premises in Ludgate-hill, with the fixtures and trade utensils, and the goodwill of the business.

In May 1869, defendant Osborne obtained his discharge in bankruptcy, and set up in business as a cheesemonger with the defendant Parker (who had formerly been his foreman), in premises in the Old Bailey, only three doors from Ludgate-hill. He called his new place of business Osborne House, and issued advertisements and circulars, which the bill alleged were calculated to induce the public to believe that the business carried on by him in the Old Bailey was identical with, or a continuation of, the business formerly carried on by him at Ludgate-hill.

The plaintiffs filed their bill against Osborne and Parker to restrain the defendants from representing, in the manner alleged in the bill, their business to be that formerly carried on at Ludgate-hill, or a continuation of it.

Amphlett, Q. C. and *J. W Chitty*, for the plaintiffs, now moved for an injunction as prayed by the bill, and contended that the goodwill was an asset of the bankrupt's estate, and that there was no distinction between the sale of a goodwill by a trader and the sale of it by his assignees in bankruptcy.

Kay, Q. C. and *J. N. Higgins*, for the defendants, *contra*.

The following cases were cited:
Churton v. *Douglas*, Johns. 174;

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Crutwell v. *Lye*, 17 Ves. 337;
Johnson v. *Helleley*, 2 De G. J. & S. 446;
Kenedy v. *Lee*, 3 Mer. 452;
Hall v. *Burrows*, 9 L. T. Rep. N. S. 561.

The VICE-CHANCELLOR (without calling for a reply) said that although advertisement was probably the object of the application, yet both the purchaser and the defendant were entitled to their strict legal rights. In substance there was no distinction between the sale of the goodwill of a business by a person in trade and a sale of it by his assignees in bankruptcy. When a person became bankrupt, the goodwill became an asset of the estate, and the assignees had a right to sell everything. It seemed to be settled that if the goodwill of a man's business was sold he had no right to represent himself as carrying on that business which he has sold, nor to use its trade marks, or to represent himself as the continuer of the business. It might be conceded that there was nothing to prevent the defendant from setting up business next door to the plaintiff, or from representing that he had been twenty-two years at Osborne House, or from representing that Parker had been his principal assistant. But the defendant had no right to call his house of business Osborne House, as that was a mode of representing the business to be the same, "Osborne House" being the designation of the business, and that name could only be assumed to make the public believe that it was the same business. The defendant had no right to talk of the old and new firm in such a way as to produce an impression that they were the same business. The advertisements issued by the defendants appeared to be utterly unjustifiable, as they amounted in effect to a statement that the defendants' business was the same as that carried on by the old firm. There would therefore be an injunction restraining the defendants from using bill-heads having such emblems as described in the bill, or from using any such emblems, circulars, and notices as described in the said bill, and from in any manner holding out that the defendants were carrying on business as successors to or in continuation of the business formerly carried on by the defendant Osborne at Ludgate-hill, and from continuing to use the name "Osborne House," or "Osborne's House." The defendants to pay the costs of the suit.

Solicitors: *Linklaters and Co.*; *Lewis, Munns, Nunn, and Langdon.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORES, Esqrs., Barristers-at-Law.

Wednesday, Nov. 10.

ADAM RIVERS STEELE (app.) v. THE MIDLAND RAILWAY COMPANY (resps.).

Railway—Entering upon land before compensation made—What is a "wilful" entering within sect. 85 of the Lands Clauses Consolidation Act.

The words "wilfully enter upon and take possession of any lands" in sect. 89 of the Lands Clauses Consolidation Act 1845 do not apply to a case where the parties have entered under a mistaken belief of their right to enter upon the lands.

A railway company being desirous of entering upon land before an agreement had been come to for compensation pursuant to sect. 85 of the above Act, proceeded under sect. 59 to have a surveyor nominated for determining such compensation. One of the justices who nominated him was a shareholder in the company, but this fact was unknown at the time to the company, and the company thereupon entered upon the land:

Held, that this was not a "wilful" entering within the meaning of the section.

This was a case stated by justices under the 20 & 21 Vict. c. 43, and was as follows:

This case is stated by us, the undersigned, Stephen Ponder Kennard and William Charles Lake Bashford, Esq., two of Her Majesty's justices of the peace for the county of Middlesex, according to the statute made and passed in the twenty-first year of the reign of Her Majesty Queen Victoria (c. 43), to improve the administration of the law so far as respects summary proceedings before justices of the peace.

On the 13th Aug. 1868, the above named Adam Rivers Steele, of Cricklewood, in the parish of Willesden, in the said county of Middlesex, Esq., made complaint, in due form of law, before Patrick Douglas Hadow, one of Her Majesty's justices of the peace in and for the said county of Middlesex, against the above named the Midland Railway Company, for that the said company, being the promoters of a certain undertaking, to wit, the railway between London and Bedford, with the branches therefrom by the Midland Railway (Extension to London) Act 1863, authorised to be made at the parish of Hendon, in the county aforesaid, did otherwise than is by The Lands Clauses Consolidation Act 1845 in that behalf excepted, unlawfully and wilfully enter upon and take possession of certain land of and in the possession and occupation of the said Adam Rivers Steele there situate, which said land was at the time of the said company so as aforesaid, entering upon and taking possession thereof as aforesaid, required to be purchased and permanently used by the said company for the purposes and under the provisions of the said Act of Parliament, The Midland Railway (Extension to London) Act 1863, the same being the special Act within the true intent and meaning of the Lands Clauses Consolidation Act 1845—without any such consent as is mentioned or referred to in or by sect. 89 of the Lands Clauses Consolidation Act 1845, and without having made any such payment for the benefit of any parties or party interested in the said land or such deposit by way of security, as are respectively mentioned or referred to in or by the said sect. 89, and without having *bonâ fide* and without collusion paid any compensation agreed or awarded to be paid in respect of the said land to any person whom the said company reasonably believed to be entitled thereto, and without having deposited the same in the Bank of England or otherwise, for the benefit of the party or parties interested in the said land, or made such deposit by way of security in respect thereof as mentioned or referred to in the said sect. 89, although such person might not legally have been entitled thereto; and that thereby and by reason of such entry and taking possession as aforesaid the said company did damage to the said land to a large amount, to wit, the sum of 5000*l.* contrary to the statute in such case made and provided, and that the time when the matter of the said complaint arose and the time of the commission of the said offence were and each was within six calendar months when last past, whereby and by force of the statute in that behalf the said company had forfeited to the said Adam Rivers Steele the sum of 10*l.* and also the sum of 5000*l.*, the amount of the damage which was done to the said land by reason of such entry and taking possession thereof as aforesaid.

On the 2nd Sept. 1868 the said complaint came on to be heard before us the said Stephen Ponder Kennard and William Charles Lake Bashford, as such jus-

tices as aforesaid, at the Court House, Edgware, in the said county, when both parties by their counsel appeared before us. The complaint against the said railway company arises under the Lands Clauses Consolidation Act 1845, sect. 89.

Upon hearing the said complaint as aforesaid, it was proved before us, and we find as follows:

The said company are the Midland Railway Company mentioned and referred to as the Midland Railway Company in the Midland Railway Company (Extension to London) Act 1863, which received the royal assent and was passed on the 22nd June 1863. A copy of this Act accompanies this case, and is to be considered as part of it.

Before and at the respective times of giving the notices hereinafter mentioned, the said Adam Rivers Steele was possessed of a certain house and land at Cricklewood aforesaid, described and delineated in the plan which accompanies this case; this plan and the statements thereon are correct, and are to be taken as part of this case.

The land which was entered upon and taken by the said company, as after mentioned, has been continually since the year 1855, until taken possession of by the said company as herein mentioned, used and occupied by the said Adam Rivers Steele with his house, and was always during that time necessary for the convenience of the said Adam Rivers Steele as occupier of the said house.

In the month of Sept. 1864 the said company, under and by virtue of the said Act of Parliament, gave notice in writing to the said Adam Rivers Steele, dated the 12th of that month, requiring to purchase and take for the purposes of the last-mentioned Act a part containing 1a. 0r. 28p. of his aforesaid land, and which was subject to the enactment contained in sect. 5 of the said Act of Parliament.

The following is a copy of the said notice:

Midland Railway (Extension to London.)

You are requested to take notice that the Midland Railway Company require to purchase and take for the purposes of the Midland Railway (Extension to London) Act 1863, and the Midland Railway (New Lines and Additional Powers) Act 1864, or one of them, all that piece or parcel of land containing by admeasurement 1a. 0r. 28p., or thereabouts, which said piece of land so required as aforesaid is situate in the parish of Hendon, in the county of Middlesex, and is parcel of the larger piece of land defined and described in the plans and books of reference of the railways authorised by the said first above-mentioned Act deposited at the office of the clerk of the peace for the said county of Middlesex, with the No. 3 in the said parish of Hendon, or in whatsoever way the same is therein defined and described, and for the better description of the land so required as aforesaid, the same is delineated on a plan attached hereto, and thereon distinguished by a red colour. And the said company are willing to treat and agree with you and every of you for the purchase of the land and hereditament so required as aforesaid, and as to the compensation to be made to you and every of you for the damage that may be sustained by you and every of you by reason of the execution of the works authorised by the said Acts or either of them, and the said company hereby demand from you and each and every of you the particulars of your respective estates and interests in the lands and hereditaments so required as aforesaid, and of the claims made by each of you respectively in respect hereof.

And you are further required to take notice that, if for twenty-one days after the service hereof you shall fail to state the particulars of your respective claims in respect of the land and hereditaments so required as aforesaid, or treat with the said company in respect thereof, or if you or any of you respectively and the said company shall not agree as to the amount of the compensation to be paid by the said company for or in respect of your respective interests in the premises so required, or the interests therein which you respectively are by the said Acts of Parliament or either of them enabled to sell, or for any damage that may be sustained by you respectively by reason of the execution of the works authorised by the said Acts or either of them, the said company will forthwith proceed to require the amount of such compensation to be settled in the manner provided by the said Act for settling cases of disputed compensation.—Dated this 12th Sept. 1864.

GEORGE BROWN, Secretary of the said Company.

To Adam Rivers Steele, Esq., and to all persons having or claiming any estate or interest in the said land and hereditaments.

On the 3rd Oct. 1864 the said Adam Rivers Steele served upon the said company a notice in writing, having reference to the aforesaid notice of Sept. 1864, and the said land mentioned therein, signed by him, which is as follows:

To the Midland Railway Company.

Take notice that I am not willing to sell or convey a part only of my house, of which, by your notice to me dated the 12th Sept. last it is stated that you require to purchase and take part; and further take notice that I am willing and able to sell and convey the whole of my said house. My estate and interest in my said house is the freehold of inheritance thereof in fee simple in possession.

Dated this 3rd Oct. 1864. A. R. STEELE.

Cricklewood, near London.

An Act of Parliament was passed in 1865 relating to the said company and their powers, "videlicet" the Midland Railway (New Lines and Additional Powers) Act 1865, and by sect. 20 thereof it was enacted that the said company might from time to time enter upon, take, and use, and appropriate all or any of the lands therein described, including certain lands in the said parish of Hendon, provided that except in exercise of the powers granted by the Midland Railway (Extension to London) Act 1863, the company should not enter upon, take, or use any of the said lands in the said parish of Hendon, except only the sites of certain new roads, without the consent in writing of the respective owners, lessees, and occupiers of the lands and houses called Rockhalls, situate in the said parish of Hendon, on the east side of the Edgware turnpike road, opposite to the aforesaid house of the said Adam Rivers Steele, situate in the said parish of Willesden, and on the west side of the Edgware turnpike road, or at the option of the company until the said company should have purchased under the powers of the Act 1865 those last-mentioned respective lands and houses.

The said Adam Rivers Steele, and the owners, lessees, and occupiers of the said lands, and houses, called Rockhalls, presented a petition to the House of Commons against the Bill for the said Act, the Midland Railway (New Lines and Additional Powers) Act 1865. The said company put in evidence before the committee of that House to whom the said Bill was referred, the aforesaid notice of the said Adam Rivers Steele, of the 3rd Oct. 1864, and by their counsel, Mr. Cripps, cross-examined thereon before the said committee, the said Adam Rivers Steele, who was examined as a witness in support of the said petition, and the following are, among other, questions and answers upon such cross-examination which are taken from a print of the said proceedings before the said committee:

371. When the clause came to be put in operation did you serve a notice on the Midland Company to take the whole of your property?—Last September.

372. Is that your signature (handing a paper to the witness)?—Yes.

373. Do you know that you have power by law, if any part of your property is taken, to compel them under the circumstances to take the whole?—Any part of my house not my property that relates to my house.

374. This is your notice:—"To the Midland Railway Company. Take notice that I am not willing to sell or convey a part only of my house, of which by your notice to me, dated the 12th Sept. last, it is stated that you require to purchase and take part; and further take notice that I am willing and able to sell and convey the whole of my said house. My estate and interest in my said house is a freehold of inheritance thereof in fee-simple in possession. Dated this 3rd Oct. 1864.—A. R. Steele, Cricklewood, near London." That you served on the company?—I sent in that answer to their notice to me that they were going to take part of my property.

375. Was this the plan which accompanied their notice to you of what they required to take?—I have no doubt that it is.

376. That is part of your field?—Yes, which I occupy with my house.

377. When you say it is part of your house, you mean part of a field occupied with the house?—Yes, in law, part of the house.

378. That gave you, strictly speaking, power to compel them to take the whole?—I consider so.

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379. 1863 was the Act, and notice was served in 1864?—The 3rd Oct. 1864.

The said Adam Rivers Steele was represented by *Rodwell*, Q. C. and *Stephenson* as his counsel on the said petition, but in re-examination, no further questions were put upon this matter.

The said committee afterwards inserted the aforesaid provision in the 20th section, but did not include the said Adam Rivers Steele or his said house therein.

The said Adam Rivers Steele, and the owners, lessees, and occupiers of the said lands and houses, called Rockhalls, afterwards presented a petition to the House of Lords against the said Bill, and the said Adam Rivers Steele proposed to the committee of that House, to whom the said Bill was referred, that words should be added to the aforesaid provision in the said 20th section, extending it to him; the said company then put in evidence before the said committee the said notice of the said Adam Rivers Steele of the 3rd Oct. 1864, and Mr. Cripps, their counsel, then stated to the said committee that it was impossible for the said company to take any part of the land of the said Adam Rivers Steele without taking the whole. The said Adam Rivers Steele was represented by counsel on this occasion also, who had the opportunity of being heard in reply to the said statement of Mr. Cripps. The said committee did not extend the aforesaid provision in the said 20th section to the said Adam Rivers Steele.

On the 8th Nov. 1865 William Bryan, a clerk of Messrs. Beale, Marigold, and Beale, the solicitors of the said company asked Richard Hall the younger, surveyor, to go with him to the justices of the peace sitting at Hampstead, in the said county of Middlesex, for the purpose of being nominated under sect. 85 of the Lands Clauses Consolidation Act 1845 as an able practical surveyor, to value the plaintiff's land comprised in the said notice of the 12th Sept. 1864, and they then went there together for that purpose, and before James Marshall and Robert Prance, two of Her Majesty's justices for the said county of Middlesex, who were then sitting there as such justices. Mr. Bryan then asked the said justices to appoint a surveyor to value the aforesaid land of the said Adam Rivers Steele, and suggested to them in substance that Mr. Hall should be appointed, who had acted in similar cases for the said company, and the said justices then signed a nomination and appointment of that date of the said Mr. Hall as an able practical surveyor, for determining the value of the estate and interest of the said Adam Rivers Steele in the said land. No notice was given to the said Adam Rivers Steele of the said application, nor was he aware that it would be made, and he had no opportunity of showing cause against such appointment or attending before the said justices thereon.

The said Robert Prance, Esq., one of the justices who signed the nomination and appointment of the said Mr. Hall, was before and at the time he so signed the same a registered shareholder of and in the said company, and had been and was such shareholder continually for twenty-three years then last past.

On the 19th Jan. 1866, the said Adam Rivers Steele had delivered to him by a clerk of Messrs. Beale, Marigold, and Beale, the then solicitors of the said company, a bond, dated the 30th Nov. 1865, of and under the common seal of the said company, and the hands and seals of John Mercer and Josiah Lewis, two of the directors of the said company, as sureties of the said company, for payment to the said Adam Rivers Steele, his executors, administrators, or assigns, of the sum of 300*l.*, with a condition thereunder written, reciting that the said company required to purchase and take for the purposes and under the powers of the Midland Railway (Extension to London) Act 1863, a piece or parcel of land, being the aforesaid part, containing 1a. 0r. 28p., mentioned in their said notice of the 12th Sept. 1864, of the said land of the said Adam Rivers Steele, and reciting that no agreement had been come to, or award made, or verdict given, for the purchase money or compensation to be paid by the said company to the said Adam Rivers Steele for his estate or interest in the said piece or parcel of land; and that the said company were desirous and proposed, under and subject to the powers and provisions of the Lands Clauses Consolidation Act 1845, to enter upon and use the same for the purposes and under the provisions of the said Act, before any such agreement or verdict should be come to, made, or given, but that the said Adam Rivers Steele did not consent to such entry, and reciting that the said Richard Hall, jun., an able practical surveyor, duly nominated and appointed by James Marshall and Robert Prance, two of Her Majesty's justices of the peace for the county of Middlesex, in accordance with the provisions of the Lands Clauses Consolidation Act 1845, had determined the value of the estate and interest of the said Adam Rivers Steele of and in the said land at the sum of 300*l.*; and that the said company had, in pursuance of the provisions in that behalf contained in the Lands Clauses Consolidation Act 1845, paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, to be placed to his account there to the credit of the said Adam Rivers Steele, as such deposit by way of security to him as required by the last mentioned Act the sum of 300*l.*, and by which said condition it is provided that if the said company should make such payments unto the said Adam Rivers Steele, or such deposit in the Bank of England, as is therein mentioned, and is required by the statute in that behalf, that then the said bond or obligation should be void, otherwise should remain in full force.

The said Adam Rivers Steele has continually since he gave the said notice of Oct. 1864, insisted that the said company were bound to take the whole of the said property comprised in the said notice of the 3rd Oct. 1864, in compliance therewith, and that part of the said land comprised in the said notice to treat of Sept. 1864, was part of his said house, and he has taken proceedings both in a Court of Chancery and in a court of law for the purpose of trying the question whether he is right in his contention or not. On the 1st Jan. 1868, the said Adam R. Steele brought an action of ejectment to recover possession of the said lands taken possession of by the said company as after mentioned.

During the time while the said proceedings in Chancery were pending, that is to say, on the 1st Feb. 1866, and whilst the said A. R. Steele was in the possession thereof, the said company took possession of the said piece of land comprised in their said notice of the 12th Sept. 1864, and also of 24 perches more of the land of the said A. R. Steele, over which powers were given to them by the aforesaid sect. 5 of the said Act of Parliament of 1863, but the said A. R. Steele was not aware, until Oct. 1867, that the said company had taken possession of such further part of his said land, the said complaint was not made in respect of the said 24 perches.

The land of the said A. R. Steele, of which the said company so as aforesaid took possession, was, at the time such possession was taken, in the possession of the said A. R. Steele, and was his property in fee simple, and was part of a meadow of his which was thereby bisected, leaving the greater part thereof on the East side of the land taken, and the farthest side from the said house of the said A. R.

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Steele with and for his convenience as occupier of which he held and occupied the said meadow.

In the month or April 1868, the said A. R. Steele first ascertained that the said R. Prance was such registered shareholder in the said company as aforesaid.

On the 15th June 1868, and thence continually afterwards, the said company had express notice and knowledge that the said Robert Prance, Esq., one of the justices who signed the said nomination and appointment of the said Mr. Hall, was at the time he so signed the same as aforesaid a shareholder in the said company as aforesaid. The said R. Prance had had numerous transactions of buying and selling shares and stock in the said company, principally between the years 1848 and 1860, the said company always took receipts for dividends, and hold many receipts signed by the said R. Prance, and transfers of shares as well signed by him. Mr. James Samuel Beale, one of the firm of Messrs. Beale, Marigold, and Beale, the solicitors of the said company, did not know or had he any reason to suppose when Mr. Prance signed the said appointment that he was a shareholder in the said company, and never heard thereof till the 16th June 1868. John Moore, who is now the acting secretary of the said company, and William Edward Blaxter, a clerk in the secretary's office of the said company, were not aware either on the 6th April 1868, or before that time, or until afterwards informed of the fact by the company's solicitors, that the said Robert Prance, in his capacity of a justice of the peace, or in fact, signed any appointment of a surveyor under the Lands Clauses Consolidation Act 1845, to value any lands belonging to the said A. R. Steele, or any other person; besides the facts herein stated and appearing, the appellant did not give any evidence to prove, nor did the respondents give any evidence to disprove, that any director, officer, or servant of the said company, who knew that the said R. Prance was a shareholder of the said company, was aware that the said R. Prance had in his capacity of a justice of the peace, or, in in fact, signed any appointment of a surveyor under the Lands Clauses Consolidation Act 1845, to value any land belonging to the said A. R. Steele, or any other person, nor that the members of the said firm of Beale, Marigold, and Beale, or any other officer, agent, or servant of the said company who knew that the said R. Prance had, in his capacity of a justice of the peace, or in fact, signed such appointment, knew that the said Mr. Prance was a shareholder in the company, or was in any way interested in the matter.

The railway of the said company from London to Bedford has been made and constructed over the said land of the said A. R. Steele, comprised in the said notice of the 12th Sept. 1864, upon an embankment of 13 feet in height, and has been used by the said company for through goods traffic in and since the month of Sept. 1867, and for local public traffic in goods and coal in and since the month of March 1868. The railway was opened for passenger traffic on the 18th July 1868.

On the 20th June 1868 the said A. R. Steele, he then claiming as of right to do so, entered into and upon that part of the said railway of the said company which had so as aforesaid been made upon and over his said land, and entered into and upon his said land, upon which the said railway and the said embankment have respectively been made as aforesaid, and remained there for ten minutes picking and gathering, and there picked and gathered, certain flowering or seeding, and then took and carried the same away; the said Adam R. Steele gave no notice to the said company of his intention to enter on the said land.

On the 7th July 1868 the said Adam Rivers Steele filed a supplemental bill in Her Majesty's High Court of Chancery against the said company, praying that the said company might be restrained from opening for public traffic their railway over the land of the said A. R. Steele comprised in the said notice of the 12th Sept. 1864, and from using or interfering with the said land, and from continuing in possession thereof; and that, if necessary, it might be declared that the said appointment of a surveyor insisted upon by the said company by their answer in the original suit was void, the said R. Prance not being a justice of the peace within the meaning of the Lands Clauses Consolidation Act 1845.

On the 9th July 1868 the said A. R. Steele moved for an injunction to restrain the said company from opening the said railway for public traffic, and from using or interfering with the said land, or from continuing in possession thereof. Giffard, V.C., before whom the said motion was made, made no order thereon, except that costs should be costs in the cause. The said A. R. Steele appealed to the Lords Justices from the decision of the said Giffard, V.C. The appeal was heard on the 30th July, and was dismissed with costs. The proceedings in this suit are still pending.

On the 7th July 1868 the said company by the said Messrs. Beale, Marigold, and Beale, their then solicitors, gave notice to the said A. R. Steele that pursuant to the 36th section of the Railway Companies Act 1867 they would, at the expiration of seven days from that date, apply to the Board of Trade to appoint a surveyor pursuant to that section; and should proceed to take all other steps required by that section and the 85th section of the Land Clauses Act; to give to the said A. R. Steele proper security for the completion of the purchase from him of the lands comprised in the said notices of the 12th Sept. 1864 and the 11th June 1866.

The Board of Trade, on the 18th July 1868, in pursuance of an application made to them by the said company after the expiration of the seven days referred to in the last-stated notice, but without the said A. R. Steele having any notice or information as to the time of making the application further or otherwise than as aforesaid, or as to who was proposed to be appointed, appointed Henry Arthur Hunt as an able practical surveyor, to determine the value of the estate and interest of the said A. R. Steele, of and in the land comprised in the said notice of the 12th Sept. 1864; and the said H. A. Hunt did determine the value thereof, including compensation for all damage, as is by the Railway Companies Act 1867 directed to be included therein, at the sum of 750*l.*, and the company paid into the Bank of England as a deposit by way of security as required by the said last-mentioned Act the sum of 750*l.*; and also on the 21st July 1868 gave to the said A. R. Steele a bond dated that day, and under the common seal of the said company, and the hands and seals of William Phillip Price and William Unwin Heygate, Esqrs., two of the directors of the said company, as sureties for the said company for payment to the said A. R. Steele, his executors, administrators, or assigns, of the sum of 750*l.*, with a condition thereunder written for making the same void if the said company should make such payment unto the said A. R. Steele or such deposit in the Bank of England as is therein mentioned and required by the statute in that behalf.

The said land of the said A. R. Steele, of which the said company as aforesaid took possession in Feb. 1866, was at the time of the said company so as aforesaid entering upon and taking possession thereof, and has ever since been and still is required to be purchased and permanently used by the said company for the purposes and under the provisions

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of the said Act of Parliament. The Midland Railway (Extension to London) Act 1863, and the said company did enter upon and take possession as aforesaid of the said land, and from thence until the time of making of the said complaint, with the exception only of the aforesaid entry on the said land by the said A. R. Steele, on the said 20th June 1868, have continued in possession of the said land without any such consent as is mentioned or referred in, or by sect. 89 of the Lands Clauses Consolidation Act 1845, and without having made any such payment for the benefit of any parties or party interested in the said land, or such deposit by way of security as are respectively mentioned or referred to in or by the said sect. 89, and without having *bonâ fide* and without collusion, paid any compensation agreed or awarded to be paid in respect of the said land to any person whom the said company reasonably believed to be entitled thereto, and without having deposited the same in the Bank of England, or otherwise for the benefit of the parties or party interested in the said land, or made such deposit by way of security in respect thereof as mentioned or referred to in the said sect. 89, although such person may not legally have been entitled thereto, save only and except that the said company on the said 21st July 1868, gave to the said A. R. Steele the bond of that date in paragraph 20 hereinbefore mentioned, and made the payment therein mentioned into the Bank of England.

It was proved by witnesses called on behalf of the said A. R. Steele that to remove the soil and clay which the said company have placed upon the said land of the said A. R. Steele, for the purpose of forming the aforesaid embankment for their said railway over that land, would cost the sum of 2790*l.* 4*s.*, and that such was the damage done to the said land by reason of such entry, and taking possession as aforesaid by the said company.

The said witnesses were not cross-examined on behalf of the said Midland Railway Company, whose counsel stated he did not wish to cross-examine them.

It was contended before us on the said hearing of the said complaint on behalf of the said A. R. Steele, that the entering upon and taking possession by the said company as mentioned in the said complaint of the said land by the said A. R. Steele, was wilful within the meaning of sect. 89 of the Lands Clauses Consolidation Act 1845. Also that the said company, resuming or continuing in possession of the said land after the said A. R. Steele, had so as aforesaid entered thereon upon the said 20th June 1868, and after the said company had had express notice and knowledge as aforesaid that the said R. Prance, at the time he signed the aforesaid appointment and nomination of the 6th Nov. 1864 of a surveyor, was a shareholder in the said company, was a new and wilful entering upon and taking possession of the said land of the said A. R. Steele by the said company. Also, that the matter of the said complaint arose within six calendar months next before making of the said complaint.

And further, that the said company having continued in possession of the said land of the said A. R. Steele from the time when the said company so as aforesaid first entered upon and took possession thereof, until the time of the making of the said complaint, with the exception of the aforesaid entry on the said land by the said A. R. Steele on the said 20th June 1868, was one continued act and part of the matter of the said complaint, and that the time limited for making the said complaint had not previously to the making of the same commenced to run, or at all events did not so commence until the said 20th June 1868, which was within six calendar months next before the making of the said complaint. And further, that if the time limited for making the said complaint did commence to run on or before the 20th June 1868, then that a new matter of complaint by the said A. R. Steele against the said company, arose upon the said company having entered upon and taken possession of the said land after the said entry thereon of the said A. R. Steele, and within six calendar months next before the making of the said complaint.

It was contended on behalf of the said company that the said entry and taking possession of the said land by the said company was not wilful within the meaning of the said 89th section of the said Lands Clauses Consolidation Act 1845.

We, upon hearing of the said complaint, found and decided that the entering upon and taking and retaining possession by the said company, as mentioned in the said complaint, of the land of the said A. R. Steele, although unlawful upon the ground that the said R. Prance was a shareholder in the said company as aforesaid, and therefore incompetent to join in the said appointment of the said Richard Hall the younger as aforesaid was not wilful within the meaning of the said sect. 89 of the Lands Clauses Consolidation Act 1845, we therefore dismissed the said complaint with costs.

Whereupon the said A. R. Steele did, pursuant to the first-mentioned statute, within three days after the said determination—that is to say, on the 2nd Sept. 1868 duly apply in writing to us, the said justices, to state and sign a case, setting forth the facts and the grounds of our determination, for the opinion of this honourable court, and he having duly entered into a recognisance to prosecute without delay such appeal, and to submit to the judgment of this honourable court, and pay such costs as may be awarded by the same, as required by the said statute in that behalf, we the said justices do hereby, in pursuance of the said statute, state and sign the case accordingly.

And it appears to us, and we humbly submit to this honourable court, that the questions of law arising upon the case are—First, whether the said company, in entering upon and taking possession in the month of Feb. 1866, as aforesaid, of the land the said A. R. Steele, or continuing or being in possession thereof as aforesaid, either until or after the said A. R. Steele had so as aforesaid entered thereon upon the said 20th June 1868 was a wilful entering upon and taking possession of the said land within the true intent and meaning of sect. 89 of the Lands Clauses Consolidation Act 1845; and, secondly, whether the matter of the said complaint arose within six calendar months next before the making of the said complaint. If the opinion of the court be in the affirmative upon both the said questions, then such order to be made by the said court, under the Act of Parliament in that behalf, as to the said court may see fit; if otherwise, then our said determination is to stand affirmed.

Given under our hands, this April 1869.

By sect. 59 of the Lands Clauses Consolidation Act 1845 (8 Vict. c. 18), it is enacted that on application by the promoters of the undertaking to two justices, and upon proof that any party entitled to compensation is by reason of absence from the kingdom &c., prevented from treating, "such parties shall by writing, under their hands, nominate an able practical surveyor for determining such compensation as aforesaid, and such surveyor shall determine the same accordingly, and shall annex to his valuation a declaration in writing subscribed by him of the correctness thereof."

By sect. 85 it is enacted that if the promoters of the undertaking shall be desirous of entering upon and using any such land before an agreement shall have been come to, or an award made, or verdict given for the purchase-money or compensation to be paid by them in respect of such lands, it shall be

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lawful for them to deposit in the bank, by way of security, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two justices in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of such lands, &c.

By sect. 89 it is enacted that,

If the promoters of the undertaking or any of their contractors shall, except as aforesaid, wilfully enter upon and take possession of any lands which shall be required to be purchased or permanently used for the purposes of the Special Act, without such consent as aforesaid, or without having made such payment for the benefit of the parties interested in the lands, or such deposit by way of security as aforesaid, the promoters of the undertaking shall forfeit to the party in possession of such lands the sum of 10*l.* over and above the amount of any damage done to such lands by reason of such entry and taking possession as aforesaid, such penalty and damage respectively to be recovered before two justices, &c.

Prentice, Q. C. (*Hawkins*, Q. C., *Little*, and *Thesiger* with him) appeared for the appellant.—The entry of the respondents on the land was unlawful inasmuch as the surveyor (Mr. Richard Hall) was not duly appointed, one of the justices, Mr. Robert Prance, being a shareholder in the Midland Railway Company. [COCKBURN, C. J.—The complaint is, continuing in possession after notice—a mistake seems to have been of not the slightest importance.] The question is, what is "wilfully entering upon lands?" It was the duty of the company to have procured a proper authority for their surveyor, and although they may not have actually known at the time that Mr. Prance could not legally act in the matter, they were bound by their wrongful act, especially after they had express notice from Mr. Steele. [COCKBURN, C. J.—Can you say that an act is done *wilfully* wrong if the party really believes he has authority to do it?] He must take care to satisfy himself that he is acting lawfully. Even upon an indictment for a misdemeanor it would be no excuse that he did not act wilfully if he really disobeys the law. This was held in *Reg.* v. *Price*, 11 Ad. & Ell. 727, where a party was indicted for a misdemeanor for refusing to register the birth of his child, and in which Lord Denman said, "He is therefore brought within the principle and the very words of the decisions alluded to, having wilfully (though in one sense innocently) refused to do that which he was lawfully required under the Act to do." He referred also to

Hudson v. *M'Rea*, 3 L. J. 66, M.C.
Hutchinson v. *The Manchester, Bury, and Rossendale Railway Company*, 15 M. & W. 314.

Lloyd, Q. C., for the company was not called upon.

COCKBURN, C. J.—We are against you. I am clearly of opinion that the term "wilfully," as used in the 89th section, means an absence of an honest belief on the part of the company of the existence of the conditions precedent. When they entered upon the land it must be supposed from all the circumstances that they believed they had a right to do so. They were certainly at that time in ignorance that one of the justices who signed the authority to the surveyor was a shareholder; and although they continued in possession after they became acquainted with that fact, that does not make their original entry wilful.

BLACKBURN, J.—I am of the same opinion. The justices say, "We decided that the entering upon and taking and retaining possession by the said company as mentioned in the said complaint, of the land of the said Adam Rivers Steele, although unlawful upon the ground that the said Robert Prance was a shareholder in the said company as aforesaid, and therefore incompetent to join in the said appointment of the said Richard Hall the younger as aforesaid, was not wilful within the meaning of the said section 89 of the Lands Clauses Consolidation Act 1845;" and I am of opinion that in coming to that decision they were perfectly right.

MELLOR, J.—The word "wilful" may have a different meaning according to circumstances, as where, without consent or paying money or any supposed authority, a party takes possession. But in the sense in which the word is used in this section, the conduct of the company was not wilful.

HANNEN, J. concurred.

Judgment for the respondents.

Attorneys for the appellants, *Steele* and *Son*, Bloomsbury-square.

Attorneys for the respondents, *Beale*, *Marigold*, and *Beale*, Park-street, Westminster.

Wednesday, Nov. 10.

GIDEON SMITH (app.) *v.* EDWARD MACKIE (resp.).

Highway—Scrapings of a road deposited on the sides—Removal of same—Sect. 118 *of the* 3 *Geo.* 4, *c.* 126 (*the General Turnpike Act*).

Upon an information against the appellant for breaking up the soil of certain land or ground within 25 *feet from the middle or centre of a turnpike road under sect.* 118 *of the* 3 *Geo.* 4, *c.* 126 (*the General Turnpike Act*), *it appeared in evidence that the soil in question consisted of a bank covered with turf, of from one foot to eighteen inches higher than the adjoining water table of the road, and that the appellant had caused a portion of such bank to be broken up, and the turf and soil removed. It was contended that the bank was formed by road sand scraped from the road, and spread from time to time on the land by the roadside, and that what had been broken up and taken away did not come within the* 118*th section. It was further given in evidence that the bank appeared to have been so formed, but that for a great many years it had been covered with turf. Upon this the justices convicted the appellant:*

Held, that they were right in so doing.

This was an appeal against the decision of the justices of the peace for the county of Surrey upon an information preferred by the respondent—the surveyor of roads for the Croydon highway district—against the appellant, under sect. 118 of the 3 Geo. 4, c. 126 (the General Turnpike Act), for having at Coulsdon in the month of Oct. 1868 broken up the soil of certain land or ground within 25 feet from the middle or centre of the turnpike road leading from Croydon to Reigate. The information was heard before the justices at a petty sessions held at Croydon on the 19th Dec. 1868, and, by adjournment, on the 2nd Jan. 1869, and the justices convicted the appellant of the said offence, and adjudged him to pay 1*s.* for a fine, and 14*s.* 6*d.* costs. The appellant being dissatisfied with the decision as being erroneous in point of law, gave notice of application for a case under the 20 & 21 Vict. c. 43, for the opinion of the Court of Queen's Bench, and he duly entered into a recognisance as required by the Act of Parliament, and the justices accordingly stated and signed the following case:

On the east side of the turnpike road, leading from Croydon to Reigate, there is in the parish of Coulsdon, in the county of Surrey, a stripe of waste land or ground lying between the road and certain cultivated land; part of it was, till broken up by

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the appellant, covered with turf, and was from a foot to eighteen inches higher than the road, and part of this strip had been formerly excavated as a gravel pit, leaving between the pit and the road a bank covered with turf, and from one foot to eighteen inches higher than the adjoining water table of the said road. It was proved that the defendant had caused a portion of this bank to be broken up and the turf and soil removed, and that the place at which such breaking up took place was within the distance of twenty-five feet from the middle or centre of the said road. But it was contended on his part that the strip of land in question was a bank formed of road sand scraped from the road and spread from time to time on the land by the road-side, and that what had been broken up and taken away did not come within the meaning of the 118th section of the General Turnpike Act, which it was urged had reference only to the natural or original surface of the soil.

The respondent (the surveyor of the road) and a labourer employed on the road, who were witnesses for the prosecution, deposed that the bank appeared to them to have been so formed from the scrapings of the road. It appeared in evidence that the portion of the bank which remained was, after the appellant's removal of the soil in question, reduced to about two feet in breadth, the gravel pit lying open immediately beyond it. That as long as the witnesses could rembember (and one of them remembered the bank for fifty years), the bank in question, both the part taken away and the part left, had been covered with turf, like the part still left. No further evidence was given as to the formation or condition of the bank than as above appears. We were of opinion and found that there was not sufficient evidence to prove that the bank so broken up as above mentioned had been formed by the accumulation of road sand, as alleged for the defence; and that if it had been so formed, the sand so accumulated had become so incorporated with the original surface of the soil, and that the said bank was at the time of committing the alleged offence, soil of land or ground within the distance of 25 feet from the centre or middle of the turnpike road, within the meaning of the section in question, and we accordingly convicted the appellant.

The question for the opinion of the court is, whether the conviction be erroneous in point of law? If so, the conviction to be quashed; if not, to stand.

Given under our hands this 13th March 1869.

T. H. R. EDRIDGE,
JOHN EASTTY,
Justices of the Peace for the County of Surrey.

By sect 118 of the 8 Geo. 4, c. 126 (The General Turnpike Act) it is enacted:

If any person . . . shall make any drain, gutter, sink, or watercourse across or otherwise break up or injure the surface of any turnpike road, or of any part thereof, or shall plough, harrow, or break up the soil of any land or ground, or, in ploughing or harrowing the adjacent lands shall turn his or their plough or harrow in or upon any land or ground within the distance aforesaid from the middle or centre of any turnpike road made or to be made . . . every person so offending shall forfeit for every such offence 40s.

Philbrick appeared for the appellant.—Mr. Smith, the appellant, merely took away the road sand which had been scraped from the road, and no part of the original soil. It is contended that he has not broken up or injured the surface of the road. The provision of the 118th section was intended to prevent the breaking up of the original soil, and not a mere deposit. [BLACKBURN, J.—What difference is there? In fact there is nowadays very little of the natural soil upon the surface of the land. COCKBURN, C. J.—You say that if the soil is artificial it may be removed.] The section does not intend to prevent the owner of the soil from taking away any artificial deposit. It does not say "break up the land," but "the soil of the land." It was in evidence that the bank was formed of the sand from the road. [COCKBURN, C. J.—But it was covered with turf. BLACKBURN, J.—And for fifty years and upwards. Were not the justices justified, even if it had been originally soil from the road, in finding that it had become incorporated with the land? COCKBURN, C. J.—If it were not originally a part of the soil, it certainly had become such.]

Cave, for the respondent, was not called upon.

COCKBURN, C. J.—We are all of opinion that the objection cannot be supported.

Judgment for the respondent.

Attorney for appellant, *W. H. Rowland*, Croydon.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Thursday Nov. 11.

AMES v. WATERLOW AND OTHERS.

Composition-deed, registrar's certificate of—Sheriff—Trespass—The B. L. C. A. 1849 (12 & 13 *Vict. c.* 106), *ss.* 112, 113—*The B. A.* 1861 (24 & 25 *Vict. c.* 134), *s.* 198.

Trespass cannot be maintained against the sheriff or his bailiff for detaining in prison on civil process a man who has obtained the certificate of the chief registrar of the Court of Bankruptcy of the filing and registration of a deed of composition under the 192*nd section of the B. A.* 1861, *even though the sheriff has notice of the certificate.*

Ames *v.* Colnaghi, 18 *L. T. Rep. N. S.* 327; *L. Rep.* 3 *C. P.* 359; 37 *L. J.* 159, *C. P., commented on.*

The declaration was for assault and false imprisonment.

The defendants pleaded a justification under a writ of *exigi facias* directed to them as sheriffs of the county of Middlesex.

The plaintiff new assigned that before the defendants took the plaintiff into custody as in the said second plea alleged, the plaintiff had made and executed such deed and documents, and had taken such steps and proceedings, that under and by virtue and in pursuance thereof and of the Bankruptcy Act 1861, one J. F. M., then being the chief registrar of Her Majesty's Court of Bankruptcy, did duly certify that on the 12th Oct. 1865, a certain deed (here describing the deed as a deed of composition under the 192nd section of the Bankruptcy Act 1861), was, on the 12th Oct. 1865, brought into the office of the said chief registrar, and was duly filed and registered, &c. Averment that the said certificate was given as well under the hand of the said chief registrar as under the seal of the said Court of Bankruptcy, and was afterwards duly issued and delivered by the said chief registrar to the plaintiff, of all which the defendants had due notice. That plaintiff brings this action, not for the trespasses in the said second plea admitted and attempted to be justified, but for that the defendants committed the trespass in the declaration alleged after the said alleged taking and keeping the plaintiff in custody as in the second plea is admitted, and after the plaintiff had duly produced and shown such certificate to the defendants, and after all conditions had been performed, and all things had happened and been done, and all reasonable and other times had elapsed necessary to entitle the plaintiff as well to have the full benefit and protection of the said certificate, and to be discharged from the said alleged

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taking and keeping in custody in the said second plea mentioned, as also to maintain this action for the trespasses in the declaration alleged.

To the new assignment the defendants pleaded, secondly, that the plaintiff did not make or enter into any deed or instrument within the meaning of the Bankruptcy Act 1861 as alleged, nor were any or either of the conditions necessary in that behalf observed or fulfilled, and by reason thereof the said certificate of the chief registrar was invalid and of no force. The defendants also demurred to the new assignment, on the ground that it did not allege facts which entitled the plaintiff to his release by the defendants from their custody as such sheriff, &c.

The plaintiff demurred to the defendants' third plea, on the grounds that, first, it did not allege any facts which justified the defendants in committing the trespasses in the declaration and new assignment alleged; secondly, that the alleged certificate of the chief registrar being existent and in force at the time of the alleged trespasses by the defendants was a statutory protection to the plaintiff against such trespasses until set aside by due course of law; thirdly, that the said plea ought to have alleged which of the said conditions had not been fulfilled; and, fourthly, that the said plea tendered an issue of law to be tried by a jury.

Joinder in demurrer to the new assignment.

Joinder in demurrer to the second plea to the new assignment.

Robinson, Serjt. (*Tapping* with him) for the plaintiff. The question raised on these pleadings is whether the sheriff is justified in detaining in custody a man who produces the certificate of the chief registrar of the Court of Bankruptcy, of his having filed in that court a composition-deed under the 192nd section of the Bankruptcy Act 1861. If he is not justified in so detaining him, then this action lies against the sheriff for the detention. That he is not so justified has been abundantly decided by the decision of the Court of Queen's Bench (affirmed in the Exchequer Chamber) in the case of *Lloyd* v. *Harrison*, 12 L. T. Rep. N. S. 271; and 34 L. J. 97, Q. B., Ex. Ch.: 14 L. T. Rep. N. S. 799; 35 L. J. 153, Q. B., and the decision of this court in *Ames* v. *Colnaghi*, 18 L. T. Rep. N. S. 327; L. Rep. 3 C. P. 359; 37 L. J. 159, C. P. In giving the judgment of the Exchequer Chamber, in *Lloyd* v. *Harrison*, Erle, C. J., said: "We are of opinion that the certificate of such a deed is that which is to operate as a valid certificate. We are of opinion that the sheriff is not bound to go and ascertain whether a valid deed exists, and then to act. It is a matter beyond his powers to ascertain that; and we think that the words of the statute are that the certificate of such a deed shall be the matter which the sheriff has to look to. The certificate would be without any operation at all if it did not have the effect that is contended for. The sheriff is to see whether there is a certificate of such a deed. The certificate states the validity of the deed. The deed itself may be an invalid deed; but it is the certificate which was produced. As a protection in bankruptcy we are clearly of opinion that it did not give the debtor mere privilege, but gave him a right to be discharged." And M. Smith, J., at the conclusion of his judgment in *Ames* v. *Colnaghi* (*ubi sup.*), says, "If he (the plaintiff) has a right, the court must give him the corresponding remedy. . . . Our judgment must be for the plaintiff, as the legitimate result of the decision in *Lloyd* v. *Harrison* (*ubi sup.*), viz., that if the sheriff may discharge, he *must*." For the purposes of the plaintiff's case, it makes no difference whether the composition-deed was good or bad.—[BOVILL, C. J.—We must take it on these pleadings that the deed was bad; in fact, that there was no such deed. What is the value of the certificate if there is no deed? WILLES, J.—The plaintiff himself has created the whole difficulty by making a bad deed, and by misstating facts in his affidavit.] In *Tarlton* v. *Fisher*, 2 Doug. 671, the sheriff was held not liable to an action of this kind for imprisoning a man who had taken advantage of 20 Geo. 2, c. 64, s. 2. But the words in that case are not so strong as those of the 198th section of the Bankruptcy Act 1861. In this case the sheriff has no discretion, but he is absolutely bound to discharge within a reasonable time after notice of the registrar's certificate. This case may also be distinguished from *Mangay* v. *Bart*, 5 Q. B. 381, in which the Court of Exchequer Chamber, reversing the decision of the Court of Queen's Bench, held the sheriff not liable to an action of trespass for arresting a man who was summoned to attend the court of review as a witness. The ground on which that judgment proceeded was that "the privilege (p. 393) the breach of which is the subject of complaint, is not to be considered . . . to be the privilege of the person attending the court, but of the court which he attends, and therefore the allowing or not allowing the privilege is discretionary." [BOVILL, C. J.—By the 198th section of the Bankruptcy Act 1861 the certificate of the registrar gives the same protection as an order of protection in bankruptcy. Is there any clause as to the production of the certificate, or as to the discharge on production of the certificate?] Only the 198th section. A man who has such certificate is entitled, on giving the sheriff notice of it, to be discharged without going to the Court of Bankruptcy or any other court. [BRETT, J.—It was not necessary to raise the present question in *Ames* v. *Colnaghi* (*ubi sup.*). You now say that if a man gets a certificate by fraud, the sheriff, though having notice of the fraud, is bound to discharge him, under pain of an action at the suit of the author of the fraud.] Yes. *Lees* v. *Newton*, 35 L. J. 285, C. P. is in favour of the plaintiff. In *Moone* v. *Rose*, 20 L. T. Rep. N. S. 606; 38 L. J. 240, Q. B.; L. Rep. 4 Q. B. 486, there was a breach of a statutory duty, and the gaoler was held liable. [WILLES, J. read the 112th and 113th sections of the Bankrupt Law Consolidation Act 1849. The right to a discharge does not consist in the production of the certificate, but in the language that "no judgment shall be available, &c." It makes no difference, so far as an action of trespass is concerned, whether the sheriff has or has not notice of the certificate. KEATING, J.—You say that an officer is justified, after being told by his prisoner that he has the registrar's certificate, in detaining him until he has a copy of it—is he then, in the mean time, a trespasser?] Possibly not. [KEATING, J.—Does not the 113th section of the Act of 1849 seem to provide a special remedy? BOVILL, C. J.—The certificate of the registrar has, by the statute, the same effect as an order of protection in bankruptcy. Now there must have been hundreds of cases in which debtors, who have obtained such an order of protection, have been arrested by the sheriff. Can you produce any single instance, in which the person so arrested has brought trespass against the sheriff?] No. [BOVILL, C. J.—This seems, then, to be a case of the first impression. It seems to me monstrous that a sheriff should be made a trespasser, if he does not instantly discharge a prisoner who produces a registrar's certificate, even without having time to verify it. The certificate may, for aught he knows, be fraudulent.]

Quain, Q. C. (*Day* with him) for the defendant, was not called upon.

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BOVILL, C. J.—It is argued in support of this demurrer, that this court has in the case of *Ames* v. *Colnaghi* (*ubi sup*), decided that the sheriff is bound of his own authority to discharge a man whom he has taken under a *capias*, on his producing a certificate under the hand of the chief registrar, and the seal of the court, of the filing and registration of a composition-deed, and that the defendant in this case having refused to discharge the plaintiff from his custody on his producing such certificate, an action of trespass will lie against him. But I am of opinion that this first proposition is grounded on a misconception of the decision in *Ames* v. *Colnaghi*. The present question was not then before the court, but only the general question whether, under the circumstances, the plaintiff was entitled to his discharge, and the court decided that question in the affirmative. The mode of his discharge was not in question. In the present case, however, the question as to the mode of discharge is expressly raised, and it is contended that the sheriff is bound to discharge on the production of the certificate. It is not even said that any time is to be allowed for the verification of the certificate, or that any judge's order is required; but it is contended that the bare production of the certificate is sufficient. The solution of this question depends on the construction we put upon the 198th section of the Bankruptcy Act 1861 (24 & 25 Vict. 134). The section says that "after notice . . . no execution . . . shall be available . . . without leave of the court." We see then that the writ remains in force after the granting of the certificate, but its action is suspended until the leave of the court is given to make it available. The court may grant or refuse leave. The section goes on to say that "a certificate under the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy." The debtor would have the certificate in his possession, and he may make it available to get his discharge just as he could a protection in bankruptcy. In what way is that? When was a sheriff ever made responsible for executing process against a man who has obtained a protection in bankruptcy? No such action has ever been maintained. I could not put it more strongly than it was put in the year 1781 by Buller, J., who, in giving judgment in the case of *Tarlton* v. *Fisher* (*ubi sup.*), says, "In the case of bankrupts or insolvents what is done? Hundreds have been arrested, but there never was an instance of an action against the sheriff or his officers in such cases. The practice in the case of bankrupts is to apply to a judge, and verify the certificate by affidavit: (*vide* 5 Geo. 2, c. 30, s. 13.) How could the sheriff ascertain that the certificate was signed by the commissioners? He cannot administer an oath." In reality the whole of the Bankruptcy Acts show that no such action will lie, especially as provision is expressly made for a remedy in case a bankrupt be arrested while protected by order of the court: (see sect. 113 of Bankrupt Law Consolidation Act 1849 (12 & 13 Vict. c. 106). But the remedy there given is not against the sheriff, but against the officer, and it does not give the bankrupt a claim to general damages, but simply 5*l.* a day. The Legislature has thus made provision for the protection of bankrupts, and has also provided a remedy in case that protection is not observed. The case of *Tarlton* v. *Fisher* (*ubi sup.*) turned on the construction of the following words in the statute 20 Geo. 3, c. 64, s. 2. "And shall not be liable to be arrested by virtue of any civil process out of any court; and in case they have been or shall be so arrested, shall be discharged therefrom." There it was held that a sheriff was not liable in trespass for executing process on the person of a man who had taken advantage of the above statute; but that the man in question, if arrested, must make application to the court for his discharge. In Watson on the Office of Sheriff (2nd edit. pp. 141), it is laid down:—"The sheriff, notwithstanding the defendant claims privilege from arrest by his bankruptcy and certificate, or under a discharge as an insolvent debtor, shall not discharge him without an indemnity, or by order of the court, for otherwise he might be driven to litigate with the plaintiff the question of the defendant's privilege; for the court will not stay proceedings in the event of an action brought against a sheriff for discharging a certificated bankrupt arrested by him, without an order of a judge." We see then that by the 198th section the same force is given to the registrar's certificate as to an order for protection in bankruptcy. In what way then is it to operate? To entitle the holder to get discharged from custody, but not to give him a right of action against the sheriff for the imprisonment. Therefore, in this view of the case, the new assignment is bad, or if it be good, the plea affords a good answer to it.

WILLES, J.—I am of the same opinion. If it were necessary to deal with the plea I should be prepared to hold that it sufficiently alleges that the plaintiff obtained a registrar's certificate that he was not entitled to. But I do not think that the new assignment discloses any cause of action. What appears from it is that the person of a judgment-debtor was detained by the sheriff after he had taken proceedings under the Bankruptcy Act 1861, and had procured the proper certificate of the chief registrar as to the due registration of a composition deed under that Act. I pass over the question whether the new assignment sufficiently alleges that the sheriff had notice of this certificate. I do not think that it does. Still for the purposes of this case I am willing to assume that it does, and that the composition-deed to which the plaintiff's certificate related was a good deed. What then does the plaintiff in his new assignment say? He says that he made a composition-deed under the Bankruptcy Act 1861, that he duly obtained the certificate of the registrar of the registration of the deed, and that the sheriff, with full notice of the premises (not such notice as is spoken of in the 198th section of the Bankruptcy Act 1861, for that refers to notice in the *Gazette*) continued to hold the plaintiff in his custody under an *exigi facias*. For this detention the plaintiff brings an action against the sheriff. Can he bring trespass under such circumstances? This question turns on the construction we put upon the 198th section of the Bankruptcy Act 1861. [The learned judge read the section.] The notice referred to in the section I take to mean notice in the *Gazette*. Our decision would affect an execution levied on the goods as well as one on the body. It thus becomes material to see whether the plaintiff's counsel is right in saying that the construction which he puts on the Act entails no hardship on the sheriff, on the ground that no cause of action exists until after notice of the certificate. But sect. 198 of the Bankruptcy Act 1861, and sects. 112 and 113 of the Act of 1849 show that this ground is not maintainable. They show that after notice no process shall be available either against the goods or the person of the judgment-debtor. The case of goods in bankruptcy is provided for by vesting them in assignees. There are various clauses which give a certain protection to executions levied before bankruptcy. Where those clauses do not apply, the sheriff is made responsible to the assignees, but not until after a reasonable time, and always with protection to the sheriff, if an adverse claim is set up. The Act of 1849 goes on in the 113th section to speak of the arrest of the

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body. [The learned judge read the section.] The provision at the end of the section shows how the certificate is to be made available. We must put a construction on the 198th section of the Act of 1861, so as to give it the same application in the case of goods as in the case of the body of the bankrupt. It was never held that the sheriff was bound to read the *Gazette*. All that the Act of 1861 says is, that, after notice, process shall not be available, &c. In the case of *Smith* v. *Egginton*, 7 A. & E. 167; 6 L. J., N. S., 206, Q. B., the Court of Queen's Bench held that the sheriff was not liable to an action of trespass, for the reasons I have mentioned. The question of notice would not affect the question of trespass. Then, again, the case is further illustrated by *Moone* v. *Rose* (*ubi sup.*), where an officer was held liable for detaining a prisoner after that he ought to have brought him up in the Court of Chancery on a *habeas corpus*, the Act in that case saying that if "the defendant shall not be brought . . . within the time aforesaid, the sheriff, gaoler, &c., in whose custody he shall be, shall thereupon discharge him out of custody," &c., which made it incumbent on the officer to discharge him. So, again, in *Tarlton* v. *Fisher* (*ubi sup.*), an action of trespass was brought against the sheriff under an Act which said that in such case the prisoner "shall not be liable," &c. But the construction put upon those words was that they conferred no right of action on the prisoner, but simply that they entitled him to be discharged. I do not, however, think it necessary to lay great stress on the cases. I think that great confusion has been caused on account of the doctrine laid down in *Tarlton* v. *Fisher*, 2 Doug. 671, not being consistently adhered to. There is no one authority for the maintenance of an action under such circumstances as these. With reference to the case of *Mangay* v. *Burt*, 5 Q. B. 381, it may seem extraordinary that a man should be entitled to a privilege, and yet that, if he be arrested, he shall have no action for the arrest. But this apparent anomaly disappears when we come to consider the history of our law, and the old doctrines as to suing out a writ of privilege. That was the old form of remedy available to a person who, being privileged from arrest, was nevertheless arrested. This case stands on the same footing, and I think it quite right that it should, for otherwise there would be no end to the actions against the officers who execute the process of the courts. For these reasons I am of opinion that our judgment must be for the defendants.

KEATING, J.—I am of the same opinion. I think that the new assignment is bad. The counsel for the plaintiff is only prepared to support it on the authority of *Lloyd* v. *Harrison* and *Ames v. Colnaghi* (*ubi sup.*), and he has inferred, because the Court of Exchequer Chamber has decided that the sheriff is justified, as against the judgment-creditor, in discharging a prisoner who produces the registrar's certificate, and this court also has said that he is entitled to discharge the prisoner in such a case, that therefore the sheriff is liable in an action of trespass at the suit of the judgment-debtor, if he does not discharge him. But I think that he has misconceived the effect of our judgment in *Ames* v. *Colnaghi*. In that case the court only decided that the prisoner was entitled to his discharge. The court therefore said that the sheriff must discharge him, and it is contended that if he does not do so he becomes a trespasser. But what the judges meant was, that the sheriff must discharge him because the court would order it. As the plaintiff can produce no other authority, and this one fails him, I am of opinion that the new assignment fails, and that our judgment must be for the defendants.

BRETT, J.—I am entirely of the same opinion. Even assuming the facts in the new assignment to be true, I cannot see that they disclose a good ground of action. I am led to this conclusion by the reasons given by my brother Willes. It seems to me that his judgment is strongly supported by that of Blackburn, J., in the case of *Rossi* v. *Bailey*, 19 L. T. Rep. N. S. 130; L. Rep. 3 Q. B. 621. The counsel for the plaintiff is unable to support his argument on the authority of the old cases, but he contends that the maintenance of this action is the logical consequence of our decision in *Ames* v. *Colnaghi* (*ubi sup.*). I, however, think that that case only decides that the effect of the registrar's certificate is to entitle the debtor to his discharge.

BOVILL, C. J.—If any further authority were needed to show that this action cannot be maintained, I should cite the case of *Philipps* v. *Naylor*, 3 H. & N. 14. In that case the debtor had an order of protection in bankruptcy and the sheriff had notice of it, yet it was held that an action of trespass could not be maintained.

Judgment for defendants.

Attorney for plaintiff, *W. S. Masterman.*

Attorneys for the defendants, *Burchell* and *Hall.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 13.

(Before KELLY, C, B., MARTIN, B., BLACKBURN, LUSH, and BRETT, JJ.)

REG. v. DAVID JONES.

Bigamy—Knowledge of the first wife being alive—Direction to the jury.

In 1863 *the prisoner married Mary Anne Richards, lived with her about a week, and then left her. It was not proved that he had since seen her. In* 1867 *he married Elizabeth Evans, his first wife being then alive. On the trial of an indictment for bigamy, the learned judge told the jury that they must be satisfied that the prisoner knew that his first wife was alive at the time of the second marriage:*

Held, that the direction of the judge to the jury was right, and that it was not necessary to prove affirmatively that at the time of the second marriage the prisoner knew that his first wife was alive.

Case reserved for the opinion of this court by Channell, B.:—

The prisoner David Jones was tried before me at the last assizes for Carmarthenshire.

The indictment charged the prisoner with marrying Mary Anne Richards, and afterwards, and during her life, feloniously marrying one Elizabeth Evans.

The prisoner was convicted, and the conviction is to be taken as correct, subject only to the question hereinafter stated.

The prisoner on the 29th June 1863 married Mary Anne Richards. On the 29th Nov. 1867 he married the said Elizabeth Evans.

Mary Anne Richards was proved to be alive at the time of the trial.

It was proved on cross-examination that the prisoner lived with her for about a week, and then left her. It was not proved that he had since seen her.

For the prisoner it was contended that affirmative proof must be given that at the time of his marriage with Elizabeth Evans, the prisoner actually knew that Mary Anne, his first wife, was alive. The case of *Reg.* v. *Lumley*, 38 L. J. 86, M. C., 20 L. T. Rep. N. S. 454, was relied on.

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I overruled the objection, holding that positive proof on that point was not absolutely necessary.

I left the case to the jury, telling them they must be satisfied that the prisoner knew his first wife was alive at the time of the second marriage.

The question is whether I was at liberty to do so, or whether, upon the authority of the case referred to, I was bound to direct an acquittal. If I ought not to have left the case to the jury, the conviction is to be reversed.

The prisoner is not in custody, but is to be called up for sentence if the conviction is held good.

W. F. Channell.

No counsel appeared on either side to argue the case.

Kelly, C. B.—We need not say more than that the case was properly left to the jury, and that the conviction must be affirmed.

The rest of the Court concurred.

Conviction affirmed.

Reg. v. George Thompson.

Housebreaking implements—24 & 25 Vict. c. 96, s. 58—Possession.

Where several persons are found out together by night for common purpose of housebreaking, and one only is in possession of the housebreaking implements, all may be found guilty of the misdemeanor of being found by night in possession of implements of housebreaking without lawful excuse (24 & 25 Vict. c. 96, s. 58), for the possession of one is in such case the possession of all.

Case reserved for the decision of the court for consideration of Crown Cases Reserved.

At the general quarter sessions of the peace in and for the county of Surrey, on Thursday, the 29th July 1869, George Thompson and William Jones were charged upon the following indictment:

Surrey. The jurors for our lady the Queen upon their oaths present, that George Thompson and William Jones at about the hour of two of the clock, *ante meridiem*, of the 22nd July 1869, at the parish of St. George the Martyr, Southwark, in the said county of Surrey, were found, they the said George Thompson and William Jones then and there by night, as aforesaid, unlawfully having in their possession without lawful excuse certain implements of housebreaking, that is to say, one crow, one knife, one candle, and twenty lucifer matches, against the form of the statute in such case made and provided. And the jurors aforesaid upon their oath aforesaid do further present that before the time of committing the misdemeanor hereinbefore mentioned, the said George Thompson and William Jones were severally convicted of felony, that is to say, the said George Thompson, by the name of John Patterson, at the general session of the peace held at the sessions house on Clerkenwell-green, in and for the county of Middlesex, on Monday, the 4th March 1861, and the said William Jones, by the name of Samuel Lambert, at the adjourned general session of the peace, held at the sessions house, on Clerkenwell-green, in and for the county of Middlesex, on Monday, the 29th May, 1867.

William Jones pleaded guilty; and it was proved that George Thompson was found along with Jones, Jones having on his person the crow and the knife, and George Thompson having on his person the candle and lucifer matches.

It was contended that a candle and lucifer matches were not housebreaking implements within the meaning of the statute, and that Thompson could not be said to be in possession of the crow and the knife found on Jones.

Thereupon the court directed the jury, that if they were of opinion that Thompson was in the company of Jones, with the same object as Jones, and for the purpose of housebreaking, they should find him guilty on the indictment, and that they might take into their consideration the fact of the candle and lucifer matches being found on him as showing the purpose to which the crow and the knife were intended to be applied, but that the candle and lucifer matches alone could not be held to be housebreaking implements within the meaning of the statute.

The jury returned a verdict of guilty, and the court reserved the question for the Court for Consideration of Crown Cases Reserved, whether the possession of housebreaking implements by one of two persons for a common object is the possession of each.

Judgment on Thompson was respited, and he was committed to the county gaol at Newington until the decision of the Court for Consideration of Crown Cases Reserved should be known.

Thos. Tilson, Chairman.

Straight for the prisoner.—The conviction cannot be sustained. There was no evidence of Thompson's being in possession of housebreaking implements. The indictment is founded on the 24 & 25 Vict. c. 96, s. 58, "whoever shall be found by night armed with any dangerous or offensive weapon or instrument whatever with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession, without lawful excuse (the proof of which excuse shall lie on such person), any picklock key, crow, jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling-house or other building whatsoever, with intent to commit any felony therein, shall be guilty of a misdemeanor." The enactment makes the offence an individual and personal one. It cannot be that it intended to cast on another person the obligation of making an excuse for another person who is in possession of housebreaking implements. [Lush, J.—Suppose each of them had hold of a crowbar by the ends, so that neither had exclusive possession, would not the statute apply? Or if a burglar were to hire a little boy to carry his implements, could he not be convicted under it? Blackburn, J.—Or if the implements were in a pannier on an ass's back, could the donkey be said to be in possession of them?] In the statutes relating to coining (24 & 25 Vict. c. 99, s. 1) and forgery (24 & 25 Vict. c. 98, s. 45), criminal possession is defined.

No counsel appeared for the prosecution.

Kelly, C. B.—The possession of one is the possession of all. Under the Game Laws it has been held that where several persons go out poaching in the night time, and one is armed with a gun, all are armed: (See *Reg* v. *Goodfellow and others*, 1 Den. C. C. 81.)

The rest of the Court concurred.

Conviction affirmed.

COURT OF ADMIRALTY.

Reported by Henry F. Purcell, Esq., Barrister-at-Law.

Nov. 2 and 9.

The Young James.

County Court Admiralty Jurisdiction Act (31 & 32 Vict. c. 71, ss. 3, 9)—Cause of damage—Costs.

Where a cause of damage was instituted in the Superior Court, the damage done being over 300l., but the owner's liability was subsequently limited below that amount:

Held, that the plaintiff was entitled to costs in the Superior Court.

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This was a cause of damage instituted by the owners of a vessel called the *Red Jacket* against the owners of a vessel called the *Young James*. The action was entered on the 4th June, in the sum of 1000*l.*; the damage done to the *Young James* amounted to 800*l.*, the additional 200*l.* was to cover the costs. On the 27th July the vessel was released, and bail was accepted to the amount of 500*l.* On the 3rd Aug. the plaintiff filed preliminary act. On the 14th Sept. a tender of 258*l.* 2*s.* was filed. On the 29th Oct. that tender was accepted, the question of costs being reserved.

Clarkson, for plaintiffs, moved that the costs be allowed.

E. G. Gibson for defendants.—The plaintiff is deprived of his costs unless judge certifies by County Court Admiralty Jurisdiction Act, s. 9. He claims more than 300*l.*, and sect. 3 limits jurisdiction of County Courts to 300*l.* But whether the action might have been brought in the County Court is to be determined by the sum recovered; it is a legal or just claim which is to be considered, otherwise plaintiff has only to exaggerate his claim to entitle him to bring his action in Superior Courts: *Emery* v. *Binns*, 7 Moo. P. C. 195; per judges in *Woodham* v. *Newman*, 7 C. B. 654, which was on a similar section in 9 & 10 Vict. c. 95, s. 129. It was true the plaintiff there was entitled to costs, although he recovered less than 20*l.*, but it was because he proved more than 20*l.* was due to him, and the amount was reduced by a set-off. Here the defendant's legal liability from the moment of collision was fixed at an amount over which the County Court has jurisdiction. He never was liable for more. It is only the practice of the Court of Admiralty which compels the plaintiff to prove the defendant is not entitled to recover more; it is not the proof which reduces the defendant's claim. The court has no power to certify as it has not heard or tried the cause. There are no circumstances to entitle plaintiff to certificate for costs.

Clarkson in reply.—Neither the principle nor the words of the statute are opposed to the claim of my client. In this case the proceedings could not have been taken in the County Court, because the damage done the *Red Jacket* amounted to 800*l.*, and therefore was beyond the County Court jurisdiction. At common law defendant was liable for the whole of this amount; and it was subsequent to the institution of the suit that the limitation of liability had been claimed, which limitation could not have been in this case claimed in the County Court.

Nov. 9.—Sir R. PHILLIMORE (having gone through the facts).—On behalf of the *Red Jacket* it has been contended that this suit ought to have been instituted in the County Court, inasmuch as it now appears that the amount claimed was less than 300*l.*, and that having regard to the 3rd and 9th sections of 31 & 32 Vict. c. 71 (the County Courts Admiralty Jurisdiction Act), costs ought not to be allowed in this case. By the 3rd section of this Act the County Court has jurisdiction where the amount claimed does not exceed 300*l.*; and by the 9th section, "If any person shall take in the High Court of Admiralty of England proceedings which he might without agreement have taken in a County Court" (except in certain cases not necessary to be here mentioned), "and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that Admiralty cause is limited by this Act . . . he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty . . . shall certify that it was a proper Admiralty cause to be tried in the High Court of Admiralty o England." These proceedings might, it is argued, "have been taken in a County Court," and therefore the plaintiff is not entitled to costs, and is liable to be condemned in costs; and it is further contended that it is not competent to the court to certify for costs in this case, inasmuch as the cause has not been "tried or heard." Upon the first point I was referred to analogous enactment as to costs contained in the 129th section of 9 & 10 Vict. c. 95, which relates to actions for small debts brought in the Superior Courts; and there the words are "for which a plaint might have been entered," &c.; and for the construction of these words I was referred to two cases (*Woodhams* v. *Newman*, 7 C. B. 654, and *Emery* v. *Binns*, 7 Moo. P. C. 195) on the interpretation of a similar clause in a Jamaica Act. I entirely assent to the principle of both these decisions, which is in effect that the words "for which a plaint might have been entered" must refer to an amount justly or properly claimed, and that it is not competent to the plaintiff to release himself from the restraint of the Act by entering an exorbitant claim, and so ousting the jurisdiction of the County Court, and then, after the claim has been so ousted, reducing the amount to a sum which if it had been originally claimed, would have brought it within the jurisdiction of the County Court. But it was contended on behalf of the plaintiff by Mr. Clarkson, in a clear and able argument, that neither the words of the statute nor the principle of these cases was hostile to the claim of his client; not the words of the statute, because in this case the proceedings might not have been taken in a County Court, for these reasons. The damage done to the *Red Jacket* did amount to 800*l.*, and by the common law, the *Young James* was liable for that sum; the amount of claim therefore exceeded the jurisdiction of the County Court. After the suit was instituted in this court, however, the defendant availed himself of the provision contained in the 54th section of 25 & 26 Vict. c. 63 (The Merchant Shipping Amendment Act), and limited his liability to 8*l.* per ton; in order to do which it was necessary, according to the practice of this court, that he should make an affidavit that the damage had occurred without the actual fault or privity of the owner, so as to bring him within the protection of the Act; and it was not till after this limitation of liability had been claimed, which limitation could not in this case have been claimed in the County Court, that the claim was reduced below the amount of 300*l.*; and in fact it is analogous to the case of a demand reduced by a set-off, to which the judges in *Woodhams* v. *Newman* held the statute did not apply. In *Emery* v. *Binns*, no question of set-off or of limitation of liability subsequent to the institution of the said suit arose. I am of opinion that this cause was properly instituted in this court; it becomes, therefore, unnecessary to consider that part of the argument which relates to my inability to certify for costs, inasmuch as the case has not been "heard or tried" before me. I pronounce for the prayer of the plaintiff in this case, including thereby the condemnation of the defendant in costs.

Proctor for the plaintiff, *Shipwith*.

Proctor for defendants, *Coots*.

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COURT OF PROBATE.

Reported by W. Leycester, Esq., Barrister-at-Law.

Tuesday, Nov. 16.]

(Before Lord Penzance.)

In the Goods of J. S. Gill.

Will—Memorandum—Incorporation.

A testator left a will revoking all former wills, by which he directed certain articles to be distributed by the executors according to written instructions affixed to his will. No such instructions were found affixed to the will, but a paper was found duly executed according to the Wills Act, which had been referred to in a former will, and which contained instructions to his executor.

The court refused to incorporate it with the existing will, on the ground that it did not correspond to the description therein, and also refused to admit it to probate independently as it had been revoked by the last will.

James Sebastian Gill died at Reading in the county of Berks, leaving a will and codicil duly executed, dated Nov. 2, 1868. The will revoked all former wills, and contained the following clause:

All my books, pictures, sketches, guns, rods, goods, and chattels in and about the rooms I shall occupy at the time of my decease, I wish my executors to dispose of faithfully and conscientiously according to the written directions left by me and affixed to this my will, trusting as I unhesitatingly do in their honour and integrity.

The testator had executed a previous will in Aug. 1866, which contained a similar clause. The existing will was prepared by Mr. Weedon, the testator's solicitor, and remained in his custody until the testator's death. No written directions were affixed to the will, nor could Mr. Weedon remember whether the testator had referred to any such document at the time of executing the will, but on search being made in his depositories, the following paper of written directions was found:

To my executors, the Rev. F. T. Gill and R. Haynes Lovell.—I have written the following directions for your guidance with respect to many things and goods not mentioned in my will, which said will very probably will be found at Wm. Weedon, Esq., Solicitor, Reading. In you, as my executors, I have the greatest faith as regards your honour and integrity, and I feel confident that all my wishes will be carried out faithfully, and that this will form a part of the above-mentioned will.

The paper went on to provide for the distribution of various articles, books, pictures, sketches, folio stand, folio book of engravings, fishing tackle and rods, harmonium, gun, sword, bedstead, washing stand, wearing apparel. And it concluded by forbidding his executors to spend more than 40*l.* on his funeral. The paper was dated Aug. 1866, and was executed according to the provisions of the Wills Act.

C. A. Middleton moved for probate of the will and codicil of Nov. 1868, with the paper of instructions as incorporated by reference. He submitted also that it was entitled to probate as a duly executed testamentary paper. He cited

In the Goods of Mary Sunderland, L. Rep. 1 P. & M. 129;

In the Goods of Stewart, 3 S. & T. 122.

Lord Penzance.—I am of opinion that this paper cannot be incorporated with the will. What the testator did was this: In August 1866 he made a will, according to the statement of the attorney, something similar to that now in existance. At the date of the execution he wrote a paper beginning thus: "I have written the following directions for your guidance (that is, his executors,) with respect to many things not contained in the will;" and he went on to provide for the distribution of a great number of articles belonging to him. That was intended to form part of the will of August 1866, and was duly executed as a testamentary document. In 1868 he made a new will, in which he revoked all former wills, and in that will there is a clause which directs "all my books, guns, rods, pictures, and other chattels which may be in and about the rooms I shall occupy," to be disposed of by the executors, "according to written directions left by me and affixed to this my will." Well, the will is found, but nothing is affixed to it, and nothing is discovered corresponding to the directions he has described. The court is then asked to go back to the directions affixed to the former will. I see great difficulty in doing that; in fact, it is impossible. It is extremely probable that the testator made a fresh list, or more than one, and that he afterwards tore them up, as often happens. If, indeed, the existing list had answered the terms of the list described in the will, there might have been something to say; but it does not, for it disposes of many articles which cannot be said to answer the description of articles "in and about my room." I am of opinion, therefore, that the directions cannot form part of the will of 1868. Then, it is said that the directions being well executed, are not revoked, and therefore may be admitted to probate. But it is quite clear that there being language in the will of 1868 revoking all other former wills, if there is not a special reference excepting the directions, they must be revoked too. The motion, therefore must be refused.

Attorney, *Pitman.*

Tuesday, Nov. 9.

In the Goods of W. J. Law (deceased),

Codicil wrongly described as codicil to a revoked will—Probate.

A testator died leaving a will revoking all former wills. He subsequently executed a codicil, which by mistake he described as a codicil to a previous will:

The Court, on the authority of In the Goods of Steele, *admitted the codicil to probate.*

W. J. Law died Oct. 1869, leaving a will and codicil duly executed. In July 1860 he made a will disposing of all his property, a considerable portion of which was in the West Indies, and providing equally for all his children. On Jan. 24, 1866 he made another will, in which he revoked all previous wills, and this he deposited with his banker. Shortly before his death he made a codicil commencing in these words: "I, William J. Law, declare this to be a codicil to my last will and testament, bearing date July 21, 1860." Between the wills of 1860 and 1866 the West India property dealt with in the first will had all been disposed of, and a son of the testator had died. The codicil referred to this latter fact, and provided for his widow and children by placing them in the same position as if their father had survived. There were no words in the codicil to show an intention of revoking the will of 1866, or to revive the will of 1860.

Dr. *Middleton* now moved for probate of the will of 1866 and the codicil, as together constituting the will of the deceased, on the authority of

In the Goods of Steele, L. Rep. 1 P. & M. 575.

Lord Penzance.—The facts fall within that case and you may take probate as asked.

Attorney: *Davidson*

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Nov. 6 and 16.

BECKETT *v.* HOWE AND ANOTHER.

Will—Acknowledgment—Signature not seen by attesting witnesses—Presumption—Probate granted.

A testator, at the time of the attestation of his will, folded it so that his signature was not seen by either of the attesting witnesses. To one of them he had spoken of witnessing his will, and to both he had talked of the necessity of arranging his affairs:

The court, on the authority of Gwillim *v.* Gwillim, *held the will to be duly executed.*

The plaintiff, an executor, propounded the will of H. J. Long, a widower without children, who died March 1869, leaving a will purporting to be executed in July 1868. It was a holograph will, and the attestation clause was in the following form:

In witness whereof we the undersigned have, at the request of the testator, and in the presence of each other, signed our names.
H. PRESTAGE.
J. OAKLEY.

At the time of attestation, the testator folded the will in such a manner that none of the writing could be seen, and neither of the attesting witnesses could say positively whether his signature was on the will or not. The case was tried before Lord Penzance on Nov. 6, and both the attesting witnesses were examined.

Mr. Oakley deposed that two or three days before the execution of the will the testator asked him if he would step across to Mr. Prestage's some evening to sign his will. Accordingly, an appointment was made, and the witness went to the house of the other attesting witness. The testator produced a document from his pocket, which he folded up so that no writing could be seen, and he remarked, alluding, as was supposed, to the recent death of his wife, "You are aware that there has been a change in my circumstances which involves a change in my affairs." The word "will" was not mentioned. The testator then pointed to where the witnesses were to sign, and they signed accordingly, Prestage first and Oakley afterwards. This witness saw no writing on the document at all.

Mr. Prestage gave a similar account of the transaction, except that the testator had not asked him to witness his will, but only to sign a paper for him. He saw no writing on the document. In cross-examination the witness said the testator did not appear to be endeavouring to conceal the contents of the paper. On this evidence,

Dr. *Tristram*, on behalf of the executor, submitted that the will was duly executed. There was sufficient evidence to presume that the signature was there when the witnesses signed, and that being so what passed was a sufficient acknowledgment of the signature.

Dr. *Spinks*, contra.—Before the testator could be presumed to have acknowledged his signature it must be shown that it was there. [Lord PENZANCE. —*In the Goods of Gwillim*, 3 S. & T. 200, the court held that it was not necessary to have evidence that the name was there, but that it was at liberty to draw the inference from the circumstances.] So far from the testator acknowledging it as his will he endeavoured to conceal the fact from them. He cited

In the Goods of Pearson, 33 L. J. 127, P. & M.;
In the Goods of Holgate, 1 S. & T. 261;
In the Goods of Hammond, 3 Sw. & T. 90.

Cur adv. vult.

Nov. 16.—LORD PENZANCE.—In this case the court took time to consider the former decisions with the view of seeing, whether any case had already been decided which in any way qualified the doctrine that was laid down by Sir C. Cresswell in *Gwillim v. Gwillim*. The question is, whether a will has been properly executed, and the facts are that a testator stated to one attesting witness a few days before the date of the execution, that he wished him to come on a particular day to witness his will, and to the other attesting witness he likewise said he wished him to sign a paper, not mentioning what it was, and that he wished him to be present at the same time as the other attesting witness. In accordance with this, a meeting was fixed, and one evening both witnesses arrived. Then the testator produced a paper which he carefully folded up, so that neither could see anything that was on the paper. Having made a remark to them both that owing to the death of his wife it was necessary to alter his affairs, he asked them to sign their names as witnesses. The question is, is that a due execution? The sum and substance of the facts came to this; the witnesses did not see the testator's name, and he never told them that his signature was there. But he did tell one of the witnesses directly, and both indirectly, that it was a will on the occasion when they attended the execution, because he gave them both to understand that the death of his wife had rendered a change of his affairs necessary. The doctrine in *Gwillim v. Gwillim* is this, that if a man produces a paper to the witnesses, and gives them to understand that it is his will, and then gets them to sign their names to that, both being present at the same time, that is an acknowledgement of his signature; that is always supposing the signature is there at the time. Whether that is right or wrong the court does not stop to inquire. It is founded on two cases decided in the Privy Council, to which Sir Cresswell Cresswell referred. But he arrived at this determination: that provided a man acknowledges a paper to be his will and the signature is there at the time, then that is an acknowledgment of his signature. The facts in this case come up to that requirement. What passed between the testator and the attesting witness was tantamount to saying that it was his will, and I think also that his signature was there at that time. It may be said, what evidence is there that his signature was there at all? Here again, I must refer to *Gwillim v. Gwillim*. If it were necessary to prove it by direct evidence, I should say there were difficulties; but the court ought to judge from the whole appearance of the document, and from the whole circumstances of the case, whether it is satisfied that the signature was there. I think there is quite as much here as there was in *Gwillim v. Gwillim* to show that the signature was there. Sir C. Cresswell said: "If it were necessary to have direct evidence that the name of the testator was on the will when he acknowledged it by asking them to witness the will, the proof of the execution would fail; but that certainly is not necessary, for the contrary was decided in *Cooper v. Bockett*, 4 Moo. P. C. C. 419. The other case in the Judicial Committee, and to which I have alluded, goes a great deal further, because there the only attesting witness denied the existence of the will at the time of the attestation. In the case of *Loyd and Hart v. Roberts*, one of the attesting witnesses was dead, and there was an imperfect attestation clause." That exactly applies to this case, where there is also an imperfect testimonium clause. Sir C. Cresswell then goes on to say, "The court is therefore at liberty to judge from the circumstances of the case whether the signature was on the will at the time of the attestation or not." These remarks apply exactly to the present case, and therefore I hold the will to be duly executed.

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Dr. *Spinks*, for the defendant, asked for costs out of the estate. The litigation arose entirely from the act of the testator in folding up his will.

Lord Penzance.—There are no merits. It was merely a question of due execution, and I shall not allow any costs out of the estate.

Attorney for the plaintiff, *Rothesay*.

Attorneys for the defendant, *Ingle*, *Coope*, and *Holmes*.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. Leycester, Esq., Barrister-at-Law.

Wednesday, Nov. 3.

(Before Lord Penzance, J. O.)

Constable v. Constable.

Alimony pendente lite—Witnesses examined in support of petition—No answer of husband—His right to cross-examine witnesses—Practice.

On a wife's petition for alimony pendente lite, the husband having filed no answer, the court would not allow him to cross-examine the witnesses called to prove his faculties.

This was the wife's suit for a dissolution of marriage, on the ground of cruelty and adultery, and the present application was for alimony *pendente lite*. The husband had filed no answer to the petition.

Hole, for petitioner, examined her in proof of her husband's faculties; and

Bosanquet, for the respondent, proposed to cross-examine her.

Hole objected, and

The court held, that as the husband had filed no answer, he was not entitled to cross-examine witnesses called in support of the petition.

Attorneys for the petitioner, *Miller* and *Miller*.

Attorney for the respondent, *Eyre*.

Tuesday, Nov. 9.

Green v. Green.

Restitution of conjugal rights—Pleading.

In a wife's suit for restitution of conjugal rights, the husband pleaded that he had been induced to marry her on a false representation that she was pregnant by him; that she had, since their separation, committed adultery; and that he was not able to maintain her:

The Court ordered the first plea to be struck out, and allowed the second to stand. The charge of adultery it directed to be pleaded in the usual manner with particulars.

This was a wife's suit for restitution of conjugal rights. In his answer the husband pleaded in the 4th and 6th paragraphs, that his wife was pregnant when he married her, and that he had been induced to marry her by false representation that he had seduced her. In the 7th paragraph he pleaded that he had no home of his own to take her to; and in the 8th paragraph that his wife, since their marriage, had been guilty of adultery.

Dr. *Spinks*, for the wife, moved that the 4th, 6th, and 7th paragraphs be struck out, and that the respondent be ordered to give particulars of the 8th paragraph.

Staveley Hill opposed the motion.

Lord Penzance, J. O.—The 4th and 6th paragraphs have certainly nothing to do with the question to be decided by the court. The 7th paragraph I shall not order to be struck out at the present stage. The charge of adultery must be pleaded in the usual way, and with as much particularity as possible.

Attorney for petitioner, *Singleton*.

Attorney for respondent, *Phillpott*.

Yeatman v. Yeatman and Rummell.

Dissolution suit—Former suit pleaded in answer.

The husband prayed for a dissolution on the ground of adultery, and the wife, in her answer, pleaded that in his former suit the issue of cruelty had been found in her favour:

The court refused to strike out this plea.

This was a husband's suit for dissolution on the ground of his wife's adultery with the co-respondent. The respondent denied the charge, and pleaded that she had formerly succeeded in a dissolution suit brought by her husband, and also in a suit for judicial separation brought by herself.

Yeatman moved that these paragraphs be struck out of the respondent's answer. She could not plead the judgments given in her favour, they would only come in as discretionary bars to the judgment of the court after the verdict in this suit had been pronounced.

Lord Penzance, J. O.—You cannot exclude the former suits from the knowledge of the court, and I shall certainly not order the paragraphs to be struck out.

Jayne v. Jayne and Prothero.

Dissolution—Countercharge of cruelty—Pleadings.

In a husband's suit for dissolution, after the pleadings had been completed and issue joined, the court refused to allow the co-respondent to add to his answer a charge of cruelty against the husband.

This was a husband's suit for dissolution on the ground of his wife's adultery with the co-respondent. The respondent and co-respondent had both pleaded a simple denial, and after the pleadings had been completed and issue joined,

Dr. *Tristram*, on behalf of the co-respondent, moved for leave to add to his answer a charge of cruelty against the husband.

G. Browne, for the petitioner, *contra*.

Lord Penzance, J. O.—The court is willing at all times to allow a wife to plead, though she may have allowed the time to go by. But here both parties have filed their answers, and cruelty is not a thing which ought to be allowed to be pleaded at the last moment. I shall certainly not allow the co-respondent to plead cruelty at this stage.

Attorney for the petitioner, *Abbott*.

Attorneys for the co-respondent, *Heath* and *Co.*

Friday, Nov. 19.

Holt v. Holt and Davis (Queen's Proctor intervening.)

Dissolution—Decree nisi—Queen's Proctor intervening—Reversal of decree—Costs.

Where the Queen's Proctor intervened after a decree nisi, and established a charge of adultery against the petitioner, the court reversed only that part of the decree

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which dissolved the marriage, and left standing that part which condemned the co-respondent in costs.

This was originally a husband's suit for dissolution of marriage on the ground of the wife's adultery. All the issues were found for the petitioner, and the court pronounced a decree *nisi*, dissolving the marriage, and condemning the co-respondent in costs. Subsequently the Queen's Proctor obtained leave to intervene, and charged the petitioner with adultery. The case was heard before the Judge Ordinary, and the issues were found for the Queen's Proctor.

Dr. *Spinks*, on behalf of the petitioner, moved that only so much of the decree *nisi* as dissolved the marriage should be reversed, and that the other part, condemning the co-respondent in costs, should be allowed to stand.

The *Attorney-General*, for the Queen's Proctor, submitted that this was an entirely novel proposition. Hitherto it had been the custom to reverse the decree *simpliciter*. At any rate, the co-respondent ought to be heard.

Dr. *Spinks*.—He did not appear to the suit, and therefore had no right to be heard.

Lord PENZANCE, J. O.—The original suit was of such a character that I don't think the co-respondent ought to be released from the payment of costs. At present, therefore, I shall only reverse that part of the decree *nisi* which dissolves the marriage; but I will hear any application the co-respondent may make on the matter of costs.

Proctor for petitioner, *Wills*.

Queen's Proctor.

Irish Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

DROGHEDA ELECTION PETITION.

Thursday, Jan. 19.

(Before KEOGH, J.)

Intimidation — Inflammatory addresses — Personal responsibility of candidate—Spiritual influence—Violence—Mob riot—Organised system—Majority of good votes—Subsequent intimidation.

An organised system of bribery or treating will avoid an election, although not in any way connected with the candidate or his agents, and though the votes affected thereby might be struck off on a scrutiny.

In order to put intimidation upon a parallel with bribery and treating in this respect, it must prevail to such an extent that the court may be satisfied that freedom of election has ceased to exist in consequence.

It was contended that the respondent having a majority of good votes, it mattered not that after that majority had been obtained voters were intimidated and the freedom of election interfered with. But it was

Held, that interference with the freedom of election after the contest was thus virtually decided, voided the return.

Where the law has been violated, and outrage and intimidation have been organised, the onus is upon the respondent to show that that intimidation and that violence have not produced their natural consequences, viz., terrifying the people from the exercise of their legitimate franchise.

Orangemen were expected down from Dublin to aid the side of the petitioner, and a meeting of the supporters of the respondent was held the day before the polling, in which speeches were made by the Catholic clergy and others inciting the people to "hurt the Orangemen into the Boyne," "give them a warm reception," &c. The respondent heard these speeches; and on the following day voters were met at the railway station and treated with violence, in the presence of the respondent and his conducting agent. One voter, who told the respondent that he did not intend to vote for anyone, was carried by force to the tally room. Further, it was necessary that voters should be escorted into the town by constabulary and military, and both these forces were assaulted with bludgeons and missiles.

Held, that the election was void on the ground of intimidation.

On the day of the polling the respondent went to voters who were opposed to him, and offered to give them his escort to protect them to the poll, they being afraid to go, notwithstanding there were military and constabulary in the streets:

Held, that this was conclusive evidence out of the respondent's own mouth to prove that there was not freedom of election in the borough.

If stones are thrown, shots fired, and bottles hurled amongst persons going to register their votes, they are not bound to again risk their lives, but may claim that the election be declared void.

If voters are deterred from voting by a prevailing terror, but without influence being brought to bear upon them personally, the election will be declared void.

The Dungarvon *and* Roxburgh *cases considered.*

This was a petition by Sir L. M'Clintock against the return of Mr. Benjamin Whitworth. The petition alleged by its third clause, that upon several days preceding the election, addresses and speeches of an exciting and inflammatory nature were delivered in the public streets of Drogheda, by Mr Whitworth and several other persons, in his presence, and with his knowledge and consent, for the purpose of urging and inciting a number of persons to use force in order to intimidate and prevent the electors from voting for the petitioner. The fourth clause alleged that a large number of men and women were hired by the said Benjamin Whitworth, or with his knowledge and consent, for the purpose of intimidating electors, in order to induce them to vote for the said Benjamin Whitworth, or to refrain from voting for the petitioner or Mr. Brodigan. The fifth clause alleged that several members of the Roman Catholic priesthood improperly exercised their spiritual influence over many of the electors, for the purpose of constraining them to vote for Mr. Whitworth, and to prevent them from voting for the petitioner or for Mr. Brodigan. The seventh that upon the 26th Nov. 1868, being the polling-day, several thousand persons, friends and supporters of the said Benjamin Whitworth, armed, some with firearms, and others with bludgeons and sticks, attacked voters who wished and had promised to vote for the petitioner, and inflicted very severe wounds and other bodily injuries upon them, and forcibly prevented many of them from recording their votes, and also attacked a large escort of cavalry, infantry, and police, who were acting as an escort for the protection of voters, and caused such terror and alarm in the minds of the electors, that many who had promised to vote for Mr. Brodigan, and some who had promised to vote for the petitioner, were induced by intimidation to vote for Mr. Whitworth; and many of the electors who had promised to vote for the petitioner, and had come long distances to do so, and were most anxious to do so if they could, without risk of their lives, were deterred from going to the poll and recording their votes. The eighth, "That the offence of undue influence at the said election was committed by the said Benjamin Whitworth, and a great number of other persons, with his knowledge and consent; and that an

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organised system of intimidation and violence was established by the said Benjamin Whitworth and his friends and agents, and that thesaid Benjamin Whitworth could at any time have restrained the rioters from acts of violence if he had been willing to do so."

Heron, Q. C. and *Palles*, Q. C., argued the case for the sitting member.

Plunkett, Q. C. for the petitioner.

The material arguments and evidence appear in the judgment.

KEOGH, J. (after stating the allegations in the petition):—One of the best established rules of freedom of election is, that the electors shall come to the poll perfectly free as they are registered, that they shall not themselves accept bribes, that they shall not be treated, that they shall not be coerced, and that they shall not be intimidated; and if, as regards any single vote, it is proved to the satisfaction of the court that any such voter has been so acted upon, it is the imperative duty of the court to resolve that that is not a good vote. I am taking it now step by step; first, as to the question of avoiding an election. There may be many votes declared to be bad votes; there may be men bribed at an election; there may be men treated at an election; there may be men coerced at an election; but it does not necessarily follow that, because of those circumstances, the election itself is void. But I take it to be well settled law, not only settled by a chain of decisions of Committees of the House of Commons, but decided also collaterally in cases in which such questions were brought before the Superior Courts, that an organised system of bribery, that an organised system of treating, will invalidate an election, and compel the court (whatever it may be) trying the question to declare that to be a void election. Surely it could not be for a moment contended that supposing, in a borough of this description, banks were to open their doors, to let it be understood and known that every man who voted in a particular way would receive a sum of money, that large amounts were deposited for that purpose which you might never be able to trace to the candidate, or to any one of his agents; but yet you would be able to prove that there was an organised and extensive system of bribery carried on in the borough, an election under such circumstances could be allowed to stand. Take, then, the case of an organised system of treating. I am speaking now of cases in which nothing could be traced to the candidate or his agents; but suppose that at the head of every street food and drink were provided in large quantities, and places for eating and places for drinking opened, as to which it was known that every voter who wished to go thither and seek for food or for drink would receive it, provided he was a voter upon the side of a particular candidate, and that that was an organised system for the purpose of debauching the voters of a particular borough, although all the while not traceable to the member or to his agents, so as to disqualify him at future elections, is it to be supposed for a moment that that organised system would not defeat the election? I take it that it is well settled that it would do so, and that there is no possibility of contesting that proposition. Now, I refer to a case in which probably as much indulgence was shown to the sitting member by a committee of the House of Commons as in any case which is to be found within the whole range of the authorities; that is the well-known *Dungarvan* case, in which the present Sir Joseph Napier, afterwards Lord Chancellor of Ireland, was the chairman of the committee. There the member was declared duly elected; but what does that learned chairman say? "Two great principles," said the learned chairman, "were always sought to be maintained: first, that the election should be free; secondly, that the character of the candidate should be pure in regard to that election. It is very material to distinguish between acts by which an election may be avoided, and the misconduct by which the candidate may be disqualified. It is justly observed by Mr Rogers, in the seventh edition of his work on elections, that there are usually two distinct issues: first, whether the election has been procured by bribery or other undue influence; and, secondly, whether the sitting member has been guilty by himself or his agents? this second issue being subordinate to the first. He states that the second issue is usually entered into with a view to incapacitate the sitting member from becoming a candidate, supposing the election should be declared void. On such an issue it becomes the very essence of the inquiry to show that he was cognisant of the corruption; for the object being to fix upon him a personal incapacity, strict proof may be well demanded to show that he was implicated in the transactions complained of. The avoidance of an election depends upon the effect of all acts done which interfere which the freedom required by law. The disqualification of a candidate arises from his culpability in what he does, or causes to be done, or attempts to do, for the purpose of procuring a return by undue influence. These matters are in their nature distinct, and ought not to be confounded." Now, again, I recur to the words, "The avoidance of an election depends upon the effect of all acts done which interfere with the freedom required by the law;" and, acting upon that well-settled view of the law, Mr Palles yesterday, in his most able and eloquent address, did not seem to me to contend that an election might not be avoided by an organised system of bribery or an organised system of treating, but he most properly said, "You may have a vote struck off the poll, and the voter incapacitated without unseating the sitting member." So, undoubtedly, you may have many voters declared incapacitated and struck off the poll upon a scrutiny, without disqualifying the sitting member, or unseating him. So, in like manner, for treating, you may have many votes similarly dealt with without unseating the sitting member. But again, I say, if the aggregate of those instances amount to what may be called an organised system of bribery, or an organised system of treating, pushed to such extremities as to convince the tribunal which is deciding upon the case that freedom of election has not existed, then that election ought to be and will be avoided, although it may not have the consequence of disqualifying for a future election the sitting member. Mr. Palles, in his very clear and astute argument, assimilated intimidation to bribery and treating; but, at the same time, tried to limit the consequence of acts of intimidation, and he used a very remarkable phrase, that "it must be the communism of intimidation." Now, I adopt that expression, though probably it is not a strictly accurate expression; but to my mind it conveys a great deal; and the way in which I accept it is this, that to put intimidation upon a parallel with bribery and treating, it must be spread over such an extent of ground, it must permeate through the community to such an extent that the tribunal considering the case, and ultimately to decide upon it, is satisfied, if it be so, that freedom of election has ceased to exist in consequence. If that be the case, I, for my part, see no distinction between the law as to an organised system of bribery, an organised system of treating, and an organised system of intimidation. This dis-

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tinction was taken, before some Committees of the House of Commons constituted as they were, that intimidation, however extensive it might be, unless it had a substantial influence upon the fate of the election, could not result in the election being declared void. And Mr Palles, with the great industry which he always shows, and which assures me that everything that can be said upon his side has been brought forward, mentioned a number of cases, and particularly, I think, referred to the *Roxburgh* case, which may be considered a leading case upon the subject. This case of the *Roxburgh* election, reviewing as it did almost all the antecedent decisions, was argued by one of the most eminent Parliamentary lawyers. I allude to Mr. Austin, who was perhaps the most eminent advocate who ever argued before committees of the House of Commons. After reviewing those authorities (I believe it is stated in the notes that these cases had been very carefully examined, so as to insure their accuracy even in the arguments of counsel), Mr. Austin thus sums up the result of all these cases:—"In the Reports of Perry and Knapp are to be found collected cases of riots, beginning with the year 1624, and ending with the *Coventry* case in 1827. Among them are only two instances in which the election was not set aside. The *Pontefract* election in 1624 was set aside. The *Southwark* election in 1702 was set aside, though several witnesses swore that they never knew a quieter election. Three *Coventry* elections in 1706, 1722, and 1736; two *Westminster* elections in 1722 and 1741; the *Pontefract* in 1768; the *Morpeth* in 1774; the *Coventry* in 1781; and the *Nottingham* in 1802, were all set aside on account of riots. The *Coventry* elections in 1827 and in 1833 are the only instances of petitions not being successful where riots have been proved." And then Mr. Austin goes on to explain why he thinks even that the late Coventry decision is not an authority, because he says, that before the committee came to the conclusion of the inquiry, it appeared that the petitioning candidates, "Mr. Tyler and his colleague, abandoned the contest, and retired without any reference whatever to the riots, and consented to the return of the sitting members without any protest against the validity of the election." But notwithstanding the very able argument of Mr. Austin, Mr. Palles very properly said, and relied upon the fact, that this committee in the *Roxburgh* case arrived at resolutions, showing that riots had taken place, but still allowing the sitting member to hold his seat. Now it appears upon the resolutions of that committee, "That it appears to this committee, that at the late election for the county of Roxburgh, riotous and tumultuous proceedings took place, in consequence of which, according to the evidence produced before this committee, prosecutions were instituted in the Justiciary Court of Scotland, upon which prosecutions certain of the offenders were convicted. That the committee are of opinion that the riots were not of such a nature, nor of so long a duration, as to prevent the votes of the electors of the same county of Roxburgh being taken in the matter of such election." That was their decision. And the basis of this decision is, that although there were riots, yet they were not of such a nature, or of so long a duration, as to prevent the votes of the electors being taken. But even that resolution was not arrived at unanimously by the committee. On the contrary, the minority of the committee moved that the election should be declared null and void by reason of the adjournment and premature close of the poll at Hawick, whereby the electors of that district were deprived of a portion of the period allowed by law for the exercise of the franchise. And that proposition on a division of the committee was negatived by six to three, the committee consisting of nine members. And the resolution arrived at was only on the ground that the interruption of the poll or "the riots were not of such a nature, nor of so long a duration as to prevent the votes of the electors of the same county of Roxburgh being taken in the matter of such election." Accordingly it was held that the sitting member should retain his seat. The distinction to which I was referring may be illustrated in the following manner:—Let me suppose that fifty men were shot dead (if the argument is worth anything, it must be pressed to that) outside this court-house upon the 21st of last November, every single man of them coming up with Sir Leopold M'Clintock's ticket in his hand, from his tally-room, to register his vote on his behalf, every one of their lives might be taken away and yet that being admitted, and proved, and conceded, the election should still not be declared a void election. That is the proposition, because by the very able argument of Mr Heron, seconded and enforced, and losing nothing of its weight, but as I think gaining as it went along, by the admirable argument of Mr Palles, it is contended that provided the sitting member has, at the close of the poll, a majority of registered electors, be it ever so small (and I lay no stress upon the circumstance that it was here of the very smallest, because in the view I take of this case it is not to be decided by mere numerical calculations), then no matter what happens outside that; no matter how many electors are assaulted; no matter how many are driven from the polling booths; no matter how many men are hunted through the fields, and are obliged to go by devious ways and across paths, in order to get back to their homes, or to the conveyances which are to take them to their homes; no matter how much blood has been shed; no matter how much spiritual intimidation has been brought to bear upon the electors; still if the candidate who is returned upon the day of the polling by the high sheriff is able to take his pen and say, there are 1000 electors on the register for the Borough of Drogheda, my seat cannot be in any way endangered, or the election declared null and void, because I have polled, no matter by what means, 501 electors. To be of any value the argument must be pressed to that, unless (which is an impossibility) the other candidate can show that he, but for the violence which was used, would have had a majority on the day of the poll. I must at once say that that is a proposition from which I wholly and entirely dissent. It is subversive, in my mind, of the whole principle of freedom of election. Again, it is said by both of the counsel for the sitting member, that freedom of election is secured, provided that the majority are shown to have had the power of recording their votes. I deny that altogether. This is not solely a contest between Mr Benjamin Whitworth the sitting member, and Sir Leopold M'Clintock the petitioner. There is another and a greater interest than belongs to either of them; there is the public interest. The liberties of the people of this country are involved in the freedom of election; and I say that the humblest individual, the poorest unit in the whole of the constituency of the county of the town of Drogheda, has as good a right freely, without fear, without favour, without intimidation of any kind or description, to come into this court-house upon the day of the election as the richest man upon the register, and as good a right as the great majority of that constituency. Take it that a candidate has by the most legitimate means, without any injury whatsoever being inflicted upon anyone, without any coercion, without any bribery or treating, obtained the votes of nine-tenths of the constituency in his favour, yet it is of vital importance to the public weal that the remain-

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ing tenth should be able to record their votes and to express their opinions. It is alleged that the respondent had the majority of the whole constituency, namely, I think 365. There were some of them who gave evidence, who said that they would have voted otherwise, but for intimidation. Men absolutely came up here, and swore that they had promised their votes to Sir Leopold M'Clintock, and that they would have exercised the franchise in his favour, "If I had been protected," was the expression used by one man; "but he was afraid of his life," was the expression of another. Take away these two or three votes (though I say again I attach no value to the numerical argument, as I call it), and even that sorry argument disappears, namely, as to having a majority of the constituency. Then it is said, how is the party to show that it did not influence the election? The petitioner should prove that it did. First, you are to obtain a majority by violence, by intimidation, and by undue influence; and, having then so got a majority, you are to turn round on the other party, and say, "You are in the minority, and you must show that the mind of each voter that composed that majority, so as to place me ahead of you, has been influenced by this intimidation." In the case of bribery it might be hard, if there was an extensively organised system, to trace it to each individual; and in the case of treating detection would be still more difficult. But even there you have something to lay your hands upon; you have money, you have food, you have drink, but who is there that will venture to gauge the influence of intimidation? Who will say how far that reaches? Who will be able to tell what the effect of intimidation is upon the human mind? It is true that you may prove that a man has been told, standing outside the court-house, "If you go in and vote for Sir Leopold M'Clintock your brains will be dashed out." That will show that that man has been intimidated; but will any man say that if there are half a dozen voters standing by whilst that same observation is made, the influence of that threat, directed specially against him, will not operate upon them? How is the limit to be fixed? How is the influence of intimidation to be traced? I will put a case which I am sorry to say is not an imaginary one. Supposing that a minister of religion were to say to an individual voter, "If you do not vote in a particular way, and if anything should happen to you, between this time and the time at which you should reach your dwellinghouse, your immortal soul, your salvation, will be perilled," who is to say what would be the extent of the influence of that observation, proceeding from the mouth of a minister of religion, upon the whole of his congregation? It is not possible to give evidence in a court of justice which would carry out the proposition which has been laid down by the counsel for the respondents here; and if at all it is to be made a matter of evidence, the onus of proof should be thrown upon them to show that when the law has been violated, when gross outrage and intimidation have been organised, that intimidation and that violence have not produced their natural consequences, namely, terrifying the people from the exercise of their legitimate franchise. Now let us come to the facts of this case. Friday, 13th Nov., was the first day of Sir Leopold M'Clintock's canvass. His first witness, Mr. Cairns, canvassed with him, and says that at first they were well and respectfully received, and that there was no incivility. On the Monday they attempted to canvass, and then, he says, the whole character and appearance of the place was changed, and they were immediately met with insults from the mob. Now, to that I call particular attention; they were immediately met by a violent mob, and that very mob, Mr. Cairns says, closed upon him, and tried to throw him down, very near this court-house; and then there is this remarkable circumstance, which has not been much commented upon, but which I take to be the opening of the whole of this inquiry In that mob were two solicitors, one of them Mr. Clinton, and the other Mr. Verdon. Mr. Clinton, turns out to have been the conducting agent of Mr. Whitworth, and he was in that mob, and, as Mr Cairns says, was countenancing that mob. On the Tuesday, Mr. Cairns says, it became hopeless to canvass, from the state of the town. Wednesday is the day of nomination. On the day before the polling in this place Mr. Whitworth is staying at a particular hotel, which I think is called Simcock's Hotel, and on the evening of this day the people outside are addressed from the window of that hotel. Beyond the possibility of doubt it is established that there were a number of Roman Catholic clergymen in that room upon that evening. The first gentleman who speaks, and who, I think, is the Rev. Mr Murphy, as distinguished from the Rev. Dr. Murphy, said, "He would advise them seriously to be fully prepared, for the Orange party in Drogheda were anxious and panting to crush them. He never wished any man to do wrong; but he must again call on them to be prepared, for the Drogheda Orangemen had secured the assistance of 500 of their brethren in Dublin. Those Catholics who are on the side of the Orangemen must be put down; they must be crushed at any risk. They should therefore be well prepared for them, for it was a terrible crisis:" that is the first speaker; then comes the address of the next gentleman, the Rev. Mr. M'Kee, and he said, "the Orangemen of Dublin were on the next day to come down to Drogheda; if those men should come, let them hurl them into the Boyne. Let the people meet them in the morning at the train, and give them a warm reception." The first gentleman says that "The Catholics who are on the side of the Orangemen must be crushed at any risk," and then the next gentleman says, "Let them hurl the Orangemen into the Boyne; let the people meet them in the morning at the train, and give them a warm reception." Again, this passage occurs: "He advised all who heard him to bring their friends to the poll, to marshal their forces early in the morning, and when they were about to charge, say, 'Friends of freedom, charge them home; foes of freedom *faugh-a-ballagh!*'" which we all know is "Clear the way." Then again he says: "The would-be Catholic member, Mr. Brodigan, and Orange emissaries from hell, had come among them at this critical juncture; he advised the people to be faithful in following the advice of their clergy." This is another clergyman, the Rev. Mr. Gavin: "Yesterday, in the city of Dublin, some of the friends of ascendancy in this town hired 300 assassins to come down and butcher the Catholics of Drogheda. He asked them would they meet them; he assured them, on the word of a priest, that what he said was a fact, that some party in favour of the Orange candidate here went to Dublin and purchased the tag-rag and bob-tail of Orangedom to come down and butcher them to-morrow, and he did not want the people of Drogheda to treat those hirelings as they deserved." Mr. M'Kee is the first person who called upon them to go to the station to meet these so-called Orangemen at a particular hour in the morning, and to throw them into the Boyne. What takes place? The crowd outside say (and this is admitted), "We will, father, meet them;" it is proved distinctly that they cried this out from the crowd. The next morning, at half-past eight o'clock down came Mr. Hamilton and some two or three voters by the early train, and they wanted to go up the town to vote. There was a resident magistrate there, Mr. Reed,

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who had with him a number of constabulary and a number of soldiers; and that gentleman tells the gentlemen who had arrived at that early hour of the morning, that they could not with safety go up to the town. He said that he could not escort those voters up, and as a matter of fact they were not escorted up, until the other party had arrived; to what then took place I shall have to refer in more detail in another branch of the case. Mr. Hamilton is with those four men whose names are Semple, McDonald, Usher, and Devine; Semple appears to have been a man of a better class than the rest; probably he felt that he had friends in the bystanders, and that he was known; at all events, he goes up alone and votes for Sir Leopold McClintock, and does so in safety; it is an extraordinary circumstance; McDonald disappears, no one knows how or whither, but he got back home in some way, and did not vote; Usher and Devine remained with Mr. Hamilton; Mr. Hamilton is said to be the agent over the property on which they live. It is said, on the other hand, that there was tyranny established over those voters; that may or may not be, but so far as the evidence is given here, it does not go very far, because the letter by which those voters were canvassed is produced. Mr. Hamilton says: "Sir Leopold McClintock is going up for the borough of Drogheda, and you will oblige me by giving him your vote;" he gives them half a sovereign to go up to Dublin to amuse themselves with, and on the morning of the election they are here with Mr. Hamilton at the station; they being here, Mr. Whitworth arrives on the scene, and so does Mr. Clinton, who, mark, was identified with the very first violent mob that was acting in this town, and who is the conducting agent of Mr. Whitworth: Mr. Whitworth is up with his conducting agent at the station, when it is surrounded and filled by an admittedly most violent mob, because it must have been violent, as it intimidated Mr. Reed, the resident magistrate; they are armed with sticks; they are armed, as one of the clergymen told us, with railway bolts, those joining bolts about a foot long, to which nuts are attached, by which two rails are laid together and joined, and they are flourishing these weapons. Whilst this scene is going on those two voters are appealed to by Mr. Whitworth, and to one of them Mr. Whitworth says, "For whom will you vote?" The crowd being round them in this way, and at the same time two or three iron bolts being held up in his face, Usher says, "I will vote for you," and he has come on the table since and said that he did it to save his life. The moment he says that, Mr. Whitworth says, "Come along here." I do not mean to say with any criminal intent as to coercing this man, but he takes him away, and he is immediately hoisted upon the shoulders of the people, and they carry him off to Mr. Whitworth's tally-rooms; he declares that he went to vote for Mr. Whitworth, but he never voted for Mr. Whitworth; that was a most remarkable circumstance. What takes place with Devine? "For whom do you vote?" he is asked, and he replies, "I will not vote for anyone;" and Mr. Whitworth, according to his own statement, leaves that place; but almost instantaneously, as Mr. Hamilton and Devine describe the scene (and their description of it is entirely uncontradicted), that mob, in which two minutes before Mr. Whitworth and his agent Mr. Clinton, were in close contact, seize this man Devine and drag him away, as he says himself, and put him on a car; six men get up, three on each side, and instead of this man, who we are asked to believe willingly went on the car, being placed on the side of the car, he is thrown on his back on the well cushion; and so carried up to Mr. Whitworth's committee-rooms. The learned judge here reviewed the evidence which showed that voters were assaulted over the bayonets of the soldiery, and that the latter were prepared "literally, as if they were entering an enemy's country." He then referred to the personal action of Mr. Whitworth:—"At one or two o'clock in the day," says Mr. Whitworth, "I myself went wherever I heard there was a voter who was likely to register his vote against me, and I absolutely offered him my protection, with the high sheriff or somebody else, to take him up to the poll." The whole of that evidence had a most powerful effect upon my mind in the opposite direction to that which it was doubtless intended to produce. Did ever anyone hear in a legitimately conducted election, where there was freedom of election, of a man coming and canvassing against himself? Did ever anyone hear of a committee of one candidate going and suggesting to voters in the other interest to come up and poll? "I will give you an escort," says Mr. Whitworth; and can any man say he believes that voters who come from great distances, as one gentleman did, 160 miles at least, from Clew Bay in the west of Ireland to Dublin, and another who came from Waterford to Dublin, whom the Queen's troops, cavalry, infantry, constabulary, magistrates, the whole civil and military power that could be organised in this town, were not able to protect, would be safe in coming up to the poll even with Mr. Whitworth? But if that be so, and if the gentlemen who offered to bring voters up to the poll (Mr. Chadwick was one and Mr. Gradwell was another) had the power of doing what all this military authority could not effect, what is the natural logical conclusion? Why, that the whole of the people of this town were obedient to their nod, and that they could call them off from violence or encourage them on to it at any moment exactly as they thought would best suit the interests of their candidate, and that they only offered this protection when, awaking to a sense of what had been done, they saw that no such election could be declared free, and that every election must be declared void, in which such an intolerable infraction of the liberty of the subject had taken place. To my mind the whole of that shows better than any evidence to what a state this town had been brought, and how the dreadful transactions which had taken place operated upon the minds of the persons who were most anxious for Mr. Whitworth's return, when they absolutely went about the town canvassing every man who was supposed to be in the interest of his opponent to come up and register his vote in order to take out of his mouth afterwards the right to say that he had not an opportunity of doing so. I say, if stones are thrown, and shots fired, and bottles hurled, amongst persons coming up to register their votes, they are not bound again to risk their lives in coming to the poll; and if they do not risk their lives they are not precluded from coming before one of the authorised courts of the country to say, "It was not a free election, in which we could not have registered our votes without imminent peril to our existence." The whole of the doctrine, that freedom of election consists in the freedom of the majority is, I say, subversive of the rights of the electors, is contrary to the laws of the land, and is irreconcilable with common sense. Who knows how many voters were induced by terrorism upon that morning to vote for Mr. Whitworth? How can it be told how many were influenced by seeing that the other party were driven out of the field and had not a chance? Did not Mr. Whitworth himself use that very argument to induce voters to poll for him, namely, that he had a considerable majority over his opponent? I am bound to say that was a void election; I cannot avoid saying there was no freedom of election, and I shal

certify to the Speaker of the House of Commons that that election was void, and that Mr. Whitworth was not duly elected; and further, that Mr. Whitworth, within the meaning of the 7th section of the Act of Parliament, has been by himself and his agents, guilty of undue influence. I have arrived at the following resolution: First, that Benjamin Whitworth, Esq., is not duly elected a burgess to serve in this present Parliament for the borough and county of the town of Drogheda; secondly, that the last election for said borough and county of the town of Drogheda is a void election; thirdly, that Benjamin Whitworth, Esq., was, by himself, and by his agents, guilty of undue influence as regards two electors, John Devine and Michael Kelly, at the last election for the said borough and county of the town of Drogheda; fourthly, that a system of intimidation was organised and carried out at the last election for the said borough and county of the town of Drogheda, subversive of the freedom of election, and outrages were committed which were calculated to deter, and did in fact deter, a considerable number of voters from exercising their franchise at such election; fifthly, that the costs of the petition be paid by the respondent.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Wednesday, July 7.

THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA (apps.) v. EVANS AND ANOTHER (resps.).

China and Japan—Bankruptcy—Money of bankrupt carried to special account at bank—Fraudulent preference.

The respondents, assignees of a bankrupt, brought an action against the appellants' bank to recover a sum belonging to the bankrupt, and alleged to have been in the appellants' hands at the date of adjudication of bankruptcy.

The said sum, in pursuance of an agreement between them and the bankrupt previously to adjudication, had been carried by the appellants to a special account, as security against bills, not yet at maturity, drawn by the bankrupt and discounted by the appellants:

Held (reversing the judgment of the Supreme Court of China and Japan), that the action failed, since by the contract the sum claimed formed no part of the bankrupt's estate, but was rightly in the hands of the appellants at the time of the action.

Fraudulent preference, under such circumstances, could have no application to the case.

This was an appeal from a judgment of Her Majesty's Supreme Court for China and Japan, pronounced on the 18th Nov. 1867.

The appellants carry on the business of banking, at, among other places, Hankow. The respondents were the creditors' assignees of the estate and effects of John Mackellar and William Grant Gordon, who, under the style of "Mackellar and Co.," carried on business as merchants at Hankow, up to the end of June, 1867. Mackellar and Co. were customers of the appellants.

In July, 1867, the respondents filed a petition against the appellants to the judge of Her Majesty's Court at Hankow, whereby they as such assignees as aforesaid claimed from the appellants, as such bankers, a sum of 12,000 taels belonging to the said firm, alleged to have been in their hands at the date of the adjudication in bankruptcy of the said firm, and to be due and payable to the respondents as such assignees.

In answer to the said petition the appellants alleged that, according to the terms of their retainer as bankers, they were bound to pay any cheque of the said firm which should be duly presented, and which should not exceed in amount the moneys of the said firm in the hands of the appellants, "applicable to the payment thereof at the time of the presentment threreof," and that at the date of the said adjudication in bankruptcy they held the sum of taels 27, 2 mace, and 1 candareen, so applicable; and that the said sum they had been and then were ready and willing to pay.

As to the sum of 10,000 taels parcel of the respondents' claim, the appellants answered as follows: that "The same was not payable to the said John Mackellar and William Grant Gordon, nor to the plaintiffs on demand; but was by special agreement between the defendants (appellants) and the said John Mackellar and William Grant Gordon, made previously to their said adjudication as bankrupts, specially set aside to be retained by the defendants as security for any sum which might subsequently appear due to the defendants from the said John Mackellar and William Grant Gordon, in respect of advances then previously made to them by the defendants; and the said sum of 10,000 taels was, in pursuance of such agreement and with the sanction of the said John Mackellar and William Grant Gordon, carried to a special account with them in the books of the defendants called the 'margin bills account,' that all bills for or in respect of which the said sum of 10,000 taels was so specially set aside, as aforesaid, have not yet arrived at maturity, so that the defendants do not know what sum they are or may be entitled to deduct from the said sum of 10,000 taels; and, therefore, all things have not happened and all times have not elapsed necessary to entitle the plaintiffs (respondents) to have the said sum of 10,000 taels, or any part thereof paid to them."

The facts were as follows:—Mackellar and Co. were in the habit of drawing bills on various persons at Shanghai against tea shipped to Shanghai. The appellants were in the habit of discounting the said bills, the shipping documents for said tea being hypothecated with them by way of security.

On the 25th June 1867, the appellants, there being at that time several of the bills drawn as aforesaid still running, applied to Mackellar and Co. for an additional margin of 15 per cent. on the bills so drawn and running; and on the 27th June Mackellar and Co. paid the appellants the sum of 10,000 taels as such margin. The said sum of taels 10,000 was part of an advance of taels 32,000 made earlier on the same day by the appellants to the said Mackellar and Co. against teas by them shipped to Shanghai.

The respondents gave evidence that the said payment was made voluntarily by the firm of Mackellar and Co., and that it was made by the said firm at a time when they were in contemplation of bankruptcy.

The appellants endeavoured to prove that they were ignorant that Mackellar and Co. were likely to suspend payment, and that they were justified in demanding of and receiving from the said firm the said sum of 10,000 taels, and that the said payment was made under pressure. Mackellar and Co. suspended payment on the 28th June 1867, the day following the making of the payment aforesaid, and on the 1st July 1867 were adjudicated bankrupts.

The suit was heard by the court at Hankow, when judgment was given for the appellants. Against that judgment an appeal was brought to the Supreme Court of China and Japan, the learned judge of which was of opinion, first, that Mackellar and Co. were not, at the time of making the alleged agreement relative to the said margin, indebted to the appellants, and that the appellants were not their "creditors" of the said firm; and, secondly, that the payment of the said sum of 10,000 taels

was, under the circumstances, a fraudulent preference, that it was made in immediate contemplation of bankruptcy, and that it was voluntary and unjustifiable. He accordingly gave judgment for the respondents, and the decision of the court at Hankow was ordered to be reversed with costs.

From this judgment and decree the present appeal was brought.

Sir *Roundell Palmer*, Q.C., *J. Brown*, Q.C., and *Cohen* were for the appellants.

Field, Q.C., *Charles* and *Myburgh* were for the respondents.

Judgment was delivered by Lord Justice GIFFARD:—Their Lordships cannot entertain the slightest doubt in this case. As regards the twenty-seven taels, the respondents must have those, but this small sum cannot affect the question of costs, nor does it appear ever to have been a matter in dispute. As regards the case itself, there obviously was but one contract, and one transaction—that is detailed in the letter to which Mr. Field referred. The letter, taken in connection with the evidence, shows distinctly that there was but one contract on the 27th June, and that that contract was an advance of 32,000 taels in this way—22,000 taels were to be advanced and 10,000 taels were to be held as margin to secure certain debts. If those were the terms on which the advance of the 22,000 taels was made, and the 10,000 taels were to be retained, and if the whole was one transaction, as it clearly was, it necessarily follows that the 10,000 taels cannot be recovered so long as the state of circumstances is such as that consistently with the contract, the 10,000 ought to be in the hands of the bank. It is clear that this was the state of things at the time when the judgment was given, and that there was then no ground whatever for proceeding for the recovery of these 10,000 taels. Fraudulent preference, therefore, can have no application whatever, because the 10,000 taels formed no part of the bankrupt's estate, and there was not in any sense a dealing with that which belonged to the bankrupt. Upon these grounds, without going further, their Lordships think it sufficient to say that the judgment of the Supreme Court was wrong, that the judgment of the court of first instance was right, and that the appellants ought to have all their costs before the court of first instance, before the Court of Appeal, and before this court, deducting the twenty-seven taels on the assumption that this sum has not been already paid. With respect to the facts raising the question of fraudulent preference, it is unnecessary for their Lordships to express what their opinion would have been had the dealing been a dealing with the bankrupt's estate; suffice it to say that the learned judge of the Supreme Court has laid down the law more widely than it ought to have been laid down, and in a way to which their Lordships cannot assent. Their Lordships will, therefore, humbly report to Her Majesty that the judgment of the Supreme Court for China and Japan ought to be reversed with costs, and in lieu thereof that the appeal from the inferior court to the Supreme Court ought to be dismissed with costs, and the judgment of the inferior court confirmed, deducting the twenty-seven taels if the same has not been paid.

Judgment reversed.

Agents for the appellants, *Oliverson, Peachey, Denby*, and *Peachey*.

Agents for the respondents, *Brooks* and *Co.*

Wednesday, July 7.

(Present: The Right Hon. Sir JAMES COLVILE, Sir JOSEPH NAPIER, and Lord Justice GIFFARD.)

ANDERSON AND OTHERS (Directors of the Australian Alliance Assurance Company, apps.) *v.* THE PACIFIC FIRE AND MARINE INSURANCE COMPANY (resps.).

Victoria—Marine insurance—Construction of words "Insured only for 4000l." in proposal for re-insurance.

The respondents, in a proposal for the re-insurance of a ship in appellants' company, stated that she was "insured only for 4000l." This was the amount of the original insurance. The proposal also contained the amounts of insurances effected in other offices, but from this list, an insurance, effected without the respondents' knowledge by a mortgagee, was omitted:

Held (affirming the judgment of the Supreme Court of Victoria), that the words "insured only for 4000l." must be construed as stating the amount of the original insurance, and not as a representation of the sum total insured in all offices whatever; the occasion on which, and the purpose for which the words were used, suggesting some limitation on their generality.

This was an appeal from a judgment of the Supreme Court of Victoria. The respondents brought an action against the appellants, as directors of the Australian Alliance Assurance Company, to recover from them 500*l.*, the amount of a re-insurance effected by the respondents with the appellants' company upon a ship called the *Beechworth*, employed in the Murray River trade, which was destroyed by fire on the 8th Jan. 1867, fire being one of the perils insured against.

The first count of the declaration stated by way of inducement the terms of an insurance, which certain persons trading under the style of "Smith and Banks" had effected with the respondents, the insurance being for three months from the 24th Oct. 1866, in the sum of 4000*l.*, on the hull, furniture, and machinery of the said ship the *Beechworth*, valued by agreement between the respondents and the assured in the said insurance at 6000*l.*, being on the terms, among others, that if the assured should have made any other assurance upon the interest therein covered prior in date to that insurance, and in respect whereof the risk should have commenced to run, the respondents should be answerable only for so much as the amount of the prior insurance might be deficient. The count went on to aver the existence and continuance of the interest of Smith and Banks in the ship to the amount of all the money insured by them thereon up to and at the time of the loss, and then in substance alleged that on the 17th Nov. 1866, the respondents caused themselves to be re-insured with and by the appellants' company in the sum of 500*l.* on the said ship, upon and subject to the terms and conditions of the first-mentioned insurance, for the same period, at the same value, and against the same perils as those in the first-mentioned insurance; that the respondents were, up to the time of loss, interested in the ship to the amount of 4000*l.*; that during the continuance of the said insurance and re-insurance the ship was totally lost by fire; and that the respondents had paid to Smith and Banks the sum insured by them.

The second plea to the first count was that the appellants were induced to become insurers by the mis-representation by the respondents to them of a fact material to be known to them, and material to the risk of the re-insurance, that is to say, that the ship which the respondents valued at and represented to the appellants to be of the value of 6000*l.* was insured only for 4000*l.*, and was insured for the said 4000*l.* by the respondents' insurance first men-

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tioned, and by the insurances by the respondents of part of their risk under that insurance in other offices, viz.: Adelaide 1500*l.*, Australasian 500*l.*, Netherlands India 250*l.*, whereas it was also insured by James Lawrence in the Victoria Fire and Marine Insurance Company for 1500*l.*

The application for re-insurance was by proposal on a printed form furnished by the appellants, specifying heads of particulars, the details of which were filled in by the respondents in writing. This proposal was in the following form:

To the Australian Alliance Assurance Company.
No. of proposal, 1797. Melbourne, 17th Nov. 1867.
I have to request that you will grant an assurance against maritime risk in your office on the following:—
On hull, furniture, and machinery.
Name of ship, *Beechworth*, of the register of tons.
Date of sailing.
Name of master.
From 24th Oct. 1866, to 24th Jan. 1867.
Valued at 6000*l.*; *insured only for* 4000*l.*
For the period of three months.

Warranted free from capture and seizure, and the consequences of any attempts thereat.

Amount for which insurance is required, and the warranty "free of all average."	£
Amount for which insurance is required, and the warranty "free of average and 10 per cent. unless general," or the ship be sunk, burned, stranded, or snagged, and in such latter case to be free therefrom, unless general, as aforesaid, under 2 per cent.	£500
Amount for which insurance is required to recover all risks as set forth in your policy, except capture and seizure.	£

Loss payable in Melbourne.
Policy in.
Signature of proponent.—pro SMITH, STRACHAN, and Co.
Address—Agents, Pacific, F. & M. Ins. Co.
EDWARD SAYCE, Junr.

Accepted this 16th Nov. 1866.
By
At premium of 3*l.* per cent.
Declined this day of 186 by

Amount of premium received £
When received
No. of policy
Written by

Being a reinsurance of one-eighth of P. F. Co.'s policy No. , and subject to its terms, and to that Co.'s settlement in event of loss or arrear.

The ship is warranted not to trade, to touch or stay at any bar, harbour, or open roadstead, unless there shall be stationed thereat a resident harbour-master or pilot appointed by the Government within whose jurisdiction such place may be, or to any port or place within the limits of Torres Straits, or to any port or place on the West Coast of New Zealand.

Insurances in other Offices.

Adelaide	1500
Australasia	500
Netherlands, India	250
P. I. Co.	1250

The words "valued at" were printed; the words and figures "6000*l.* insured only for 4000*l.*" were in writing. The whole of the sentence commencing "being a reinsurance" &c., and the words and figures at foot from "insurance in other offices" to the end were also in writing.

A more formal acceptance, signed on behalf of the appellants, was afterwards given, but no policy was issued.

It appeared at the trial that Smith and Banks, before effecting their insurance with the respondents, had mortgaged the ship to James Lawrence, and that he had effected the insurance with the Victoria Insurance Company for 1500*l.* before Smith and Banks had insured with the respondents.

Mr. O'Grady, one of the appellants and the manager of the appellants' company, was called as a witness, and stated that the directors of that company were induced to enter into the insurance by the statement among others contained in the proposal, "insured only for 4000*l.*," and that if it had been insured for 5500*l.* the risk would not have been accepted by them.

Mr. Halfey, Mr. Macmahon, and Mr. Anderson, all of whom were directors of the appellants' company, and present when the proposal was considered, by the board, also gave evidence to the effect that they were induced to accept the proposal from seeing the margin between the value as stated 6000*l.*, and the amount of insurance 4000*l.* Mr. Strachan, the respondent's agent, stated that when he first applied to the appellants they objected to take any re-insurance on the Murray River trade.

Neither the respondents nor the appellants were, in fact, aware until after the reinsurance was effected that Lawrence had insured the ship in the Victoria, or in any office, or that the ship was insured, except as stated in the proposal.

The jury in answer to the judge found that by the words "only 4000*l.*" in the proposal was meant that that was the only sum for which the vessel was insured in any office.

The appellants insisted that the insurance by Lawrence was a material fact affecting the extent of risk taken by them, inasmuch as the difference between the estimated value and the insured value of the ship would be reduced by reckoning it, and that the words "insured only for 4000*l.*" occurring in the accepted proposal amount to a warranty or a representation by the respondents that there was no other original insurance on the ship but that for 4000*l.* made with the respondents.

The respondents insisted that those words meant no more than that the original insurance made with the respondents was for the sum of 4000*l.* only.

The cause was tried before the Chief Justice of the Supreme Court of Victoria and a jury on Aug. 1, 1867, when a verdict was found for the appellants on the second plea, leave being reserved to the respondents to move to enter the verdict.

The respondents subsequently obtained a rule *nisi* to enter the verdict, on the ground that the representation that 4000*l.* only was insured, did not exclude the insurances by persons other than the respondents, and upon cause being shown against that rule, the court made the rule absolute to set aside the verdict for the appellants, and to enter a verdict for the respondents for 500*l.* and costs.

This decision was the subject of the present appeal.

J. Brown, Q.C. and *Lord* for the appellants.—The words "insured only for 4000*l.*" were a warranty that the total amount of the original insurance or insurances in any office whatever, and whether effected by the respondents or other persons, did not exceed 4000*l.* If not a warranty, they were a representation, material to the risk and untrue in fact; and since the respondents had the means of ascertaining the truth of the representation before making it, they cannot take advantage of their own neglect after having misled the appellants. The construction contended for is the correct one, according to the rule laid down in Arnould on the Law of Marine Insurance, part 2, c. 1, p. 511, 3rd edit., that "in the construction of representations, the primary rule is to take the words in their plain and obvious meaning, and in that sense in which it is most reasonable to conclude that they were understood by the underwriter:" (see *Sibbald* v. *Hill*, 2 Dow. 268.) And there is the further reason for construing the words in the sense in which they were understood by the appellants, that the selection of language was made by the respondents, whose duty it was to communicate all material facts. If the meaning was a question of fact, the jury has found it for the appellants.

Mellish, Q. C. and *Murray*, for the respondents, were not called on.

Judgment was delivered by Sir JOSEPH NAPIER:—The question turns upon what, in fair construction, is the meaning of the words, "Insured only for 4000*l.*?" Whether it is to be considered as a representation that it was the sum total insured in

any one or more of the insurance offices, or whether it related to the insurance in the office of the Australian Alliance Company? It appears to their Lordships that upon the fair construction of these words they refer only to the insurance effected in the office of the Australian Alliance Insurance Company. As between insurer and reinsurer, it being open to the owner to insure in any sum he liked, could it be taken as a representation upon which anyone could have been expected to rely in the unlimited sense contended for? The occasion on which, and the purpose for which, the words were used, suggest that some limitation on their generality is required; and taking them in connection with the words in the memorandum which says, "being a reinsurance of one-eighth of Pacific Fire Company's policy, and subject to its terms, and to that company's settlement in event of loss or arrear," their Lordships are clearly of opinion that the judgment of the court below is right, and ought to be affirmed. Their Lordships will therefore humbly recommend to Her Majesty that the judgment below be affirmed with costs.

Judgment affirmed.

Agents for the appellants, *Lawrance, Plews, Boyer,* and *Baker.*

Agents for the respondents, *Murray* and *Hutchins.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

(Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Tuesday, May 25.

(Before the LORD CHANCELLOR (Hatherley).

Re BATES and REDGATE'S application by Petition for Patent.

Patent—Two provisional specifications—Prior right—Concurrent inventions.

Application by A. and B. to have the great seal affixed to a patent, and to have the patent dated on the 2nd Oct. 1868. *The applicants had entered a provisional specification on the 2nd Oct.* 1868. *On the 2nd Nov. C. entered the provisional specification of a patent of a similar invention, and obtained a patent on the 12th Dec. On the 19th March the present applicants had applied to the commissioners to have the Great Seal affixed to their patent, and now presented a petition for that purpose to the Lord Chancellor.*

The effect of a provisional specification is merely to protect the person obtaining it from the consequences of any publication on his part, but does not protect him from an independent inventor.

The existence of a prior provisional specification is not a ground on which the Attorney-General ought to refuse to allow a second provisional specification by another inventor to be filed; and in the event of the later applicant for provisional protection being the first to obtain a grant of letters patent, his patent is a bar to the grant of letters patent for the same invention to the earlier applicant for such provisional protection.

Stephen Bates and William Redgate, of Nottingham, petitioned the Lord Chancellor to affix the great seal of letters patent applied for by them on the 2nd Oct. 1868, for improvements in lace machines, under the following circumstances: The petitioners, in May 1868, claimed to have discovered an improvement in the manufacture of lace, and to have brought their invention into a state fit to be patented on the 5th June 1868. In their provisional specification the invention was styled "an invention for improvements in the manufacture of lace made on bobbin-net or twist-lace machines." On the 2nd Nov. in the same year Joseph Hume Bertie filed a provisional specification for an invention for "improvements in the manufacture of lace and twist-lace machines." This invention was stated by Bertie to have been made about the middle of June 1868, and he was the first to obtain a warrant for affixing the great seal to his patent. His letters patent were sealed on the 12th Jan. 1869, Bates and Redgate having omitted to enter any caveat against their sealing, and on the 26th Feb. he lodged a notice of objection to the grant of letters patent to Bates and Redgate for their invention, on the ground that he had reason to believe their invention to be similar to that for which he had obtained a patent. Bates and Redgate applied for a warrant for affixing the great seal to their patent on the 19th March, and, notwithstanding the resistance of Bertie, the Attorney-General issued his fiat authorising their application to proceed on the 24th March. They then gave notice at the Patent-office of their intention to proceed with their application for letters patent, and Bertie, on his part, gave notice of his intention to oppose the application. Bates and Redgate now petitioned the Lord Chancellor to order the great seal to be affixed to their letters patent, and to have the letters patent dated the 2nd Oct., being the day of the filing of their provisional specification, or some other day prior to the 2nd Nov., when Bertie's provisional specification was filed. There was no question which of the two inventions was in reality the earlier; nor was either charged with being a plagiarism on the other. The petitioners relied chiefly upon the fact that, whereas formerly letters patent were always dated the day when the great seal was affixed to them, the practice since the passing of the Patent Law Amendment Act (15 & 16 Vict. c. 83) had been to date the patent, when eventually granted, on the day of the application for provisional protection.

Webster, Q. C. (of the Common Law Bar) and *Everitt,* in support of the petition, contended that the prior registration by Bates and Redgate gave those gentlemen a *primâ facie* prior right to a patent. The Attorney-General, moreover, had consented to the grant of the patent, and his discretion could not be properly interfered with in the absence of any fraud or surprise on the part of the applicants. They had not been guilty of delay in giving notice to seal. Having been the first to obtain provisional protection they could not be expected to anticipate that a second provisional protection for the same invention would be granted. At all events, if Bertie had any valid objection to make to their patent that could be no ground why the Lord Chancellor should refuse to seal their patent, for this would not prevent the objection being hereafter raised at law. They referred to

Forsyth v. *Revière,* 1 Webst. Rep. Pat. 97;
Re Vincent's Patent, L. Rep. 2 Ch. App. 341;
15 & 16 Vict. c. 83, ss. 10, 19, and 20.

Grove, Q. C. and *T. Aston* (both of the Common Law Bar) appeared for Bertie, in opposition to the petitioners. They submitted that the patent of Bertie was *primâ facie* a good patent, and that the Lord Chancellor had no jurisdiction to override a valid patent. The petitioners could not make out a case of hardship. The 15 & 16 Vict. c. 83, s. 12, provided means by which a patentee might protect his rights if he would. That section enacted that an application for letters patent must be advertised, and that notice might be lodged of objections to the grant; but the petitioners had neglected to

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make any such objection for the purpose of protecting the inchoate right which they had acquired by being the first to obtain provisional protection. It was against public policy that the provisional protection should be accepted as tantamount to the sealing of the patent, for the provisional protection did not secure the publication of the invention for the eventual benefit of the public. So far from sect. 10 barring the claim of Bertie, he was himself entitled to rely on that. They cited

Re Griffith's Patent; Re Samuda's Patent, 5 L. T. Rep. 141;
Re Russell's Patent, 2 De G. & J. 130;
Orley v. *Holden*, 8 C. B., N. S., 666; 30 L. J., N. S., 68, C. P.; 2 L. T. Rep. N. S. 264.

Webster, Q. C. in reply.

The LORD CHANCELLOR (Hatherley) said:—There was no reasonable doubt on this short point when they examined the legitimate meaning of the two kinds of specification. He was of opinion that an inventor who had filed a provisional specification after another inventor had filed one in reference to the same subject-matter, but who succeeded in procuring his patent to be sealed the first, was in the same position as he would have been before the passing of the statute which provided the machinery of provisional specifications. The benefit which the statute contemplated, that inventors were to derive from provisional specification, was a considerable one. It was, however, not absolute protection against all the world, but only security from the consequences of accidental imprudence on their own part giving opportunities to workmen and others in a position of confidence for betraying their trust. If they desired to obtain fuller protection sect. 9 of the statute afforded it by means of procuring it by filing a complete specification, which would, for a limited time, confer the same rights as letters patent, and would operate as a bar to any other persons who might be seeking a patent for the same invention. The general effect of these two several modes of procedure was made plainer still by sect. 10, which provided against the case of the fraudulent filing of a second specification. The petitioners had not filed such a complete specification, but they now contended that the effect of a provisional specification was to give the person first filing it protection in the mean time against all rival inventors, and that the original wrong was in the Attorney-General suffering a second provisional specification to be filed. His Lordship was, however, of opinion, that the Attorney-General could not reasonably have refused Mr. Bertie's application in the absence of a *primc facie* case of fraud on the part of that gentleman. There was no power to compel a person who had filed a provisional specification to proceed with his invention; and if the Attorney-General were to reject a second applicant, on the ground of one such specification having been already lodged, the consequence might be the loss to the public for a year or more of the fruits of the ingenuity of many minds which often were working simultaneously in the same track. The right which a provisional specification conferred on him filing it to have his letters patent when granted dated back to the time of the filing of the provisional specification was conditional on no rival inventor intervening or obtaining a patent first. It had been complained, indeed, on behalf of the petitioners that, on Mr. Bertie's contention, an inventor might be left helpless against rivals for six months. But this was not so. A person filing a second specification must advertise, and one who had filed the first provisional specification, ought—as he would have had to do independently of the statute—to keep a watch over the advertisements, and to observe if any invention were advertised of an apparently similar character to his own. In the present case Mr. Bertie's advertisement was just like that of the petitioners. They might therefore have applied to the Attorney-General, entering a *caveat*, which would have made it incumbent on him to decide which was the first inventor. The petitioners had been negligent, and had only themselves to thank for having lost the opportunity of entering a *caveat* at the right time. The Lord Chancellor could not protect against the effects of such an omission by now antedating the patent. If there were anything in the petitioners' patent not covered by Mr. Bertie's patent, it was quite right that they should have a patent for that; but it would be improper to seal a patent which would interfere with the patent rights of Mr. Bertie, who had now possession in his favour. As, however, the matter was of first impression, it was not a case for making the petitioners pay costs. They might have their option either to have their petition simply dismissed without costs, or the order might be that there should be no costs of the present hearing, and the petitioners might have leave to apply to the Attorney-General for a patent for any part of their invention not covered by Mr. Bertie's patent. Such patent would be dated the 19th March 1869, being the day when the petitioners bespoke their patent.

Solicitors for the petitioners, *Sampson, Samuel* and *Emanuel*.

Solicitors for Mr. Bertie, *Wilson, Bristows*, and *Carpmael*.

Tuesday, Nov. 2.

(Before Lord Justice GIFFARD.)

Re BARNED'S BANKING COMPANY (LIMITED); FORWOOD'S CASE.

Company—Winding-up—Secured creditor—Claim to prove—Date of—Gen. Ord. 11 *Nov.* 1862—*Rule* 20.

The above-named company wrote a letter of guarantee to F., agreeing, in consideration of F. accepting certain bills, to provide him with funds to meet them seven days before maturity, and upon this they were accepted by F. F. also held a mortgage upon some ships belonging to the drawers to secure him against the liability on the bills. Before the seven days before maturity arrived, the company was ordered to be wound-up, and two days before maturity F. sent a notary to the official liquidator, who, on his behalf, presented the letter of guarantee, and demanded payment. This was refused, and the notary returned the letter to F., who sold the mortgaged ships, which did not produce sufficient to satisfy the charge:

Held (confirming the decision of the Master of the Rolls), that the mere presentation of the letter by the notary was not a sending in of the particulars of F.'s claim under the 20th rule of the Gen. Ord. of the 11th Nov. 1862, *and consequently that F. could prove against the estate only for the balance of the amount guaranteed, after deducting the sums realised by the sale of the ships.*

This was an appeal by the Messrs. Forwood from an order of the Master of the Rolls, made in the winding-up of the above company, whereby his Lordship disallowed in part the claim of the appellants to prove a debt against its estate.

The case is reported in 21 L. T. Rep. N. S. 256, where all necessary statements will be found.

Jessel, Q. C. and *Henming* supported the appeal, and contended that the claim had been duly sent in, and that Messrs. Forwood were consequently en-

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titled to prove against the estate for the whole amount, and they referred to

Re Barned's Banking Company (Limited), Kellock's case, L. Rep. 3 Ch. Ap. 869; 18 L. T. Rep. N. S. 671;

The 20th Order of the 11th Nov. 1862.

Sir *Richard Baggallay*, Q. C. and *Kekewich*, for the official liquidator, appeared to support the decision, but at the conclusion of the opening,

Lord Justice GIFFARD said:—I do not think I need trouble you, Sir Richard Baggallay, in this case. It is quite clear to my mind, what was decided by *Kellock's* case. The first point decided, no doubt, was this, that the rule in bankruptcy does does not apply to windings up; but the well-known rule laid down in *Mason* v. *Bogg*, and afterwards in the House of Lords, in the *Duke of York's Estate*, that a creditor holding security might, if he chose, prove for the whole of his debt and retain his security, does apply. That was the first point. Then there came a second point, viz., what was the date at which the creditor might realise his security, and not be bound to give credit for the proceeds of the realisation. The Lord Chancellor, in his judgment, says this: "I think, however, that the true rule is, that the date is to be taken as it stands at the time when the claim is put in." Then what is the meaning in that judgment of putting in the claim? To my mind, it is perfectly clear that the meaning is, that there must be a claim under the orders.

Then the only question that remains is whether that which took place in this case was a claim under the general orders or not. A letter undoubtedly in proper form would be a claim, and there cannot be a more convenient form of claim than a letter, and that disposes of the observations that have been made on *Kellock's* case. All that was done in this case was not done with the intention of making a claim under the orders, or with any reference to the orders, or with any notion that the official liquidator would be required to record the demand that was made; but a notary was sent, a notary presented a guarantee, and asked for the payment of that guarantee, which was refused, and he took the guarantee away. That, in my opinion, is clearly not a claim within the meaning of the 20th order, because the 20th order is this: "For the purpose of ascertaining the debts and claims due from the company. and of requiring the creditors to come in and prove their debts or claims, an advertisement shall be issued at such time as the judge shall direct, and such advertisement shall fix a time for the creditors to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any) to the official liquidator, and appoint a day for adjudication thereon." I certainly should not be at all disposed, if a claim had been made which was intended to be a claim under those orders, to quarrel with any letter upon a mere question of form; but in this case I look upon the matter as a question of substance and not of form. If a mere demand is made, and the document on which the demand rests is immediately taken away and no record is required of it, and nothing in writing is left; if such a demand were to be considered to amount to a claim, we should for ever have contests on affidavits of every kind and every description. The claim in this case must be a claim under the orders, and, in point of fact, that claim when made is equivalent to proof, just as in the case under a testator's estate where the affidavit is made. The only difference is that in this case the affidavit is not required unless the official liquidator asks for it, and therefore the time of making the claim is selected. After that the security may be realised, because the claim, if properly made, is in reality equivalent to proof in bankruptcy, or to proof against a testator's estate.

For these reasons I am of opinion that this appeal must be dismissed, and dismissed with costs.

Solicitors for Messrs. Forwood, *Haigh, Herbert*, and *Co.*, agents for *Haigh, Son*, and *Co.*, Liverpool.

Solicitors for the official liquidator, *Freshfields*.

Wednesday, Nov. 3.

(Before Lord Justice GIFFARD.)

Re HEYFORD COMPANY (LIMITED);

PELL'S CASE.

Company—Contributory—Winding-up—Signing memorandum of association—Allotment of shares to vendor—Paid-up shares—The Companies Act 1862, *s.* 23.

P. subscribed the memorandum of association of a company for 1350 *shares in the ordinary way, there being nothing to show that the shares were to be treated as fully paid-up. In the articles of association subsequently registered an agreement was set forth (and confirmed by them) by which P. was to transfer certain property to the company, and was to accept* 1500 *fully paid-up shares in part payment of the purchase-money. He transferred the property to the company, and* 1350 *shares were allotted to him, the remainder of the* 1500 *being allotted to his nominees, but he made no payment in money upon the shares:*

Held (reversing the Master of the Rolls, who was of opinion that P. must be placed on the list of contributories for 1350, *but would only have to pay the balance due from him after deducting the value of the property transferred by him to the company), that P.'s shares, so long as the agreement was not impeached, could only be treated as fully paid-up shares.*

This was an appeal by Mr. George Pell, from a decision of the Master of the Rolls, which is reported *ante*, p. 320. The facts are there fully stated, and it is only necessary to say that Mr. Pell subscribed the memorandum of association for 1350 shares in the ordinary way; and that an agreement was entered into between him and the company for the sale by him to the company of certain property in part payment for which the company were to issue to him or his nominees 1500 fully paid-up shares; that this arrangement was set forth in and confirmed by the articles of association, which were afterwards registered; that Mr. Pell transferred the property to the company, and that 1350 shares were allotted to him as fully paid-up, the rest being allotted to his nominees, but that he never paid any money in respect of the shares. The company being afterwards wound-up, the Master of the Rolls held that Mr. Pell must be put on the list of contributories for 1350 shares, but that he would only have to pay the balance due from him, after deducting the value of the property which he had transferred to the company.

From this decision Mr. Pell appealed.

Westlake, for the appellant.—The company cannot go behind their own agreement, and therefore, as between them and Mr. Pell, the shares must be treated as having been fully paid-up. The creditors in the winding-up have in this respect no greater rights than the company had, and indeed they had notice of the agreement between the company and Mr. Pell by reason of its being stated in the articles of association which were registered, and to which all the creditors had access.

He referred to

Re The China Steamship and Labuan Coal Company (Limited), Drummond's case, ante, p. 317;

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Re South Blackpool Hotel Company, Migiotti's case, 16 L. T. Rep. N. S. 271; L. Rep. 4 Eq. 238; *Re South of France Company, Baron de Broille's case*, L. Rep. 7 Eq. 11.

Roxburgh, Q. C., for the official liquidator.—The ground of the Master of the Rolls' decision was that in such a case the memorandum of association ought to contain something to identify the particular shares there subscribed for, with the shares which by another perfectly distinct agreement were to be issued by the company as fully paid-up shares. In the present case there was no such identification. The case differed altogether from *Drummond's* case, because there the prospectus which was issued of the new company, notified to the world that the paid-up shares were the same as those for which the memorandum of association had been subscribed. In the present case the company was incorporated in August, and the shares were not issued to Mr. Pell until December. The transactions were manifestly entirely distinct, and Mr. Pell ought to be made a contributory for the 1350 shares for which he subscribed the memorandum of association.

Without calling for a reply,

Lord Justice GIFFARD said that, as Mr. Pell signed the memoranduum of association of the company for 1350 shares, he was undoubtedly, by force of sect. 23 of the Companies Act 1862, bound to take that number of shares. But here the articles of association confirmed an agreement between Mr. Pell and the company, by which the company were to issue to him or his nominees 1500 fully paid-up shares, as part of the purchase-money for property which he was to transfer to the company. This property he accordingly transferred to the company, and 1350 shares were issued to him as fully paid up, the remainder of the 1500 being issued to his nominees. His Lordship agreed with the Master of the Rolls in thinking that those 1350 shares must be taken to have been issued in pursuance of the agreement. The Master of the Rolls, however, went on to order Mr. Pell's name to be placed on the list of contributories for the 1350 shares, but directed an inquiry to be made as to what was the money or money's worth which he had given to the company under the agreement. But that agreement had not been impeached, and his Lordship must therefore assume that its validity could not be impeached, and he must consequently take it, just as in *Drummond's* case, that Mr. Pell agreed to take 1350 shares. but that he had paid them up in full in money's worth. His name could not, therefore, be placed on the list of contributories. He must have his costs in the court below, but there would be no costs of the appeal.

Solicitors for Mr. Pell, *Elmslie, Forsyth*, and *Sedgwick*.

Solicitors for the official liquidator, *Denton* and *Hall*.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Saturday, Nov. 13.

Re BOLTON'S WILL.

Practice—Trustee Relief Act (10 & 11 *Vict. c.* 96)—*Payment out of court—Service on trustees.*

The house named by trustees in their affidavit on paying a fund into court, as the place at which they might be served, had been pulled down, and the trustees themselves had not been heard of for ten years, and could not be found:

Service on the trustees of a petition for payment out of court of the fund dispensed with, and the matter referred to chambers to inquire who were the persons entitled to the fund.

This was a petition for payment out of court of a fund, which had been paid in in 1857 under the Trustee Relief Act, to persons who had become absolutely entitled on the death of a tenant for life.

The house named by the trustees, in their affidavit on paying the fund into court, as the place at which they might be served, had been pulled down, and the trustees themselves had not been heard of for ten years, and could not be found.

Pitcairn asked that under these circumstances service on the trustees might be dispensed with.

Lord ROMILLY.—I will dispense with service on the trustees, but the matter must be referred to chambers to inquire who are the persons entitled to the fund.

Solicitors: *Walker* and *Sons*.

Re SPENCE'S PATENT NON-CONDUCTING COMPOSITION AND CEMENT COMPANY.

Company—Winding-up—Petition—Creditor—Practice.

A shareholders' petition for the compulsory winding-up of a company made out no case for an order. A creditor appeared, without notice to the company, in support of the petition, having the day before the hearing filed an affidavit proving a debt which would have entitled him to a compulsory order if he had presented a petition:

Held, that no order could be made on the petition in favour of the creditor, on the ground that the company had not notice of the fresh case made against them by the creditor, and had no opportunity of meeting it.

This was a petition by three shareholders, holding among them fifty fully paid-up shares in Spence's Patent Non-Conducting Composition and Cement Company, for the compulsory winding-up of the company, on the ground that it had ever since its formation in 1865 carried on business at a loss, and that it was impossible that it could be carried on profitably.

The petition did not allege that the company was actually insolvent, nor was its insolvency actually proved; but evidence was given in support of the petition, which showed that it was very doubtful whether the company could pay its debts.

On the day before the hearing of the petition, a creditor on an unpaid bill of exchange for 50*l*., filed an affidavit proving the debt, but the company had no notice of this affidavit. The creditor had commenced proceedings at law to recover the amount due on the bill.

Roxburgh, Q. C. and *Bond Coxe* appeared in support of the petition.

Napier Higgins, for the creditor, supported the petition and contended that, as it was clear from the evidence that the company was virtually insolvent, his client was entitled to a compulsory order.

Lord ROMILLY said that he was clearly of opinion that the petitioners had made no case for a compulsory winding-up order. It was a very peculiar case where the court allowed persons who held fully paid-up shares, and could not be called on to make any further payment, to have a compulsory winding-up, as for example where the assets were in the hands of third parties, who refused to give them up. It was clear to his Lordship that a compulsory winding-up would leave nothing to distribute

amongst the creditors, as the entire assets would be consumed in costs. The only point on which he entertained any doubt was whether he ought not to make a compulsory order and give the carriage of it to Mr. Higgins' client in order to save the expense of a fresh petition by him. His Lordship would hear Sir Richard Baggallay on that point.

Sir *Richard Baggallay*, Q.C. (with him *Horton Smith*), for the company, said that they were prepared to meet the case made by the petition; but he contended that when a creditor appeared in support of a petition he must support the case made out by the petition, and was not entitled to raise a fresh case without giving any notice to the company, who were consequently unprepared to meet it. He submitted, therefore, that no order could be made on the petition.

Lord ROMILLY said that the creditor stood in a very different position from the petitioners, and that if he had presented a petition he would in all probability have obtained a compulsory order. His Lordship was, however, of opinion that he could not turn a shareholder's petition into a creditor's at such short notice to the company of the case they would have to meet. The petition must therefore be dismissed with costs.

Solicitor for the petitioners, *J. Rand Bailey.*

Solicitor for the creditor, *Sparham.*

Solicitors for the company, *Powell, Thompson,* and *Groom.*

BERRIE *v.* HOWITT.

Solicitor and client—Charge for costs—23 & 24 Vict. c. 127, s. 28.

By virtue of the decree in a suit to set aside an appointment and uphold a settlement, A. became entitled to an estate tail in certain property. A. died (before he had paid his solicitor's costs of the suit), without issue, and without having executed a disentailing deed, and the property devolved on certain prrsons under the settlement:

On a petition by the solicitor that he might be declared entitled to a charge on the property for the amount of his costs:

Held that he was not entitled to any charge on the property, as the interest of his client (on which alone he would have been entitled to a charge) had determined by his death.

By an indenture of release dated the 23rd Dec. 1797, certain lands and hereditaments at Long Eaton and Bingham, were conveyed and assured to the use of William Howitt during his life, with remainder to the use of such one or more of the children of the said William Howitt in such shares or proportions, for such estates and in such manner as the said William Howitt should by deed or will appoint, and in default of appointment to the use of all the children of the said William Howitt, as tenants in common in tail, with cross remainders in tail between them.

By his will dated the 4th Nov. 1839, William Howitt, in exercise of the power of appointment given him by the deed of 1797, appointed the settled property to his children for life in certain shares, and made certain limitations subsequent to the life estates of his children. William Howitt died in 1840, leaving four children him surviving, namely, John Howitt, Enoch Dawson Howitt, Sarah Berrie, and William Howitt.

The suit was instituted by the heir-at-law of the testator's daughter, Sarah Berrie, for the purpose of setting aside the limitations of the several shares in the settled property contained in the testator's will subsequent to the limitations to his children for their respective lives on the ground of remoteness.

By the decree made in the cause on the 26th April 1867, it was declared that these subsequent limitations were void; the decree said nothing about costs, it being understood that all parties were to pay their own costs.

By virtue of this decree, George Enoch Howitt became entitled to an estate tail in one undivided fourth part of the settled property. He died in June 1869, without issue, and without having executed a disentailing assurance, and four persons became entitled under the decree as tenants in common in tail of the undivided fourth part to which George Enoch Howitt had been entitled.

The present petition was now presented by the solicitor of George Enoch Howitt in the suit, praying that it might be declared that he was entitled to a charge on the share of George Enoch Howitt in the settled property for 131*l.* 1*s.* 8*d.*, the amount of his bill of costs against George Enoch Howitt, and that the said sum might be declared to be a charge on the said share under and by virtue of 23 & 24 Vict. c. 127, s. 28.

The 28th section of 23 & 24 Vict. c. 127 is in the following words:

> In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void and of no effect against such charge or right; provided always, that no such order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any statute of limitations.

Joliffe, in support of the petition, cited:
Scholefield v. *Lockwood*, L. Rep. 7 Eq. 83;
Bailey v. *Birchall*, 2 H. & M. 371;
and submitted that this was a case in which property had been preserved within the meaning of the Act, and that the petitioner was entitled to a charge on the property.

Ware, for one of the respondents, contended that the petitioner was not entitled to a charge on the property against the remaindermen, but only on his client's interest in it.

Methold and *Rendall* appeared for the other respondents.

Joliffe, in reply, argued that the petitioner was entitled to a charge on the property, even in the hands of the remaindermen, as their estate would have been swept away but for the suit, and might therefore be justly said to have been preserved for them by the petitioner.

Lord ROMILLY.—I think there cannot be any charge in the present instance. The Act gives the court power to charge only the property of the person who employs the solicitor. The petitioner was entitled to a charge on the estate tail of his client, but not on the interests of the remaindermen. The interest of his client has, however,

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determined, and he can get no charge. I cannot make any order on the petition, which must be dismissed with costs.

Solicitors for the petitioner, *Rhodes, Son,* and *Duffet.*

Solicitors for the respondent, *Ware* and *Westall; Kempster.*

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Monday, Nov. 15.

THE LONDON AND MEDITERRANEAN BANK (LIMITED) *v.* STRUTTON.

Jurisdiction—Foreign action—Bill to defeat—Bill dismissed.

B. having entrusted C. with certain bills of exchange for collection in America, they came improperly, as was alleged, into the hands of D., who instituted proceedings upon them in America. Eventually they came into the possession of E., as commissioner in London appointed by the American court to collect evidence as to the pending proceedings, and B. then filed a bill against C. D. (both out of the jurisdiction), and E. praying that they might be ordered to bring the bills into court, and be restrained from negotiating or parting with them:

Held, that B. had failed to establish a sufficient case for the interference of the court.

This suit was instituted by the liquidator of the above bank against Louis Dehayes Strutton, John Morton (both out of the jurisdiction), and Richard Mullens, for the purpose of recovering possession of certain bills of exchange, which had been sent out to America for collection, had been there disposed of, and, after giving rise to certain legal proceedings in that country, were now in the possession of the defendant Mullens, as commissioner appointed by the American court for the purpose of taking evidence in England in reference to those proceedings.

The facts, as stated by the bill, were these:

The bills in question, which were for 16,000*l.*, originally formed part of the assets of the Continental Bank, which had become amalgamated with the London and Mediterranean Bank, and were drawn upon John Gladstone and Co., one by William Moses of New York, and the other by Allan Hay, and had been discounted by the Continental Bank in the ordinary course of business. Subsequently, on being protested for nonpayment, they were intrusted by the Continental Bank to the defendant Strutton, a solicitor practising in New York, but who was then in this country, and who undertook to act as the bank's agent in recovering the amounts due on the bills.

The bill further stated that with the exception of a sum of 500*l.*, which Strutton had forwarded on account of the bills, the bank had been unable to get any information from him in reference to them, and that by a breach of duty he had disposed of them in some manner beyond his authority, which was strictly limited to collecting the amounts due on them. That they were now in this country, in the hands of the defendant Mullens, and that he refused to give any information about them, further than that they had come into his possession, under a commission issued out of one of the American Courts for the purpose of taking evidence in the legal proceedings above referred to, and that he intended to dispose of them without regard to the banks' claims.

The bill prayed that the defendants might be ordered to bring the bills into court; that they might be restrained by injunction from endorsing or parting with them, except under order of the court, and for the necessary accounts.

The bill had been served on the defendants and Strutton and Morton, but as they had not entered an appearance, it had been taken *pro confesso* against them.

Dickinson, Q. C., and *J. Napier Higgins,* for the plaintiff, contended that as the bills were now in the hands of a person within the jurisdiction, the plaintiff was clearly entitled to have them placed in safe custody. Admitting that the defendant Mullens was the commissioner of the American court, yet, as the evidence showed that he had been put in motion and supplied with the bills in question by the solicitors of Morton, he must be treated as Morton's agent in this country, and not in his official capacity. It was not the proper duty of a commissioner or special examiner to take charge of the subject-matter of an action or suit, or even of the exhibits in a cause, and the mere fact of his connection with a foreign jurisdiction ought not to be allowed to interfere with the plaintiff's equity. The authorities showed that if the American court had pronounced judgment in favour of the defendants, this court would examine the decree and reject it so far as it was inconsistent with English law, and *à fortiori* would it interfere, where, as in the present instance, the proceedings were merely preliminary.

Simpson v. *Fogo,* 1 J. & H. 18; 8 L. T. Rep. N. S. 6; *Lord Portarlington* v. *Soulby,* 3 M. & K. 104.

E. K. Karslake, Q. C. and *Curry,* for the defendant Mullens, were not called upon.

The VICE-CHANCELLOR.—In this case the court is asked either to make a decree that the bills of exchange in question shall be deposited in the hands of the plaintiff, or to grant a perpetual injunction to restrain the defendant Mullens from parting with them. It appears that legal proceedings are pending for the recovery of the money due on the bills in one of the courts of the United States, and that the bills themselves are now in possession of the defendant Mullens in his capacity of commissioner appointed by that court for the purpose of taking evidence in reference to those proceedings. There has been no suggestion that the American court is not perfectly competent to deal with the question before it; but the foundation of the plaintiff's case is that the bank cannot be made safe on the bills if Morton sues on them, and that Morton has obtained them improperly from Strutton while acting as the bank's agent. But even so, Strutton was the accredited agent of the bank for receiving the money on the bills in America; and if, as their agent, he has there failed in his duties, it is in that country that *primâ facie* he ought to be called to account. The plaintiff, however, without taking any such steps, has adopted the extraordinary course of filing a bill in this country for the purpose really of defeating the legal proceedings in America. I have read the judgment in *Simpson* v. *Fogo* (*sup.*), and I agree with the principles there laid down, although it is difficult to reconcile them with other decisions, or to follow the distinction drawn between the exercise of the jurisdiction *in personam,* and *in rem.* It is well established, however, that this court will never interfere with the administration of justice in another court, except upon a case properly made out, and only then by directing its decree, not against the court itself, but against the litigants, upon whose consciences it is intended to operate, and whom it prevents from making an inequitable use of their legal rights. I consider that the plain-

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tiff has failed to make out a case for the assistance of this court, and that any rights that he may have, must be asserted in America. The bill must be dismissed with costs.

Solicitors for the plaintiff, *Lewis, Munns,* and *Co.*

Solicitors for the defendant, *R.* and *S. Mullens* and *Co.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET, and R. T. BOULT, Esqrs., Barristers-at-Law.

Wednesday, Nov. 3.

WILSON *v.* FURNESS RAILWAY COMPANY.

Specific performance—Railway company—Agreement to make and maintain a road and wharf—Demurrer.

Bill for specific performance of an agreement by which the defendants, a railway company, in consideration of the plaintiffs obtaining the waiver of certain works (which by an Act of Parliament the defendants were otherwise bound to execute), and conveying land for a road, and paying 200l. towards the repair of it, agreed to make and maintain a road and wharf, the road and wharf to be completed within a specified time. The plaintiffs obtained the waiver, conveyed the land, and paid the money, but the defendants neglected to complete the road, and make the wharf:

Demurrer, on the ground that the agreement was not one which the court could enforce, overruled.

This was a demurrer.

The bill prayed specific performance of an agreement by the defendants, and stated that by the Ulverstone and Lancaster Railway Act 1851 the Ulverstone and Lancaster Railway Company was incorporated, with power to construct a railway from Ulverstone to Comforth, and to take and use lands for that purpose, and the Act provided that, subject to any waiver or alteration which might be allowed by the Admiralty, two viaducts should be constructed by the company in man ner therein prescribed, and that "in such part of each of the said viaducts, and in such manner as should be approved and directed by the said Lord High Admiral or the said commissioners by writing under the hand of the Secretary of the Admiralty, and subject to any waiver or alteration to be allowed as therein mentioned, the said company should construct an open swing or drawbridge of not less than 36 feet clear width, and the site of such two viaducts, and the mode of constructing the same, and also the said two several opening swing or drawbridges, should be only in accordance with such approval and direction."

The defendant company was incorporated by the Furness Railway Act 1858. By the Ulverstone and Lancaster Railway Act 1858, the Ulverstone and Lancaster Railway Company, and the defendant company might enter into and carry into effect any agreement for the leasing for a term of years, and for the selling and transferring to the defendant company of all or any part of any share or interest in the railway works, lands, property, and effects then vested in and belonging to the Ulverstone and Lancaster Railway, and which they were, under the Ulverstone and Lancaster Railway Act 1851, authorised to make, maintain, and reclaim, together with all or any of the rights, powers, privileges, and authority of the Ulverstone and Lancaster Railway Company with respect to the same, and for making of the lease or sale either before or after the completion of the railway works and lands respectively, and upon such terms and conditions, and for such consideration, as the two companies should mutually agree upon; but that if any such lease or sale comprised the railway of the Ulverstone and Lancaster Company, it should comprise the whole thereof, and that from and after the transfer the defendant company should, according to the extent of the transfer, be subject to and perform, and be liable to, all contracts, agreements, duties, obligations, debts, charges, claims, and demands whatsoever with respect to the premises transferred, to which the Ulverstone and Lancaster Railway Company, if the transfer had not happened, would be subject or liable, and should indemnify the Ulverstone and Lancaster Company in respect to the same.

By an agreement dated the 25th June 1862, made between the plaintiffs and other landowners of the first part, and the Ulverstone and Lancaster Railway Company of the second part, and under the common seal of the company, after reciting (*inter alia*) the provisions prescribed by "the Ulverstone and Lancaster Railway Act 1851," regarding the construction of the opening swing bridge or drawbridge, and that a viaduct had, by the partial exercise by the Admiralty of the powers of waiver vested in them, been constructed without an opening bridge, but with preparations for making the opening at a future time, upon certain notice from the Lords Commissioners of the Admiralty, and that the Ulverstone and Lancaster Railway Company were desirous that the Lords Commissioners should thenceforth entirely and for ever waive the construction of and the right to require any opening swing or drawbridge in the viaduct, and that the parties thereto of the first part, on their own behalf, and as representing the inhabitants of places adjoining or near the viaduct, and who were interested in the question, had hitherto objected to the waiver of the opening bridge, and that, in order to obviate all further difficulties, the Ulverston and Lancaster Railway Company and the parties thereto of the first part, on behalf of themselves and the other inhabitants, had agreed together as thereinafter mentioned. It was witnessed that the Ulverstone and Lancaster Railway Company for themselves, their successors and assigns on the one part, and the plaintiffs and other parties of the first part thereto, for themselves, their heirs, executors, administrators, and assigns on the other part, mutually agreed, each party with the other party, as follows (*inter alia*):—First, that if the Admiralty should, within twelve months from the date of the agreement, and for ever thereafter, waive their right to require any opening or drawbridge in the viaduct, and if the plaintiff should, without any pecuniary consideration, convey, at the cost of the company, to the company the land required for so much of the road thereinafter agreed to be made as should pass through his estate, and all other persons through whose estates the road would pass would also convey to the company, at the cost of the company, the land which would be required for that part of the road which would pass through their respective estates, the purchase-money for such lands not to exceed in the whole l.; and also, if the sum of 200l. should be paid to the company by the plaintiffs towards the expense of the works thereinafter mentioned, that then the company would, at their own cost, and within six months from the date of the waiver and the delivery to them of the land for the purpose, unless prevented by damage done by the tide to the works, and in that case as soon after such six months as could be, make, upon the land so to be obtained for the purpose, a carriage-road of the width of 16ft. in the direction shown by the plan thereto annexed, and which should not be constructed below a certain level, and which road was to be constructed according to the specification annexed, and be a public road or highway, and would make good the fences, &c., and would yearly, after the completion of the road, pay to the corpo-

ration of Kendal, 5*l.*, to be applied in repairing or improving a certain portion of the road; and that the company should also make and maintain a wharf on the sea-shore at the place shown on the plan annexed, of the length and height mentioned in the agreement. And it was also provided that no damage done by the tide to the works in progress should be considered as any reason for the non-completion of the road and wharf, or entitle the company to receive the money before the final and complete execution of the works; secondly, that if within or before the period of one month after the company should, by writing, have informed the parties thereto of the first part, that the road and wharf were completed, any difference should arise between the company and the parties thereto of the first part, whether the road and wharf were sufficient, according to the true intent and meaning of the agreement, the difference should be referred to arbitration, according to the terms of clause 3; but otherwise, the road and wharf should, at the expiration of that time, be deemed to be sufficient, and also, that if after the completion of the road the company should exercise the right given them by the agreement of laying down certain tramways, and within one month after the completion of the same any difference should arise, the same should be referred to arbitration; thirdly, provided for the appointment of arbitrators, &c.; fifthly, that the parties of the first part, on behalf of themselves and the inhabitants, would forthwith, at the expense of the company, join and concur, and use their best endeavours to procure all other necessary parties to join and concur, with the company in making the necessary application to the Admiralty for obtaining such entire and perpetual waiver of the opening or swing drawbridge, and would, at the like expense, use their best endeavours to procure such waiver.

The bill then went on to allege as follows:

Paragraph 6:

The Lords Commissioners of the Admiralty have duly and entirely waived the construction of and the right to require any opening swing or drawbridge in the viaduct according to the terms of the above stated request, and the land required for the purpose of the road agreed to be constructed by the said agreement was duly conveyed according to the terms of such agreement, and such land was duly delivered to the Ulverstone and Lancaster Railway Company, according to the same agreement, and such land was taken possession of by that company, and the same is now vested in and in the possession of the defendant company under the sale and transfer by the Ulverstone and Lancaster Railway Company to the defendant company, stated in the next paragraph.

Paragraph 7:

Under the powers contained in the said Ulverstone and Lancaster Railway Act 1858, the Ulverstone and Lancaster Railway Company and the defendant company entered into an agreement for the selling and transferring to the defendant company of the Ulverstone and Lancaster Railway, and the works, lands, property, and effects vested in or belonging to the Ulverstone and Lancaster Railway Company, or which they were, under the Ulverstone and Lancaster Railway Act 1851 authorised to make and maintain and reclaim, together with all the rights, powers, privileges, and authorities of the Ulverstone and Lancaster Railway Company; and the defendant company accepted a sale for the purpose of carrying out such agreement, and the terms agreed on were duly approved of by the Board of Trade, and the transfer was by the agreement appointed to take effect at a day long since passed, and was evidenced by a deed of transfer dated the 4th Aug. 1863, and duly made between the Ulverstone and Lancaster Railway Company of the one part, and the defendant company of the other part, and the whole of the undertaking, property, and effects of the Ulverstone and Lancaster Railway Company has become and are now vested in the defendant company.

Paragraph 10:

The defendant company has commenced making the said road mentioned in the said agreement of the 25th June 1862, but they have not made or completed such road according to the terms and provisions of the said agreement, and such road is in a very incomplete condition, and the defendant company has not made or commenced making the wharf mentioned in the said agreement.

Paragraph 11:

The defendant company has from time to time been required by the plaintiffs to perform the said agreement, and to make and complete the said road and wharf according to the terms and provisions thereof; but the defendants, although always admitting their liability to make and complete such road and wharf, and promising so to do, have neglected to make or complete the same.

Paragraph 16:

The defendant company still refuse to perform the said agreement of the 25th June 1862.

Paragraph 17:

The plaintiffs have always been and are ready and willing to perform the said agreement on their part, and to contribute and pay the sum of 200*l.* mentioned therein according to the terms thereof.

The bill prayed—1. That the defendant company may be decreed specifically to perform the said agreement of the 25th June 1862, and to make, construct, and complete the road and wharf specified in that agreement and in the plan annexed thereto, according to the terms and provisions thereof, and to do and perform all works and matters necessary for the completion of the said road and wharf, the plaintiffs being ready and willing duly to perform the said agreement on their part. 2. That damages in respect of the matter aforesaid may be awarded to be paid to the plaintiffs by the defendant company.

Fry, Q.C., and *Currey*, for the demurrer, contended that the only things to be done by the company were: first, the making the wharf; secondly, the constructing of the road; thirdly, the paying 5*l.* per cent. per annum, and that there was a complete remedy at law for breach of this agreement, and contended that no works of this sort could be enforced by this court. They also contended that it was in reality a representative suit, and the Attorney-General should have been a party to it, to represent the places mentioned in the agreement. They cited

The South Wales Railway Company v. *Wythes*, 1 K. & J. 186;
Blackett v. *Bates*, L. Rep. 1 Ch. 117; 13 L. T. Rep. N. S. 656;
Lytton v. *The Great Northern Railway Company*, 2 K. & J. 394;
Gervais v. *Edwards*, 2 Dr. & W. 80;
Wilson v. *The West Hartlepool Harbour and Railway Company*, 2 De G. J. & S. 475; 34 L. J. 241, Ch.; 11 L. T. Rep. N. S. 692;

[The VICE-CHANCELLOR referred to *Storer* v. *The Great Western Railway Company*, 2 Y. & Coll. C. C. 48.]

Kay, Q. C. and *Nulder*, for the plaintiffs, were not called upon.

The VICE-CHANCELLOR said with regard to the main point this case was covered by the decision in *Storer* v. *The Great Western Railway Company* 2 Y. & Coll. C. C. 48; indeed this case was a stronger one than that. The construction of a road was a thing of easy performance. The company had had the benefit of the agreement. They had had conveyed to them the land on which the road was to be made, and now they wished to evade their liability to make it. Rather than allow so great an act of dishonesty to go unredressed, the court would struggle to make the company perform their agreement; and if necessary it would permit the plaintiffs themselves to do the work at the expense of the company. It had been suggested that this company had been incorporated for the purpose of making the railroad, and not of making the road. But being *bona fide* under certain onerous obligations, the company agreed with the plaintiffs to give something else instead more convenient to both parties. There was no principle on which he could hold such an agreement as this to be *ultra vires*. The length of time which had been suffered to elapse could not affect the plaintiff's

rights. The company had been nearly six years in possession of the land, but that was no reason why they should escape from the obligation they had agreed to perform. Then it had been urged that the Attorney-General was a necessary party to this suit, but he did not see the necessity of making him a party. In his opinion an individual entitled to the benefit of the agreement had a right to come to the court to have it enforced. The demurrer must be overruled with costs.

Solicitors: *Scott* and *Co.*, agents for *Moser, Arnold,* and *Moser*, of Kendal; *Sharpe*, and *Ullathorne.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Wednesday, Nov. 3.

Ex parte FITZGERALD; *Re* THE BEVERLEY COMMISSIONERS.

Commissioners appointed to inquire into the existence of corrupt practices at election.—Jurisdiction—Power of adjournment—Adjournment made when less than whole number of commissioners present—15 & 16 Vict. c. 57, ss. 1, 4.

15 & 16 *Vict. c. 57, after providing for the appointment, under certain circumstances, of commissioners to inquire into the existence of corrupt practices at elections for members to serve in Parliament, enacts (sect. 4) that "the commissioners appointed under this Act to make inquiry as aforesaid in relation to any county, division of a county, city, borough, university, or place, shall, upon their appointment, or within a reasonable time afterwards, go to such county, division of a county, city, borough, university, or place, and shall from time to time hold meetings for the purpose of such inquiry, at some convenient place within the same, or within ten miles thereof, and shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county, division of a county, city, borough, university or place, or within ten miles thereof, as to them may seem expedient, and such commissioners shall give notice of their appointment, and of the time and place of holding their first meeting, by publishing the same in some newspaper in general circulation in such county, division of a county, city, borough, university, or place, or the neighbourhood thereof; provided always, that such commissioners shall not adjourn the inquiry for any period exceeding one week, without the consent and approbation of one of Her Majesty's principal Secretaries of State."*

The power given to the commissioners by this section to "from time to time hold meetings for the purposes of the inquiry," is a power to hold meetings from time to time without formal adjournment; and this power is not cut down by the authority subsequently given "to adjourn such meetings from time to time;" the only limitation being that the inquiry shall not be adjourned for more than a week without the consent and approbation of a principal Secretary of State.

Where three commissioners were appointed under this Act to inquire into the existence of corrupt practices at the borough of B., and held various sittings there up to the 25th Sept. 1869, *when the inquiry was adjourned to the 27th Sept., on which day only two commissioners being present, the inquiry, after some evidence had been taken, was, with the concurrence of the absent commissioner, adjourned to the 19th Oct., the consent of a principal Secretary of State to this adjournment having previously been obtained; and at one of the meetings subsequent to that held on the 19th Oct., a person who was summoned as a witness, and refused to give evidence, was committed to custody for contempt; on a motion for his discharge on the ground that the jurisdiction of the commissioners had ceased from the day on which the inquiry had been adjourned by two only of their body:*

Held, that the jurisdiction of the commissioners had not ceased by the adjournment on the 27th by two only of their body; the general power conferred on the commissioners of holding meetings "from time to time" enabling them to hold meetings on the 19th Oct. and subsequent days, even on the supposition that the proceedings which took place on the 27th Sept. were informal and invalid.

In this case a writ of *habeas corpus* was granted by Hayes, J. at chambers, returnable in this court on the 2nd day of term, directed to the keeper of the gaol at York, commanding him to produce the body of Charles Edward Fitzgerald, with the day and cause of his caption and detention, &c.

From the return of the gaoler it appeared that the prisoner, Charles Edward Fitzgerald, was imprisoned in York Gaol under the following warrant, under the hands and seals of the commissioners appointed to inquire into the existence of corrupt practices at elections for the borough of Beverley.

East Riding of Yorkshire, to wit.

To the superintendent and all other constables of the division of North Hunsley, in the said East Riding, and to the keeper of the castle at York.

At the sittings of the commissioners appointed under the statute of the 15 & 16 Vict. c. 57, to inquire into the existence of corrupt practices at the last election for the borough of Beverley, and also at previous elections holden at the Sessions House at Beverley, in the said East Riding of the said county of York, on the 21st Oct. 1869, before Michael O'Brien, serjeant-at-law, Thomas Irwin Barstow, barrister-at-law, and Homersham Cox, barrister-at-law, the commissioners appointed for the purpose aforesaid, by warrant under Her Majesty's sign manual, dated the 23rd June 1869, Charles Edward Fitzgerald, a witness, having been summoned in pursuance of the said Act, and having appeared before the said commissioners, and being required by them to be sworn, or to make affirmation, as a witness in that behalf, refused so to do without offering any just excuse for such refusal, and the said commissioners having adjudged, the said Charles Edward Fitzgerald was bound by law to be sworn or to make affirmation, and having required him to do so, he wilfully and in contempt of the said commissioners and of their office, refused to be sworn or to affirm; and he having wilfully persisted and still persisting in such his refusal, the said commissioners do hereby adjudge that the said Charles Edward Fitzgerald by such his refusal has been and is guilty of contempt of the said commissioners and of their office, and the said commissioners do hereby order and adjudge that the said Charles Edward Fitzgerald be for such his contempt committed, and he is hereby committed to the keeper of Her Majesty's gaol of the castle of York, in and for the said county, to be there detained and kept in safe custody for the term of two calendar months from the day and year first above mentioned.

These, therefore, are to command you, the said constable, to take the said Charles Edward Fitzgerald, and him safely convey to the aforesaid castle of York, and there deliver him to the said keeper thereof, with this our precept, and we the said Michael O'Brien, serjeant-at-law, and Thomas Irwin Barstow, barrister-at-law, and Homersham Cox, barrister-at-law, commissioners aforesaid, do hereby command you, the said keeper of the said castle of York, to receive the said Charles Edward Fitzgerald into your custody in the said castle, and there imprison him for such his contempt for the said term of two calendar months, unless he shall in the mean time consent to be sworn or make affirmations concerning the premises, or otherwise be delivered by due course of law; and for your so doing this shall be your sufficient warrant.

Given under our hands and seals on the 21st Oct. 1869, at the sessions house aforesaid, in the county aforesaid.

(Signed) MICHAEL O'BRIEN, S. L. (Seal.)
THOS. I. BARSTOW. (Seal.)
HOMERSHAM COX. (Seal.)

From the affidavits used on the motion to discharge the prisoner, it appeared that by a joint address of both Houses of Parliament, it was represented to Her Majesty that Sir Samuel Martin, Knight, one of the Barons of the Court of Exchequer, and one of the judges selected for the trial of

election petitions, pursuant to the Parliamentary Elections Act 1868, had reported to the House of Commons that corrupt practices did prevail, and that there was reason, upon the evidence before them, to believe that they did extensively prevail at the last election for the borough of Beverley, and that both Houses of Parliament had prayed Her Majesty to cause inquiry to be made pursuant to the provisions of the Act of Parliament, 15 & 16 Vict. c. 57, by the appointment of Michael O'Brien, Serjeant-at-Law, Thomas Irwin Barstow, Esq., barrister-at-law, and Homersham Cox, Esq., barrister-at-law, as commissioners for the purpose of making inquiry into the existence of such corrupt practices; and that Her Majesty did appoint the aforesaid three gentlemen as commissioners "for the purpose of making inquiry into the existence of such corrupt practices in the said joint address referred to."

The commissioners held their first meeting for the purposes of the inquiry in the town hall at Beverley, on the 24th Aug. 1869, and various meetings were subsequently held. On the 18th Sept. 1869, application to the Home Secretary was made by letter by the secretary to the commissioners for permission to adjourn the inquiry from the following 27th Sept. to Tuesday the 19th Oct.; and the approval of the Secretary of State for the Home Department to the adjournment from the 27th Sept. to the 19th Oct., was made known to the commissioners by letter dated the 23rd Sept.

On the 25th Sept. the three commissioners adjourned the meeting to the 27th Sept. On the 27th Sept. only two of the commissioners being present, some evidence was taken, and the meeting was then adjourned to Tuesday the 19th Oct. The three commissioners sat on the 19th Oct., and adjourned to the 20th. The three commissioners again sat on the 20th, and adjourned to the 21st. On the 21st Charles Edward Fitzgerald, having been summoned as a witness, refused to be sworn, on the ground that the commissioners, owing to the informal adjournment by two only of their body on the 27th Sept., had ceased to have any further jurisdiction. For his contempt in refusing to be sworn, Fitzgerald was committed to prison.

Sect. 1 of 15 & 16 Vict. c. 57, enacts that:

Where by a joint address of both Houses of Parliament it shall be represented to Her Majesty that a committee of the House of Commons appointed to try an election petition, or a committee of that House appointed to inquire into the existence of corrupt practices in any election or elections of a member or members to serve in Parliament, have reported to the House that corrupt practices have, or that there is reason to believe that corrupt practices have, extensively prevailed in any county, division of a county, city, borough, university, or place in the United Kingdom electing, or sharing in the election of a member or members to serve in Parliament at any election or elections of such member or members, and the said Houses shall thereupon pray Her Majesty to cause an inquiry to be made under this Act by persons named in such address, such persons being (where the inquiry to be made relates to a place in England or Ireland) barristers-at-law of not less than seven years' standing, and not being members of Parliament, or holding any office or place of profit under the Crown other than that of a recorder of any city or borough, it shall be lawful for Her Majesty, by warrant under her royal sign manual, to appoint the said persons to be commissioners for the purpose of making inquiry into the existence of such corrupt practices; and in case any of the commissioners so appointed die, resign, or become incapable to act, it shall be lawful for the surviving or continuing commissioners or commissioner to act in such inquiry, as if they or he had been solely appointed to be commissioners or a sole commissioner for the purposes of such inquiry, and (as to such sole commissioner) as if this Act had authorised the appointment of a sole commissioner; and all the provisions of this Act concerning the commissioners appointed to make any such inquiry shall be taken to apply to such surviving or continuing commissioner or commissioners.

Sect. 2 provides for the commissioners being sworn; sect. 3 for the appointment of a secretary and clerks.

Sect. 4 enacts that—

The commissioners appointed under this Act to make inquiry as aforesaid in relation to any county, division of a county, city, borough, university or place, shall, upon their appointment, or within a reasonable time afterwards, go to such county, division of a county, city, borough, university or place, and shall from time to time hold meetings for the purposes of such inquiry at some convenient place within the same, or within ten miles thereof, and shall have power to adjourn such meeting from time to time, and from any one place to any other place within such county, division of a county, city, borough, university or place, or within ten miles thereof as to them may seem expedient; and such commissioners shall give notice of their appointment, and of the time and place of holding their first meeting, by publishing the same in some newspaper in general circulation in such county, division of a county, city, borough, university or place, or the neighbourhood thereof; provided always that such commissioners shall not adjourn the inquiry for any period exceeding one week, without the consent and application of one of Her Majesty's principal Secretaries of State.

Sect. 5:

Provided always, that it shall be lawful for the said commissioners, with such consent and approbation as aforesaid, to hold meetings of the said commissioners in the cities of London or Westminster, and to adjourn the same from time or time as they may deem fit.

Sect. 8 enacts that—

It shall be lawful for such commissioners, by a summons under their hands and seals, or under the hand and seal of any one of them, to require the attendance before them, at a place and time to be mentioned in the summons, which time shall be a reasonable time from the date of such summons, of any person whomsoever whose evidence, in the judgment of such commissioners or commissioner, may be material to the subject-matter of the inquiry to be made by such commissioners, and to require all persons to bring before them such books, papers, deeds, and writings, as to such commissioners or commissioner appear necessary for arriving at the truth of the things to be inquired into by them under this Act; all which persons shall attend such commissioners, and shall answer all questions put to them by such commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds, and writings required of them, and in their custody and under their control, according to the tenor of the summons; provided always, that no statement made by any person in answer to any question put by such commissioners shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal.

Sect. 12 provides that

If any person on whom any summons shall have been served, by the delivery thereof to him or by the receiving thereof at his usual place of abode, fail to appear before the said commissioners at the time and place specified in such summons, it shall be lawful for the said commissioners to certify such default under their hands and seals, or under the hand and seal of any one of them, to any of Her Majesty's Superior Courts in England or Ireland, or to the Court of Session in Scotland, or to the Lord Ordinary on the bills in the said court, as the case may be; and thereupon such court or judge shall proceed against the person so failing to attend, in the same manner as if the said person had failed to obey any writ of subpœna or any process arising out of the said court; and if any person so summoned to attend as aforesaid, and having appeared before the said commisioners, shall refuse to be sworn, or to make answer to such questions as are put to him touching the matters in question by the said commissioners, or to produce and show to the said commissioners any papers, books, deeds, or writings, being in his possession or under his control, which the commissioners may deem necessary to be produced; or if any person shall be guilty of any contempt of the said commissioners or their office, the said commissioners shall have such and the same powers to be exercised in the same way as any judge of Her Majesty's Superior Courts of England or Ireland, or of the Court of Session in Scotland, sitting under any commission, may now by law exercise in that behalf; and all headboroughs, gaolers, constables, and bailiffs, shall and they are required to give their aid and assistance to the said commissioners in the execution of their office.

By sect. 15 of 31 & 32 Vict. c. 125, the report of an election judge on the trial of an election petition under that Act, that corrupt practices have, or that there is reason to believe that corrupt practices have, extensively prevailed in any county or borough at the election to which the petition relates is, for all the purposes of the Act 15 & 16 Vict.

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c. 57, to have the same effect, and may be dealt with in the same manner as if it were a report of a committee of the House of Commons appointed to try an election petition, and the expenses of any commission of inquiry which may be issued in accordance with the provisions of the said Act, shall be defrayed as if they were expenses incurred in the registration of voters for such county or borough.

Sir *J. B. Karslake*, Q. C., *Sleigh*, Serjt., and *Morgan Howard*, in support of the motion to discharge the prisoner.—The commissioners, by holding a meeting on the 27th Sept., when only two of their body were present, and adjourning to the 19th Oct. extinguished their powers, and all subsequent proceedings were invalid; an adjournment could only be made by all the commissioners acting together. It is the object of the Act to ensure the inquiry being carried out as speedily as possible; and this would be frustrated by holding that the commissioners, having held one meeting, might postpone the holding of the next to whatever time they liked. Their powers are strictly circumscribed by the Act. They must, by sect. 4, "upon their appointment, or within a reasonable time afterwards," go to the place appointed for the inquiry, and hold meetings "at some convenient place within the same or within ten miles thereof." The words giving them power to adjourn—"and shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county, &c., *as unto them may seem expedient*"—show that a judicial discretion is to be exercised as to the time and place to which an adjournment is made; and they are disabled from adjourning the inquiry "for any period exceeding one week, without the consent and approbation of one of Her Majesty's principal Secretartes of State." [COCKBURN, C. J.—The question really is, whether the word "adjourn" in this section means a formal adjournment, or whether we are not, looking at the whole context, to construe it in its popular sense.] It is submitted that it was intended to mean a formal adjournment. Formal notice of holding the first meeting must be given in a newspaper; why is not such a notice required as to subsequent meetings? Because such subsequent meetings can only be held by formal adjournment from previous meetings; the formal adjournment answers the purposes of a public notice, and that formal Act must be done by the entire body. [LUSH, J.—Suppose the word were not "adjourn," but "postpone," would the argument be the same.] The word used is "adjourn," a word of well-known and definite signification, and common in Acts of Parliament. In the case of the *Borough of Lisburn*, Wolf. & Brist. Elect. Cas. 234, the sitting of the committee of the House of Commons was suspended during an adjournment of the House, by the sudden indisposition of one of its members, and the committee in consequence adjourned till the day after the day appointed for the meeting of the House, and having met on that day, they held, after an argument on the subject, that they were not competent to continue the inquiry, as sect. 73 of 11 & 12 Vict. c. 98, enacted that every select committee should "sit from day to day, Sunday, Christmas Day, and Good Friday, only excepted, and shall never adjourn for a longer time than twenty-four hours, unless a Sunday, Christmas Day, or Good Friday intervene, and in such case not for more than twenty-four hours, exclusive of such Sunday, Christmas Day, or Good Friday, without leave first obtained from the House, upon motion and special cause assigned for a longer adjournment." [MELLOR, J.—In that case strong negative words are contained in the same section which gives the committee power to sit. COCKBURN, C. J.—Suppose one of the commissioners had been incapable of acting on a particular day of meeting, could not the other two adjourn the meeting?] The 1st section of the Act provides for such a case, enacting that "in case any of the commissioners so appointed die, resign, or become incapable to act, it shall be lawful for the surviving or continuing commissioners or commissioner to act in such inquiry as if they or he had been solely appointed to be commissioners or a sole commissioner for the purposes of such inquiry, and (as to such sole commissioner) as if this Act had authorised the appointment of a sole commissioner," &c. [COCKBURN, C. J.—That section contemplates the case of a commissioner being rendered permanently incapable; but suppose another case not of that character, a temporary indisposition of one of the commissioners, would an adjournment made in his absence vitiate the whole proceedings?] It is submitted that it would; everything to be done by the commissioners is to be done by the whole of them unless the Act of Parliament makes special exceptions; and special sections, the 8th and 11th, provide for what one commissioner may do; he may sign and seal a summons to a witness, and he may administer an oath or affirmation; but no such power is given to a single commissioner in the case of adjournment. Adjournment is a formal act, and to be decided on by the commissioners in the exercise of a judicial discretion. In the Municipal Corporations Act (5 & 6 Will. 4, c. 76) it was thought necessary to give express power to adjourn quarter sessions in the absence of the recorder and deputy-recorder: (See sect. 106.) In *Reg.* v. *The Coroner of Dover*, 11 L. T. Rep. N. S. 488, where a coroner holding an inquisition adjourned the court to a certain day, but the court was not held on that day, it was held that the proceedings could not be resumed, Shee, J. observing, "The forms of adjournment are requisite to secure the re-attendance of the jurors after an adjournment, at the time and place appointed, and to preserve the continuity of the proceedings from the first meeting of the inquest until its completion by the signing of the inquisition. If the coroner had taken the trouble, as it was his duty to do, of holding the court on the 8th Aug., and had then again adjourned the inquest to a day certain, all would have been right; but not having done so, the final and important proceeding of adopting and signing the inquisition did not take place under the original precept, and was *coram non judice*." Nor can one of the commissioners act as the agent of another for the purpose of adjourning; if otherwise, they might send down any person to give notice of adjournment, without any of their own body being present, whereas the words "as to them may seem expedient" point to an exercise of the discretion of the whole body, with reference to the circumstances of time and place. [COCKBURN, C. J.—So that if any mere accident, or *vis major* should prevent one of the commissioners from being present, and an adjournment takes place without him, the whole thing comes to an end.] Such is the case with regard to quarter sessions, and the same reason exists in the present case as with reference to them. [COCKBURN, C. J.—But the justices at quarter sessions have not power given them, as the commissioners have, to hold "meetings" and to adjourn them "from time to time." In the case of quarter sessions it is but one meeting. We must give the Act of Parliament a reasonable construction, and not be subtle to give it a construction which would render the whole proceedings of the commissioners informal owing to a mere accident.] As to quarter sessions, the law is thus stated in 5 Burn's Justice of the Peace (29th edit.), 947, "the sessions cannot be held without the presence of two

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justices: (1 Bla. Com. 354 n.) And so strict is this law, that if there be not enough justices to hold a sessions, they cannot adjourn it to hold same legally." So Archbold's Quarter Sessions (edit. 1869), p. 38, "If the sessions last more than one day, they must be adjourned to another, and so on until the business is finished; if there be no adjournment, the sessions are at an end, and the justices cannot afterwards legally proceed with the business." "If there are not justices enough to hold a sessions, there are not enough to adjourn it legally, and every act done after such an adjournment is void:" (*R.* v. *Westrington*, 2 Bott. 733). Where an appeal was made to the quarter sessions at Suffolk, held on the 7th April 1746, and the sessions were adjourned to 9th April at Woodbridge, where for want of a sufficient number of justices nothing was done, and another sessions was held on the 11th April, and adjourned to the 14th, when the appeal was allowed, the order of sessions was quashed, "for the words in 2 Hen. 5, c. 4, 'and more often if need be,' were never considered as giving more than one original sessions in a quarter, but only empowering adjournments: (*R.* v. *Polstead*, 2 Strange, 1263") *R.* v. *The Justices of Middlesex*, 5 B. & Ad. 1113, was also referred to, and 6 Car. & Payne, 90, where a special commission was issued to try over again certain prisoners who had been tried at a sessions which had been adjourned from a former sessions by the crier of the court whilst none of the justices were present. Even in the case of directors of a railway company, it has been held that in exercising the powers conferred on them by the Companies Clauses Act 1845, they must act together and as a board; and where the prescribed quorum of directors being three, the secretary affixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third to sign the authority, it was held that the seal of the company was affixed without lawful authority, and that the company were not liable on the bond: (*D'Arcy* v. *The Tamar, &c. Railway Company*, L. Rep. 2 Ex. 158; 14 L. T. Rep. N. S. 626.) The argument is *à fortiori* from this, that no such formal Act as adjournment can be done by any less number of commissioners than three. Is there anything here to show that the adjournment by the two commissioners was with the concurrence of the third commissisioner? [The *Attorney-General* produced the affidavits of Mr. Homersham Cox, and Mr. Secker, the secretary to the commissioners, from which it appeared that it had been arranged with Mr. Barstow, on the 25th Sept., that there should be an adjournment, and a further adjournment on the 27th Sept. The affidavit of the secretary would also show that the consent of the Secretary of State had been obtained to the adjournment of the 19th Oct.] The letter of the secretary of the commisioners to the Secretary of State ought to be produced, in order that the reasons for the adjournment may be seen. [COCKBURN, C. J.—The Act of Parliament only makes it necessary that the consent of the Secretary of State should be given; it says nothing as to the ground on which he may give it. All we have to see is that his consent has been obtained.] The consent of the Secretary of State is to an adjournment from the 27th Sept. to the 19th Oct., and not to an adjournment from the 25th Sept., the day when the last legal meeting of the commissioners was held. The tribunal of the commissioners is a new one, inquisitorial in its nature, with great powers, and, consequently, the authority of the commissioners, when the liberty of the subject is involved, should not in any way be extended beyond the limits expressly assigned by the Act of Parliament. [MELLOR, J.—On the construction contended for, what force can be given to the words "from time to time"?] Words which are merely surplusage are frequently found in Acts of Parliament; and it is one of the first principles of law that where a new power like this is given, it is to be strictly confined within the limits prescribed. [MELLOR, J., observed that there was nothing in the Act to make the proceedings an open court, and the contempt was the contempt of the commissioners, and not of the court.]

The *Attorney-General* (Sir R. P. Collier) and *Archibald*, contra.—The argument on the other side is founded upon a misconception of the functions of the commissioners, and on the false analogy of quarter sessions and other such courts. The commissioners do not constitute a court for the purpose of exercising judicial functions; they are appointed simply for the purpose of instituting inquiries; and they have got power to adjourn their meetings "from time to time." The general power of adjournment which is implied in the power to hold "meetings," and in the words "from time to time," cannot be restricted by any power to adjourn subsequently given; if this is to have any force it must be taken to give an additional power, not to cut down the general power already given. The court of quarter sessions is considered as held on one day, and a formal adjournment is necessary to keep alive its jurisdiction; but the commissioners appointed to inquire into the existence of corrupt practices at elections do not in any way exercise judicial functions. [COCKBURN, C. J.—The inquiry is, however, analogous to a judicial inquiry, seeing it is an inquiry into the propriety of disfranchising a particular borough or county.] But in the main it is an inquisitorial and not a judicial commission. In *Reg.* v. *Leverson*, 20 L. T. Rep. N. S. 485 it was held, with reference to the Central Criminal Court, that it was not necessary for the same judges to be present on each day of the trial of a particular prisoner. If a formal adjournment of the meetings held at Beverley was necessary, a formal adjournment of the meetings which sect. 5 enables the commissioners to hold in London, would also be necessary, as power "to adjourn the same from time to time as they may deem fit" is also given to them by that section; yet it would be absurd to hold that a formal adjournment is requisite where the commissioners meet in London to settle amongst themselves the report which they are to make. The case of the *Borough of Lisburn*, referred to, is quite distinguishable from the present case. [COCKBURN, C. J.—We think you need not discuss that case, as we are of opinion that it does not apply to the present case. If the commissioners in the present case had adjourned for more than a week without the consent of the Secretary of State, there might be some analogy between the two cases.] It is not necessary that all the commissioners should assent to every act done. In *Grindley* v. *Barker*, 1 Bos. & Pul. 229, it was laid down that if a power of a public nature be committed to several, who are met for the purpose of executing it, the act of the majority will bind the minority; and it was held that a condemnation by four out of the six triers of leather appointed under 1 Jac. 1, c. 22 (the whole number being met for the purpose of trying) must be considered as the condemnation of all six. There is nothing in the Act to prevent the commissioners separately instituting inquiries in different places.

Sir *J. B. Karslake*, Q. C. in reply.—The decision in *Reg.* v. *Leverson*, does not apply to the present case, an ancient usage being there prayed in aid of the interpretation of a peculiar Act of Parliament No authority has been adduced to show that ad-

journment is not a material proceeding; and that the functions of the commissioners are not merely inquisitorial, but to a considerable extent judicial, is shown by sect. 6 of 15 & 16 Vict. c. 57, which enacts that they "shall report, with respect to such election, the names of all persons whom *they find to have been guilty* of corrupt practices at such election, and as well of those who have given bribes for the purchase or for the purpose of purchasing the votes of others as of those who have themselves received money or any other valuable consideration for having given, or having refrained from giving, or for the purpose of inducing them to give or to refrain from giving their votes at such election, and also the names of all persons whom they find to have given to others, or to have received themselves, payments by way of head money, or as a reward for giving or refraining from giving their votes at such election."

COCKBURN, C. J.—I am of opinion that the return is a good return, and that the application to discharge the prisoner from custody must be refused. The prisoner has been, according to the return, committed for contempt of the commissioners at a meeting held on the 21st Oct. of this year, and the question which we have to decide is, whether this was a good and valid meeting, or whether the powers of the commissioners were at that time extinguished by what had previously taken place? Now it is admitted that the meeting of the 25th Sept., held by the commissioners, was a valid and legal meeting. It is a fact before us upon the affidavits, that upon the 25th, or before the 25th of Sept., the three commissioners had concurred in an application to the Secretary of State, as required by Act of Parliament, for the purpose of enabling them to adjourn the next meeting, which was to take place on the 27th Sept., until the 19th Oct. They having made that application, the application was acceded to by the Secretary of State, and then, although upon the 27th Sept. two commissioners only were present, it is upon this state of facts clear that the three commissioners concurred in an adjournment from the 27th Sept. until the 19th Oct. It is said that the whole proceeding of the meeting of the 27th Sept., and the meetings which followed were illegal and void. I, for my own part, think it unnecessary to decide the question, though I am very far indeed, as at present advised, from concurring in the suggestion of the Attorney-General, that it is competent to the commissioners under the Act of Parliament to exercise (except in case of incapacity as pointed out by the Act of Parliament) in any other number than the full number of commissioners, the powers vested in them. It is quite unnecessary to decide that question. I may assume for the present purpose that the proceedings at the meeting of the 27th Sept. were void, in consequence of the absence, otherwise than from incapacity, of one of the commissioners. I will assume with Sir John Karslake that the adjournment to the 19th Oct.—inasmuch as if an adjournment is required by the 4th section of the Act the adjournment must be the act of the court, and the court must consist of the full number of the commissioners, and it did not consist of that number of commissioners upon that day—I will assume, therefore, for the purpose of my judgment, that the adjournment was invalid. If it was necessary in my view of this case to decide whether an act of adjournment, in which the three commissioners concurred might not be performed by two, I should most undoubtedly require a good deal more than I have heard to satisfy me that such an act done by two commissioners would not be valid. I do not think it necessary, however, to rest my decision upon that ground; I place my judgment upon the broad proposition that an adjournment was not necessary, and I say so with reference to the particular language and provisions of this Act of Parliament. We are not dealing with a court of justice; we are not dealing with any powers to be exercised upon a specified and particular day, in which case, therefore, an adjournment is necessary if the powers are to be exercised beyond the day upon which they are appointed to be exercised. No doubt as regards courts of justice where the judicial duty is to be performed upon a fixed and given day, although there is a power of prolonging the judicial functions in a judicial inquiry from the particular day to the next day or the day following, that or so long as is necessary for the purposes of the court, that power of adjournment must be exercised accordingly to certain well-known and established forms; and if we were dealing with such a court there could be no doubt if the adjournment had not been made according to those well-established and legal forms, then the judicial functions of the court would be gone. Sir John Karslake produced abundant authority to that effect. If this were the case of a court of justice, and assuming that what was done here by the two commissioners can only be done by three, those authorities would be sufficient to show that the adjournment which took place was not a valid adjournment, and, therefore, that the court had ceased to exist. But in this case we are not bound to consider that, because the tribunal here is of another character, the adjournment here was an adjournment by commissioners not constituting a court of justice, but exercising their functions under the particular terms of an Act of Parliament; and I can only look to the terms of that Act of Parliament to see in what way these functions are to be exercised, and what are the limitations to the powers of exercising those functions. Those commissioners are authorised and empowered to hold meetings from time to time. It is not one meeting on a fixed and particular day which requires an adjournment in order to enable the persons intrusted with the powers to exercise them; but they are to hold meetings from time to time, and I apprehend if nothing further had been said about adjournment, it would be too clear to admit of argument to the contrary that they might have held a meeting to-day, passed over to-morrow, and held a meeting on the third day, and so on without any adjournment at all; and they might have done that which propriety and common justice would have suggested and prescribed, not as a matter of legal obligation but as a matter of moral right. But the difficulty is, there has been introduced after the power of holding meetings from time to time the power of adjournment. In my opinion the introduction of the power of adjournment was merely superfluous and unnecessary, and the power was involved by implication in that of holding meetings from time to time. It seems to have got in in this way, that whereas in the ordinary course such an inquiry is held, and it was the intention of the Legislature that it should be held, at the particular place where the matter arose, there may be exceptional cases, and therefore the provision is introduced giving the commissioners power to hold the inquiry at the particular borough or place which is the subject-matter of inquiry; or they may, if necessary, adjourn it from one place to another within a limited and prescribed distance. But because there has been introduced such a provision it does not, as I have already said, cut down the power of holding meetings for the inquiry from time to time as expediency and convenience may suggest. Then comes the further provision, which seems to meet all the objections which Sir John Karslake suggests as liable to arise from an unlimited power

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of holding meetings without any limitation whatever as to time; and that provision is to this effect: though you may hold meetings from time to time, yet you shall not allow any interval between the one time and the other to elapse beyond a certain specified period, unless you get the sanction of the Secretary of State. You must give notice of your first meeting, of the time and the place at which you are about to hold it, and you may hold meetings from time to time, says the Legislature. We give you credit for thinking that you will not commit such a gross outrage upon all propriety in such a matter as to deceive and mislead the persons interested in the inquiry as to the time and place at which you will hold it, and the only limitation we put in the Act of Parliament is that you shall not allow a greater interval than one week to elapse, except by the authority of the Secretary of State, and that is put in as a protection against undue delay, and keeping the inquiry hanging over the heads of the persons interested in the result beyond a certain reasonable time. That, it seems to me, is the true construction of the Act of Parliament, and, therefore, though it should turn out that Sir John Karslake's argument is well founded when he says that the proceedings of the 27th were irregular, contrary to the powers of the statute, and in consequence void, and that whatever happened on that day must be considered as invalid; yet, as the meeting was held within the time to which the Secretary of State had given his official and formal assent, it was competent to the commissioners (even if they had hesitated upon the assumption that their former adjournment was void and illegal) to start afresh and hold their meeting on the 19th Oct., to which day they had adjourned. If, in consequence of an invalid adjournment or in consequence of a sufficient notice not having been given of the holding of the meetings which followed the 19th Oct., at one of which this contempt was committed, the witness whose presence had been required, had been deceived as to the time or place of holding the meeting, that would have been a strong reason why a valid contempt should not be held to have been committed, and why therefore the commissioners ought not to have proceeded to have committed the witness to prison. But the simple question is, whether the meeting of the 19th Oct., and the meetings which followed it by regular adjournments, and the validity of which therefore depend upon the validity of the meeting of the 19th Oct., were valid. In my opinion they were, and inasmuch as it was at one of those meetings that the contempt was committed by this prisoner, and inasmuch as it was within the competence of the commissioners to commit for contempt so committed, I think that the prisoner before us should be remitted to custody.

MELLOR, J.—I am entirely of the same opinion. I cannot imagine a case more calling for the exercise of the powers of the commissioners; for the conduct of the prisoner appears to have been pursued without any scruple of any kind. He refused to be examined; he did so contumaciously most undoubtedly; and having been guilty of that sort of contumacious conduct, and having refused to give evidence, the commissioners committed him for that contempt. Now, whether or not they had the power of doing that, depends upon the construction of the Act of Parliament, and I think, when we construe an Act which creates a new state of circumstances for special purposes, we cannot try the case by analogy to regular courts of justice, but we must look at the powers committed to the commissioners. Now, if we look at the beginning of the 1st section, it says, that Her Majesty is empowered to appoint persons of certain standing as commissioners for the purpose of making inquiry as to the existence of corrupt practices. That is the object of the appointment, and that is the scope of the inquiry. In the 4th section it says this: "The commissioners appointed under this Act to make inquiry as aforesaid in relation to any county, division of a county, city, borough, university, or place, shall, upon their appointment, or within a reasonable time afterwards, go to such county, division of a county, city, borough, university, or place, and shall from time to time hold meetings." They are to hold meetings in the place indicated by the section, that is to say, at some convenient place within the borough, or within ten miles thereof. Suppose the section had stopped there, it is perfectly clear that the most complete authority is given to the said commissioners to hold meetings from time to time. If it had stopped there, there could be no doubt about it. The words that follow are not intended to restrain their power; they are intended to enlarge it rather than to restrain it. They are quite unnecessary, as it appears to me, but it is quite clear that it was not intended by them to restrain the power previously given to the commissioners to hold meetings from time to time. The section goes on thus: "And shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county division of a county, city, borough, university, or place, or within ten miles thereof, as to them may seem expedient." The word "adjourn" must be construed with reference to the context, and with reference to the object of the inquiry. That which in certain Acts of Parliament might require a technical interpretation, in reference to cases where adjournments are well understood, as, for instance, cases of courts of justice, does not apply to inquiries of this nature. Inquiries of the present kind cannot be carried on without holding meetings from time to time, and I think when the power of holding these meetings is given the word "adjourn" is used only in its popular sense, as when it is said, "We will adjourn the discussion to a future day." Judging from the context, it appears to me that it means merely a postponement, and that it has not the technical meaning sought to be given to it. The only restriction to the power given to the commissioners that I can find is this: "Provided always that such commissioners shall not adjourn the inquiry for any period exceeding one week without the consent and approbation of one of Her Majesty's principal Secretaries of State;" that is to say, the inquiry shall not hang over the borough for an indefinite period, but if the commissioners want to adjourn the inquiry for a longer period than a week, they must get the consent of the Secretary of State. Construing the word "adjourn" in its popular sense, it seems to me that there was no necessity for any formal adjournment of the proceedings. It is immaterial, therefore, to inquire whether on the 27th Sept. the act done by the commissioners was a valid act or not; and I abstain from going into any further definition, or any other expression of opinion as to the powers of the commissioners. I am, however, inclined to think, as at present advised, that when the object of the inquiry is carried into effect by the examination of witnesses, the two commissioners may with propriety have done what they did. The question may arise on some occasion hereafter as to the powers of the commissioners, and whether they have the larger authority contended for by the Attorney-General. There is certainly strong colour given to that contention by the 6th section of the Act. It says, "such commissioners shall, by all such lawful means as to them appear best with a view to a discovery of the truth, inquire into the manner in

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which the election in relation to which such committee as aforesaid may have reported to the House of Commons, &c. has been conducted." This seems to give a considerable discretion to the commissioners as to the mode in which they will conduct the inquiry; but whether it is sufficient to enable them to act as contended for by the Attorney General, I do not express an opinion, because it is unnecessary to do so. I am perfectly satisfied to rest my decision upon the grounds already stated by the Lord Chief Justice, in which I entirely agree. I think, therefore, that the prisoner must be remitted to custody.

LUSH, J.—I am quite of the same opinion. It is clear that the postponement from the 27th Sept. to the 19th Oct. was the joint act of all the commissioners, and that that act was sanctioned by the Secretary of State. I therefore do not think it necessary to express an opinion whether, if that had been the act of two only, the commission would or would not have expired. The question does not arise, and the argument is therefore reduced to one of a purely technical character founded upon the language of the section. Numerous cases have been cited with reference to courts of quarter sessions and other courts of justice, to which the technical meaning of the word "adjourn" has been held to apply. I am of opinion that there is no analogy between the two cases; that the word "adjourn" is not here used in its technical sense, as when it is applied to proceedings of courts of justice, where the authority is to hold a meeting on a given day. But where the law implies an authority to create, as it were, a special extension of that period, when it is needful for the purpose of completing the business for which the meeting is held—in such a case the whole period is regarded as one day, and the meetings or sittings as one meeting. If in such a case the day has been suffered to expire without adjournment, then nothing has been done to keep alive the functions of the body; and its authority necessarily expires. But here there is no need and no reason, as it seems to me, for the application of the technical sense of the word "adjourn" to the words of this statute. The statute says the commissioners shall go to the place in relation to which they are to make inquiry, "and shall from time to time hold meetings for the purposes of such inquiry." If the clause had ended there, how could it be contended that the commission would have expired if at the end of the first day the commissioners had concluded the meeting, and had said nothing about meeting the next day? Their power to sit is created by the Act, and the Act says they are to hold meetings "from time to time." It is not the case of a court such as in the cases referred to, where the authority is kept alive by an act of the court. Here the authority is given by the words of the statute, and it is continued in existence until the inquiry is brought to a termination. If the clause had ended there, I apprehend there could not be any question raised. Then comes the express power to adjourn, and it is upon these words that the argument has turned: "And shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county, division of a county, city, borough, university, or place, or within ten miles thereof, as to them may seem expedient." It must be contended, in order to support the argument raised, that the express power to adjourn as given there must be read as a limitation on the power under the former part of the clause, and making, as it were, the continuance of their powers conditional upon the formality of the adjournment. It seems to me that to hold that would be to defeat the object of the statute; and that to hold that, because the meeting was not adjourned in a formal way, no further proceedings were to be taken, would be something which the Act did not contemplate. The object of the enactment was to give power to the commissioners to move from one place to another, which probably they would not have had under the previous clause. Probably it was meant to express this: You shall not be bound to go on from day to day, but you shall have power to postpone the inquiry over any given number of days, with a proviso—You shall not adjourn over any period exceeding one week, without the consent of the Secretary of State. The plain meaning of the whole appears to me to be this—You shall go on from time to time holding meetings; you shall not be bound to hold them *de die in diem*; you may adjourn as you find it expedient; you may adjourn from one place to another, as you find it expedient; provided you do not postpone the inquiry for more than a week without the consent of the Secretary of State. That appears to me to give sense and meaning to the whole of the enactment, and to leave no room for the technical argument turning upon the meaning of the word "adjourn," which is applied to a different state of things altogether. I agree, therefore, with the rest of the court in thinking that the commissioners had power to issue their warrant, and that the prisoner must be remitted to custody.

HANNEN, J.—The argument of Sir John Karslake amounts, in point of fact, to this: that the commissioners, in the exercise of their functions, are bound to adjourn in the strict technical sense of that word. I think, however, upon consideration of the section, it is clear that the word "adjourn" was used in its generally received sense, as meaning postponing or suspending. I am led to the conclusion that the Act does not merely authorise the commissioners to meet and adjourn, or to hold a meeting to be adjourned from time to time, but to hold meetings. This also appears to me to point to the possibility of one meeting being had on one occasion, and another being had afterwards, but that always subject to the proviso of the 4th section, that the inquiry, whether held at several meetings or at several stages of one meeting, shall not be adjourned for more than a week without the authority of the Secretary of State. But, whatever meaning you put on the word "adjourn," I think an adjournment must be the act of all the commissioners. I do not think it need be done in any formal manner. I think all that is requisite is that the three commissioners shall agree in the doing of it. For instance, they might agree to sit for six consecutive days, and it would not be necessary to adjourn the inquiry at the end of each day. Here the three commissioners have agreed to sit on the 27th Sept. and on the 19th Oct. It seems they did not sit on the 27th Sept. because all were not present on that day, but they did sit on the 19th Oct. as agreed upon between them all; and as that was done with the consent of the Secretary of State, it was rendered as valid as if it had taken place within the period of a week. For these reasons I concur with the rest of the members of the court.

The prisoner was accordingly remitted to custody.

Attorney for the prisoner, *F. W. Blake*, for *A. W. Bainton*, Beverley.

Attorney for the commissioners, *The Solicitor to the Treasury*.

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Saturday, Nov. 13.

KENT (app.) v. ASHLEY (resp.)

Factory Acts—"Factory"—"Manufacturing process."

An open quarry in which slate is obtained and shaped so as to be saleable, is not a "factory" within the meaning of the 30 & 31 *Vict. c.* 103, *s.* 3, *sub-section* 7. *Nor is such work so performed upon the slate a "manufacturing process" within such statute.*

Case stated under the 20 & 21 Vict. c. 43 by three of seven justices for the county of Carnarvon, who adjudicated upon the hearing of the summonses hereafter mentioned, one of such seven justices having died since the adjudication.

The following is a copy of the case as stated on the application of the appellant, the three justices who signed the case having declined to adopt certain alterations therein which the respondent's solicitors were advised should be introduced in order that all the points which were raised at the hearing of the summonses should be fully before the Court of Queen's Bench.

At a petty sessions, holden at the county hall in Carnarvon, in the said county, on the 26th Sept. 1868, two summonses which had been issued by Samuel Saville Kent, sub-inspector of factories (hereinafter called the appellant), against John Newdigate Francis Astley, of the parishes of Llanberis and Llanddeiniolen, in the said county, slate and flag quarry proprietor (hereinafter called the respondent), were heard before us.

The first complaint was against the respondent for that he the said respondent then and there being the occupier of a certain factory within the said parishes and county, the same being a factory within the true intent and meaning of the Factory Acts, in such factory as aforesaid in, on, and within the precincts of which said factory fifty and more persons were employed in a certain manufacturing process, namely, in altering, repairing, ornamenting, finishing, and otherwise adapting slates and flags for sale, did unlawfully employ, keep, and allow to remain in the said factory a young person requiring a surgical certificate of age, named Richard Griffith Davies, without the certificate of age required by the said Acts, whereby the said respondent had forfeited for the said offence a penalty of not less than 2*l.*, nor more than 5*l.*

The second charge against the respondent was, for that he the said respondent, then and there being &c., &c., did unlawfully employ, keep, and allow to remain in the said factory a young person requiring a surgical certificate, named Richard Griffith Davies, without having duly registered the name of the said young person, and the date of his first employment, or re-employment, in the form and according to the directions given in the schedule B to the Act 7 Vict. c. 15, whereby the said respondent had forfeited for the said offence a penalty of not less than 2*l.*, nor more than 5*l.* This slate quarry is a large open place, extending over about 400 acres, in which there are also covered sheds or huts where the splitters work, over which hundreds of men and very young boys are employed in getting large blocks of slate, which blocks or raw material are drawn when got to other parts of the same quarry, and split with hammers and chisels used as wedges in laminæ or slates. These laminæ or slates are then edged square with an iron knife by hand into separate slates or articles, and divided into quantities for sale. They are sent away in thousands from the quarries to the markets. These slates are also sold by retail, either separately or in quantity, by the buyers of them. In these quarries also tombstones, gate posts, chimney pieces, tanks, and slabs of every size are made out of these blocks of slate, and ornamented when need be according to order.

The evidence on the part of the appellant consisted of his own testimony, and that of Dr. Maughan, the examining surgeon, and Owen Parry, the agent of the respondent's quarry, a copy of which is now given.

William Maughan:

I am a surgeon in Carnarvon, appointed by inspector of factories to certify ages of children employed in factories. I have been to Dinmore quarries; last time on July 23. I found a young person named Richard Griffith Davies. I have acted under that appointment. I had not certified Davies's age. I did not see any register there. Davies was employed in the shaping of slates. He was using his hands; he had an instrument which was used for preparing the slates for sale, to cleave and cut the sides. I had a conversation with the boy.

Cross-examined:

I was there July 23. I was in the quarry. He was working in a small shed on an open bank. The quarries embrace a large quantity of land; quarries extend to the mountain by working; there is a levelling there; it is difficult at times to pass from one part of the quarry to the others. My surgery is between seven and eight miles from the quarry. Davies appears to be a healthy boy.

Re-examined:

I found Davies in the shed; other boys in the shed. About 2000 or more working in the quarry; admitted that more than fifty are employed.

Samuel Savile Kent:

I am sub-inspector of factories for this district. I produce my appointment. I have inspected the Dinmore quarry. I have seen young persons there. I was there on the 23rd July. I saw Davies employed in the quarry, in one of the sheds, adapting the slate for sale. The shed was in the precincts of the quarry. Davies had an implement in his hand. He was not registered.

Cross-examined:

There are quarries in my neighbourhood, near Llangollen, where the Factories Acts have been carried out for about six months. About three hundred people there. Surgeon Davies Hughes is the surgeon at Llangollen. In Llangollen quarries flags are planed by machinery in an inclosed workshop, a part like a regular slated roofing.

Owen Parry:

I am agent at Dinmore Quarry. Slates and flags manufactured for sale at the quarry; and the process is, first of all, they are blasted out of the rock; then reduced into smaller blocks by pilloring and cross-cutting implements, being hammers and chisels, worked solely by the hand; then they are cleaned and dressed, all done by implements, a thin chisel and mallet for cross-cutting, a longer chisel and mallet for cleaving, afterwards dressed with a knife by hand. This operation in done in small huts about the quarry; they are ready then for the market. Flags for pavements and cisterns manufactured there. The paper put in my hands is the list of prices of slates of our quarry. We manufacture chimney pieces; chimney pieces finished by hand. The sawing is done by machinery; machinery worked by steam power. We have more than fifty persons employed in the quarry. Davies is fourteen years of age; has been employed in our quarry; he has not been certified by Dr. Maughan, and not registered.

Cross-examined:

Quarry is worked opencast. There is no boundary between quarry and mountains. There is no place that can be called an entrance into the quarry. The people enter the quarry through different scores of places. Seven persons are employed in making the chimney-pieces, thirty-three employed in any building within the quarry; the ages of the thirty-three would be about 20, there might be one 19. One of the places where the slabs are made is near a mile from the quarry, in the parish of Llanddeiniolen. There are fields between that place and the quarry. In summer, time for working in quarry six till six, in winter as long as it is light. We are not particular about boys coming punctually. Many boys come there to assist their fathers; they work for their fathers. There are many boys, sons of widows, at the request of their mothers.

Re-examined:

Where the flags are and the quarry is one trade establishment. The fields are in different occupations, but the same proprietors. A quarrier does now and then dress. The stone is brought in a rough state and taken in for dressing. There are more than fifty persons employed in making roofing slates, thirty-three in flags and chimney-pieces, several hundreds in working roofing slates.

These cases were heard and determined by us, and upon such hearing we decided to dismiss them, because we considered that in the quarries there

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was no possibility of such a thing as a clock being visible or capable of being heard by all persons employed in the quarry, which the Act appears to contemplate, and that scarcely any blame could be applied to quarries. The inside walls of the factories were to be limewashed, but that would be difficult and absurd as to a quarry; then the definition of a factory was not applicable to a quarry, being described as a place wherein machinery was used in manufacturing hemp, flax, and such like materials; and we could not bring ourselves to believe that the Legislature ever contemplated that quarries should be included under the Factory Acts. And whereas the appellant, being dissatisfied with our determination upon the hearing of the said summons, hath applied to us to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid for the opinion of this court.

Now, therefore, we, the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the foregoing case.

The question for the consideration of the court is, Is the quarry and premises before described within the operation of the Factory Acts? If the court should be of opinion that it is, then the case is to be remitted to us.

By the 30 & 31 Vict. c. 103, sect. 3, sub-section 7, it is enacted that for the purposes of the Act the word "Factory" shall mean, "Any premises whether adjoining or separate, in the same occupation, situate in the same city, town, parish, or place, and constituting one trade establishment in, on, or within the precincts of which fifty or more persons are employed in any manufacturing process," and by the same section "Manufacturing process" is to mean, "Any manual labour exercised by way of trade, or for the purposes of gain in, or incidental to, the making any article, or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article."

The previous Factory Acts, with certain exceptions, are incorporated, and by the 7 Vict. c. 15, provisions are enacted for limewashing the inside of the walls, &c., of every factory, the providing of a public clock, open to public view to regulate the time of working at the said factory, and the production of surgical certificates.

The *Solicitor-General* (*Archibald* with him), appeared for the appellant, who was the sub-inspector of factories in the district. The policy of the Legislature lately, has been to bring within the operation of the Factory Acts a variety of establishments not originally contemplated, and so, many of the provisions in the earlier Acts do not apply to establishments subsequently erected. It is not necessary that the premises should be all together, since some portions of them might really be miles away: (*Palmer's Shipbuilding Company* v. *Chaytor*, L. Rep. 4 Q. B. 209), parts of the factory may, indeed, be altogether separated from each other, if they constitute one trading establishment. [HANNEN, J.—But it must be a trade that is carried on. What would you say to a farm, or a coal-pit, or a brick-field?] A brick-field, I should say, would come within the definition of a factory. [COCKBURN, C. J.—There must be fifty persons. I do not find from the case that this number is engaged in any department of the business.] There is nothing in the Act to show that fifty persons are to be working in one place; it is enough if they are within the precincts. In a factory you may have fifty persons engaged in one process, and all the others be engaged in distinct processes. [HANNEN, J.—My difficulty is in seeing that this is a trade establishment. In *Sutton* v. *Wheeley*, 7 East, 442, it was held that a devisee of an estate, part of which was a brick-ground, making bricks there for sale generally with a view to profit, is not a trader within the bankrupt laws, though he purchased the coals and some of the wood used in burning the bricks, and had occupied the same ground as a brickmaker for general sale before the estate came to him by devise, for this is but a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state, and is not a buying of any commodity to sell it again.] That which might be a very good argument, with reference to a statute having one object in view, may not be such with reference to a statute having another object in view. The object of the Factory Acts is to protect people who cannot protect themselves. [MELLOR, J.—They are found, no doubt, to be very beneficial. HANNEN, J.—Yes; and they are in contemplation to be extended to agricultural labourers, but they are not extended to them yet. COCKBURN, C. J.—A man who grows hemp may have a rope walk, and in that case he would carry on a business quite independent of his agricultural pursuits, and that might be a factory.] Suppose a person buys the lump slate and takes it far away, and shapes it into an article of commerce, is not he a manufacturer? And, if so, why is he the less such because he carries on the business upon his own quarry?

Milward, Q. C. (with him *Hance*), for the respondent.—This is really nothing more than a quarry, and the slate is cleansed and shaped to render it saleable. These premises are not of the nature of a factory, and very few of the factory regulations could be applied to them. [COCKBURN, C. J.—No doubt when the original Factory Acts passed, the Legislature did not contemplate so wide an extension; but still by degrees various other classes of premises have been included.] None of the Factory Acts are at all applicable to such a case. The case is certainly not within the mischief of the Factory Acts, the workpeople work in the open air, and are not confined to working in a limited space as in an ordinary factory.

The *Solicitor-General* was heard in reply.

COCKBURN, C. J.— I am of opinion that the decision of the justices ought not to be reversed. I believe that the process in this case was a manufacturing process, and I entirely agree that if the proprietor of the soil uses the produce as I illustrated in the case of a rope walk, that is, if he uses the produce by working it up for the purposes of commerce, otherwise than for the mere purpose of making it saleable, it would be considered as a manufacturing process within the Act. I think, however, that what takes place in the present case is merely a matter incidental to the working of the quarry. I take it, that the object in view is to convert the soil which is quarried into a shape that shall make it saleable, and I cannot think that that is what the Legislature intended by the words "manufacturing process." I look upon the sheds as mere accessories to the quarry, and used for quarry purposes, and I cannot imagine that the Legislature in these enactments had any intention to include them in the terms it has used. The Legislature has not yet declared that open processes are to be within the enactments. The Solicitor-General has admitted that in the first instance, when the legislation was commenced with reference to factories, the Legislature had in view the cases of persons shut up in buildings where the air might be impure, and where young children and girls would be subject to great restrictions. By degrees, no doubt, this legislation has been extended to purposes and to include

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pursuits not originally intended. But the legislature has not yet included open air processes, except in certain exceptional cases, in which special legislation has taken place; and although I agree that we ought not to be too astute in such cases as this, yet we ought not to outstrip the Legislature in applying remedies for suggested defects; and I may say that I cannot think that the ordinary purposes of quarrying were intended to be included in these enactments. When the Solicitor-General suggests that such a case as this is within the evil proper to be remedied, I answer that it may be so, but that certainly it is not within the evils originally contemplated. Here we have the processes carried on in the open air, and consequently the evil of working in a confined atmosphere does not arise, nor does the evil exist of the mingling of the sexes, or the collecting together of a great number of very young persons, and although they may not have the advantage of the provisions for education, this is no more than we find in other pursuits to which the Factory Acts do not apply. Although possibly it might be advantageous to include such a case as this in the Factory Acts, yet it must be for the Legislature to interfere when it thinks the proper time for so doing has arrived. At present, looking to the circumstances of this case, and considering that the work is done in a quarry in the open air, and that really few of the evils contemplated by the Factory Acts arise, we should be misinterpreting the law if we put upon it the construction which is desired by the appellant.

MELLOR, J.—I am of the same opinion. At a certain period of the argument my mind certainly fluctuated upon the subject, but I am now quite satisfied that the Factory Acts do not apply to such a case as this. The question has always been dealt with by the Legislature as one of public policy, and if we extended the Factory Acts so as to include quarries, we should do so upon a mere surmise of our own, and I cannot help thinking that if the Legislature intended that these Acts should apply, it would have mentioned slate quarries and stone quarries in terms. I therefore perfectly concur in the views expressed by my Lord.

HANNEN, J.—I also am of the same opinion. I concur with the Solicitor-General in opinion as to the desirability of powers being conferred to bring such a case as this within some of the regulations of the Factory Acts; but I think that the Legislature by what it has enacted could never have intended that such an employment should be subject to such Acts. I cannot certainly come to the conclusion that it was the intention of the Legislature that such a case should be included within the operation of these Acts. I cannot but think that as so many occupations have been mentioned in various Acts, quarries would have been included in express terms if intended. I agree with my Lord that such premises are not included in the Factory Acts; but if I were sitting alone to decide this case, I should decide it upon somewhat narrower grounds, as not in fact being a process by way of trade. I agree that the question of trading as illustrated by the modern bankrupt laws is not conclusive; but I think when a person is using his own land he cannot be said to be carrying on a trade. In *Wells* v. *Parker*, 1 T. R. 36, Lord Mansfield thus expresses himself, "As to the first, brickmaking for sale, abstractly considered, is in fact carrying on a trade and seeking to live by the profits. Many things are necessary to be bought which can only be paid for by the sale of the bricks. The credit is given to no visible fund, but merely on the speculation of the profits expected to arise from the sale of the bricks. But the objection is that William Berand rented the brick ground, and consequently that the bricks were the produce of his own land. From the authorities that have been cited, and the reason of the thing, I take the true distinction to be this: If a man exercise a manufacture from the produce of his own land, as a necessary or usual mode of reaping or enjoying that produce, and bring it advantageously to market, he shall not be considered as a trader, though he buy the necessary ingredients and materials to fit it for market, as in the case of a farmer who makes cheese on his own land, and who buys runnet and salt; or as in a case mentioned at the bar, where a man makes his own apples into cider, though there be an expense attending the operation. and though many things are to be bought, and some mixture, yet he is no trader, for it is the usual mode of enjoying the land in the cider counties. So in the alum works, as determined, where the operation was proved to be the necessary and constant mode practised by the proprietors of alum works. Or like the case of the coal mines, where raising them out of the pit is as necessary to the enjoyment of the land as threshing corn," &c. There here follows the qualification which is suggested as applicable to the present case: "But where the produce of the land is merely the raw material of a manufacture, and used as such, and not as the mode of enjoying the produce of the land; in short, where the produce of the land is an insignificant article in comparison with the whole expense of the manufacture, there he ought to be considered as a trader." Well, then, applying that case to the present. Where a large landed proprietor who is possessed of a mountain, which he finds convenient to turn into slate; can he by so doing be said to be carrying on a trade? I should say not. The ordinary use of the slate is for roofing purposes, and it must be observed that it is only with reference to that that as many as fifty persons are employed. Upon these grounds I agree that our judgment should be for the respondent.

Judgment for the respondent.

Attorney for the appellant, The *Solicitor to the Treasury.*

Attorneys for the respondent, *Dawes* and *Burgess*, Nuneaton.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Thursday, Nov. 18.

BRISTOWE *v.* BOOTH.

Trustee Act 1850, *ss.* 28, 32, 34—*Trustee Act* 1852, *sect.* 9—*Lord of manor—Copyholds, new trustee of—Admittance—Double fine.*

P., a trustee of copyholds, devised them to S., who was not his customary heir, and died. S. having disclaimed the devise, and P. J., the customary heir of P., being beyond the jurisdiction of the Court of Chancery, the court, upon the petition of the cestuis que trust, made an order appointing A. B. trustee of the said lands in place of P., and vesting in him all the estate of P. in the said lands. The lords of the manor did not consent to the said order:

Held, that the lords of the manor were not entitled, by either common law or statute, to demand a double fine from A. B. on admission.

Special case stated by consent.

This was an action brought to recover the sum of 266*l.* for fines claimed to be payable by the defendant as customary tenant of certain copyholds or customary tenements of the manor of Woodford,

to the plaintiffs, as lords of the said manor of Woodford.

The plaintiffs are lords of the said manor of Woodford in Essex.

On the 12th April 1817 Peter Paterson was, on the surrender of Sir Edwin Boynton Sandys, admitted tenant of the said copyholds or customary tenements of the said manor.

The custom of the said manor as to descent is borough English, and extends to collaterals.

The said Peter Paterson died on the 26th Oct. 1860, and by his will duly executed, dated the 1st April 1857, he gave and devised all his copyhold and customary hereditaments whatsoever and wheresoever, unto his son Peter Paterson, his heirs and assigns, according to the custom of the said manor, whereof the same were held upon the trusts, nevertheless and subject to the powers, provisions, and declarations thereinafter declared and contained of and concerning the same.

The said will was duly proved on the 12th Dec. 1860, in Her Majesty's Court of Probate by Sophia Paterson, Peter Paterson the son, and John White, the executors, power being reserved to Mary Paterson for her also to prove.

On the 24th Oct. 1861, the said Peter Paterson, the son, was, at a court held for the said manor, admitted tenant to the lord of the said manor of the said copyholds or customary tenements, whereof the said Peter Paterson, the father, died so seised, and which were, by his will, so devised to the said Peter Paterson, the son, to have and to hold the same, with the appurtenances, unto the said Peter Paterson, the son, his heirs, and assigns, according to the tenor and effect of the said will, and according to the custom of the said manor, to hold of the lord by the rod, by copy of court roll, at the will of the lord, according to the custom of the said manor, by fealty, and the rents, fines, suits, duties, customs, and services theretofore due, and of right accustomed to be paid, done, and performed for the same.

The custom of the said manor of Woodford does not recognise or take any notice of trusts, and the custom of the manor makes no difference in respect of the fines and fees, whether the tenant is admitted as trustee or in his own beneficial right.

The said Peter Paterson, the son, died on the 20th June, 1864, without issue, having first duly made and published his last will and testament in writing, of which the following is a copy:

This is the last will and testament of me, Peter Paterson, of No. 7, Park-road, Holloway, in the county of Middlesex, gentleman. I give, devise, and bequeath all my real and personal estate and effects, of whatever nature or kind soever, unto my dear wife, Sarah Paterson, her heirs, executors, administrators, and assigns, according to the respective nature and qualities thereof, for his and their own use and benefit absolutely; and I appoint my said wife Sarah Paterson sole executrix of this my last will, hereby revoking all wills by me at any time heretofore made, and do declare this alone to be my last will and testament. In witness whereof I, the said testator, Peter Paterson, have hereunto set my hand, this 3rd March, 1862.

The will of Peter Paterson, the son, was proved on the 14th July 1864, in the principal registry of Her Majesty's Court of Probate, by Sarah Paterson, the widow and sole executrix, and the said Sarah Paterson as such devisee as aforesaid was, according to the custom of the said manor, the proper person to be admitted tenant on the court rolls of the said manor of the said copyholds or customary tenements and hereditaments of the said manor whereof the said Peter Paterson the son died seised or possessed as trustee under the will of his father, Peter Paterson the elder.

The said Sarah Paterson was never admitted tenant, by the lord or lords of the said manor, of the said copyhold or customary hereditaments hereinbefore mentioned, or any of them, and on the 10th May 1865 she duly made and signed a deed of disclaimer, a copy of which was as follows: [The case here set out the deed of disclaimer.]

At the date and execution of the said deed of disclaimer, the defendant admits that one Peter James Paterson was the nephew and customary heir-at-law of the said Peter Paterson the younger, according to the custom of the said manor of Woodford, and that the said Peter James Paterson was then, and is now, living out of the jurisdiction of Her Majesty's courts of law and equity, and the said Sarah Paterson has not at any time made any claim for freebench in respect of the said copyhold or customary hereditaments.

The plaintiffs contend that on the execution of the said deed of disclaimer by the said Sarah Paterson, the copyhold or customary hereditaments of which the said Peter Paterson the younger died seised or possessed as devisee and trustee under the will of the said Peter Paterson the elder, descended to and became vested in the said Peter James Paterson as the customary heir-at-law of the said Peter Paterson the younger, and on such descent the plaintiffs, as lords of the manor of Woodford, claim to be entitled to a fine.

On the 30th May 1865 the said Sarah Paterson, in conjunction with William Paterson and his infant children Jane Sophia Paterson, William Wadbrook Paterson, Francis Mary Paterson, Alfred White Paterson, and Walter Saunders Paterson, by him as their father and next friend, and Sophia Paterson and John White (all the parties except the said Sarah Paterson being plaintiffs and defendants in a suit then pending in Her Majesty's High Court of Chancery), presented their petition to the Right Honourable the Master of the Rolls, which, after stating the will and codicil of the said Peter Paterson the elder, the trusts thereby declared of his real and copyhold, or customary hereditaments, his death, proof of his will and codicils, the admission of the said Peter Paterson the younger to the copyhold or customary hereditaments, a suit instituted in 1860 in the High Court of Chancery for administration of the estate of the said Peter Paterson the elder, the proceedings which had taken place in the suit, the will of the said Peter Paterson the younger, his death, proof of his will, and the deed of disclaimer of the said Sarah Paterson, then stated that it had become necessary to appoint a new trustee of the said copyhold or customary hereditaments, in substitution for the said Peter Paterson the younger; and it was impossible so to do without the assistance of the Court of Chancery, and that Abraham Booth (the defendant in this action) was a fit and proper person to be appointed trustee of the said copyhold or customary hereditaments, and was willing to accept the office of such trustee. The petition then prayed (amongst other things), that the defendant, Abraham Booth, might be appointed such trustee, and that all the estate and interest in the said copyhold or customary hereditaments, which would have vested in the said Sarah Paterson, if she had accepted the devise of the said hereditaments in the said will of the said Peter Paterson the younger contained, might vest in the said Abraham Booth, upon the trusts by the will of the said Peter Paterson the elder declared concerning the same, or such of them as were then subsisting or capable of taking effect.

On the 3rd June 1865 the said petition was heard before the Right Hon. the Master of the Rolls, and his Honour, by an order of that date, did (amongst other things) order that the said Abraham Booth, the defendant in this action, be appointed a trustee of the will of the said Peter Paterson the elder, so far as it related to the copyhold or customary hereditaments devised thereby in substitution for the said Peter Paterson the younger, deceased; and his

Honour did also order that all the estate and interest in the said copyhold or customary hereditaments devised by the will of the said Peter Paterson the elder, which would have vested in the said Sarah Paterson if she had accepted the devise of the said hereditaments in the said will of the said Peterson the younger contained, should vest in the said Abraham Booth. Upon the trusts by the will of the said Peter Paterson the elder declared concerning the same or such of them as were then subsisting or capable of taking effect.

The lords and stewards of the said manor of Woodford were not, nor were nor was any or either of them, parties or party to the said petition of the said Sarah Paterson, nor to the other proceedings on which the said order of the Right Hon. the Master of the Rolls of the 3rd June 1865 was founded, nor had the said lords and stewards, or any or either of them, any opportunity whatever of being heard, either by counsel or otherwise, against the making of the said order; and the said lords and stewards, or any or either of them, did not consent to the making of the said order of the 3rd June 1865.

On the 23rd Jan. 1866, the plaintiffs, as lords of the manor of Woodford, before John Coverdale, their steward, held a general court baron and customary court of the said manor, at which the defendant appeared, and by virtue of the said order of the said 3rd June 1865 claimed to be admitted as a tenant of the manor, in respect of the copyhold and customary hereditaments devised by the will of the said Peter Paterson the elder, under the said order, and offered to pay one fine on being admitted; and the said John Coverdale, as such steward, offered to admit him as such tenant, on payment of two fines, but he refused to pay two fines on the admission, and the said steward refused to admit him, and, subsequently, at the said court, a proclamation was made according to the custom of the said manor, for the heir of the said Peter Paterson the younger to come into court and take admittance to the said copyhold or customary hereditaments, otherwise the same would be seized into the hands of the lords of the manor for want of a tenant, and the said Peter James Paterson, the nephew and customary heir-at-law of the said Peter Paterson the younger, did not appear and apply to be admitted, and has never since appeared, and has not, in fact, been admitted a tenant of the said manor according to the custom thereof, in respect of the copyhold or customary hereditaments devised by the will of the said Peter Paterson the elder.

On the 16th April 1866 the plaintiffs, as lords of the manor of Woodford, presented their petition in the before-mentioned suit in the High Court of Chancery, to the Right Hon. the Master of the Rolls, and after the statements and allegations therein contained, which are unnecessary to be stated in this case, prayed his Honour (amongst other things) that the before-stated order, dated the 3rd June 1865, might be discharged or reversed, and that, if necessary, the petition upon which such order was made might be re-heard before his Honour.

On the 24th April 1866, the said petition came on to be heard before his Honour the Master of the Rolls, and on such hearing his Honour dismissed the petition with costs to be paid by the petitioners.

On the 30th April 1866, the plaintiffs as lords of the manor of Woodford presented their petition of appeal to the Right Honourable the Lord High Chancellor of Great Britain, and after the statements and allegations therein contained, which are unnecessary to be set out in this case, prayed his Lordship (amongst other things) that the before mentioned petition of Sarah Paterson, and the plaintiffs and defendants in the suit in the High Court of Chancery might be reheard before his Lordship, and that the before stated orders of his Honour the Master of the Rolls of the 3rd June 1865, and the 24th April 1866, might be discharged or varied, and that an order might be made as prayed by the petition presented by the petitioners (the plaintiffs) as aforesaid, or that his Lordship would be pleased to make such further or other order on the premises as to his Lordship should seem fit.

On the 30th May 1866 the last-mentioned petition of the plaintiffs came on to be heard before the Lords Justices of the Court of Appeal in Chancery, and on that day the Lords Justices did (amongst other things) which are unnecessary to be set out in this case, order that the orders of the Right Hon. the Master of the Rolls, dated respectively the 3rd June 1865, and the 24th April 1866, so far as they related to the copyhold premises held of the manor of Woodford, should be varied, and should be as follows, that is to say:

Their Lordships do order that the said Abraham Booth be appointed a trustee of the will of Peter Paterson the elder in substitution for Peter Paterson, the younger, deceased. And the petitioners, as the lords of the manor of Woodford, by their counsel consenting, and the said Abraham Booth, by his undertaking to admit in any action at law, to be brought by the said lords for their fine or fines that he has been admitted to the copyhold and customary hereditaments hereinafter mentioned, it is ordered that without prejudice to any question what fine or fines is or are payable to the lords of the said manor in respect of the said hereditaments, the copyhold or customary hereditaments devised by the will of the said Peter Paterson the elder, and held at the said manor of Woodford, do vest in the said Abraham Booth for the estate of the said Peter Paterson the younger therein, to be held by the said Abraham Booth upon the existing trusts of the said will. And it is ordered that the costs of the petition presented to the Master of the Rolls on the 16th April 1866, and of the appeal petition and of the *mandamus* in the petition mentioned, and any other costs be reserved until after the action by the petitioners for the said fine or fines shall have been disposed of.

The defendant, for the purposes of this case, admits that he was duly admitted tenant of the said copyhold or customary tenement to the plaintiffs, as lords of the said manor, and that the plaintiffs are entitled to one fine, payable by the defendant, for such his admission, and that the said hereditaments are worth about 75*l.* a year. And the plaintiffs, for the purposes of this case, admit that the defendant was willing, and offered to pay, one fine for admission, and that the plaintiffs refused to accept such one fine, and claimed to have two fines paid upon such admission.

By the custom of the manor a fine is payable upon the descent of the copyhold to the customary heir; and there is evidence that if the customary heir has not been admitted, the person who next claims to be admitted has never been admitted except upon payment of two fines and sets of fees, which payment has been invariably enforced in such cases; but in all cases of persons claiming to be admitted after a descent to the customary heir, where the customary heir has not been admitted, the person so claiming to be admitted has claimed through the heir.

The defendant contends that the custom of payment of two fines and sets of fees is not applicable to him under the circumstances stated in this case.

No admission fees or fines have been paid in respect of the said hereditaments to the lords and stewards of the said manor, or either of them, since the death of Peter Paterson, the younger; and the question between the parties is, whether two fines and sets of fees are payable, or only one.

The question for the opinion of the court is: Are the plaintiffs, as lords of the said manor, on the admittance of the said Abraham Booth, as tenant of the said copyhold and customary hereditaments, under the facts before mentioned, entitled to one fine or two fines, or to a double fine? The plaintiff's costs of the action and the defendant's costs of defence are left to the decision of the court, if

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they so please to make such order, or orders as to the same, as they may consider fit.

Archibald (*Cowie* with him) for the plaintiffs.—The present question turns on the construction we put upon the Trustee Acts of 1850 and 1852 (13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55), and the view to be taken of the order of the Lords Justices set out in the case. The 32nd section of the Act of 1850 shows that the effect of the order was to substitute the defendant for the person who at the date of the order was the trustee of these lands. That person was Peter James Paterson, in whom, after the disclaimer by the widow of Peter Paterson the younger, the legal estate was vested, and who clearly was, in contemplation of law, the trustee of these lands. Here the 28th section of the Act of 1850 comes into operation, the effect of which is to carefully guard the rights of lords of manors, where a substitution of trustees is made in the case of copyhold lands. [BOVILL, C. J.—The latter part of the section seems to contemplate only a case where the court directs another person to execute "such acts or instruments"] The section applies to an order appointing a trustee. Now Peter James Paterson was never admitted on the rolls of this manor, and as the defendant was appointed trustee in substitution of him, and must deduce his title through him, he must pay a fine both for Peter James Paterson and himself on his admission. The Legislature was careful in framing this 28th section, that, though they might dispense with certain formal acts, they should not curtail the rights of the lords of manors to their payments. On the disclaimer by the widow, the state of things was just as though Peter Paterson the younger had died intestate, and the lords of the manor were then entitled to require the customary heir to come in and be admitted: (Shelford on Copyholds, 167.) The heir might alienate without admission, but in that case the alienee would have to pay two fines. Without the aid of the statute, nobody but Peter James Paterson could possibly get on the roll of this manor as tenant of these lands without paying two fines, and the statute, so far from infringing or curtailing the rights of the lords, carefully guards them. Before 1815, a copyholder wishing to devise his lands, had to make a surrender of them to the uses of his will. It was the object of 55 Geo. 3, c. 192, to render this formality unnecessary, but the statute carefully guarded the right of the lord to a double fine in such a case. Then, again, let us take the case of the first Bankruptcy Act (13 Eliz. c. 7). In the case of *Drury* v. *Man*, 1 Atk. 94, Lord Hardwicke shows that, when a bankrupt's estate is by force of the Act vested in his assignees, if these assignees subsequently sell, the vendee has to pay two fines, one for the admission of the assignees and one for his own. Lord Hardwicke accordingly recommends that, to obviate this difficulty, "commissioners of bankrupts shall for the future except copyholds out of the deed of assignment of the bankrupt's estate, because it would save the expense of two fines." Lord Hardwicke also recommended that, in future legislation, it would be very proper to remedy this inconvenience with respect to copyholds. This recommendation was followed in the Bankruptcy Act of 1825 (6 Geo. 4, c. 16), by sect. 64 of which the commissioners are to convey all lands except copyhold and customary lands to the assignees. As to the copyhold lands of the bankrupt, it is provided (sect. 68) that the commissioners shall have power to sell these, and care is taken that they shall not vest in the assignees. By this means this difficulty as to a double fine, which existed in Lord Hardwicke's time, is avoided. Sect. 114 of the Bankruptcy Act 1861 (24 & 25 Vict., c. 134) provides against any intermediate vesting of the copyhold lands. As to two fines being payable on a double devolution, he cited

Lord Londesborough v. *Foster*, 3 B. & S. 805;
Morse v. *Faulkner*, 1 Anstr. Ex. R. 11.

Joshua Williams Q.C. (*J. O. Griffits* with him) for the defendant.—The order of the Lords Justices vested all the estate of the late P. Paterson, Jun., in these lands in the defendant. The defendant has nothing to do with the heir-at-law. The order has just the same effect as if Peter Paterson the younger had surrendered these lands to the defendant. "Should the surrenderor die in the interim, *i.e.*, between the surrender and admission . . . yet . . . though the heir would take by descent and his widow be entitled to dower, on the admission of the surrenderee, such estate would be defeated, and of consequence the descent and title to dower would be defeated also:" (1 Watkins on Copyhold, p. 128, edit. by Coventry.) The Act of 1850 gave the Court of Chancery power to make an order, which was to have the same effect as if the last trustee had in his lifetime made surrender. The court has power to make an order (sect. 9 of Act of 1852), though there be no existing trustee. There was thus only one devolution of the property from Peter Paterson the younger to the defendant. Circumstances might have arisen, under which the customary heir might have been regarded as the trustee; but in such a case the order would have recited such fact, and would have vested in A. Booth the estate of Peter James Paterson, and not that of Peter Paterson the younger. Our title relates back to the death of Peter Paterson, Jun.: (*Holdfast* on *dem.of Woollams* v. *Clapham*, 1 T. R. 600.) The order was made under sect. 32 of the Act of 1850. The 9th sect. of the Act of 1852 gives the court power to make such an order, whether there be at the time any existing trustee or not. At the date of the order, Peter James Paterson was not such a trustee as was contemplated by the Act. The defendant relies on the 34th section of the Act of 1850. The plaintiff, in order to succeed, must contend that the order was wrong, and that it ought to have said that the defendant should take all the estate of Peter James Paterson, instead of that of Peter Paterson the younger. (He read the judgment of Lord Romilly, M.R., in *Paterson* v. *Paterson*, L. Rep. 2 Eq. 35, and 14 L. T. Rep. N.S. 320)

Archibald in reply.

BOVILL, C. J.—The right of the lord in this case must depend either on the custom of the manor, or on statute. If it rests on custom, it is a custom contrary to the ordinary provisions of the common law. But the facts do not bring this case within the custom. According to strict custom, the lord has no right to two fines on the admission of a tenant; but he has a right to one fine. In some cases, where the claimant has to make out his title through some person who has not been admitted, the rights of the lord are preserved; but two admissions are dispensed with. But here the lord cannot claim the second fine by custom. The defendant does not deduce his title from Peter James Paterson, as his name does not appear in the order of the Court of Chancery. It is on this order and the provisions of the Act of Parliament, that the defendant rests his claim. This order substitutes the defendant as trustee in the place of Peter Paterson the younger, the deceased trustee of the last person who had been admitted on the rolls. The power of the Court of Chancery to appoint trustees is extensive. It is conferred on the court by the two Trustee Acts of 1850 and 1852 (13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55). The 9th section of the last-mentioned Act provides that, where it may appear expedient the court shall have power to make an order, ap-

pointing a trustee, whether there be an existing trustee at the time or not. The second Act is incorporated with the first, and the two together are to be considered as one act. The effect of the order is described in the 34th section of the first Act. (The learned judge read the section). Taking these two sections (the 9th of the Act of 1850 and the 34th of the Act of 1852) together, the effect of the order, which was made under them, was to vest the whole estate of the late Peter Paterson the younger, in the present defendant. There has been a great deal of argument in the course of this case as to the effect of these sections. But they plainly apply to those various cases in which inconveniences may have arisen. The 5th section of the Act of 1852 provides for the case of a lunatic trustee; the 9th, for that of a trustee out of the jurisdiction of the court; the 16th, for the case of a trustee dying intestate without an heir. So far as the conveyance of copyholds is concerned, it is plain that, without any admission at all by the manor court, the property would vest in the trustee appointed by the court by force of the order. A difficulty, however, arises in consequence of the 28th section of the Act of 1850, as to whether in such a case it is not necessary for the trustee appointed to be admitted by the lord of the manor. The section seems to imply that, where the lord does not consent to the appointment by the court of the trustee, his admission on the rolls becomes necessary. The latter end of the section, however, which relates to this question, says nothing about fees, but leaves that to the operation of the ordinary law. This is the utmost extent to which the lord can be shown to be entitled to the fees. But when the person appointed by the court is admitted, the lord is entitled by the ordinary custom to a fine. The tenant in such a case pays one fine; but I cannot see that the lord has any right to demand a second. Mr Archibald has referred us to the provision at the latter end of the 28th section of the Act of 1850, which provides that every lord of the manor shall, "subject to the customs of the manor and the usual payments," be bound and compellable to make admittances to such lands. But these words clearly apply to the case where the court makes an order directing another person to convey. This is, however, not the case here, so that that part of the section has no application. But even under that provision, I should not say that two fines would be payable, though I express no decided opinion on this point. Mr Archibald asks us to imply that two fines are payable, in a case where the order does not direct another person to convey, but where a vesting order has been made. This estate vests in the defendant by force of the statute in precisely the same way as it would on a conveyance by the person in whose place he was appointed, viz, Peter Paterson the younger. The case is not brought within the custom of the manor, and so no double fine becomes payable. There is nothing in the Acts expressly reserving the lord's fine, except the latter part of the section I have quoted; that part, however, does not apply here. There are various Acts of Parliament which dispense with formal proceedings in the manor court, as for instance, that which renders it unnecessary for a tenant to surrender to the uses of his will. Those Acts make express reservation of the lord's fine. Then again, as to the effect of the various Bankruptcy Acts which Mr Archibald has cited, it is quite true that, by the operation of the first Bankruptcy Act, a double fine became payable; but Lord Hardwicke, in the case referred to, pointed out a mode by which this difficulty might be avoided, and this mode has been substantially followed in the later Acts. I may mention also a common practice among conveyancers to give to trustees a bare power to sell in the case of copyholds, without giving them any estate in them. In such cases only one fine is payable. So in the same way in the later Bankruptcy Acts the power of disposition of his copyholds is taken from the bankrupt and given to the commissioners or assignees, as the case may be, and by this means only one fine becomes payable. In these cases a statutory transfer is made; but only one fine is payable, and that by the alienee, the commissioners or assignees paying none. But, independently of this general view of the Act, I am of opinion that the order substantially disposes of the question, although the parties are not bound by its terms. In my judgment, the Lords Justices were quite right as to the shape given by them to the order. The only party on the rolls as trustee was the late Peter Paterson the younger. Peter James Paterson, though undoubtedly the customary heir of this Peter Paterson, was never on the rolls of the manor, and was never tenant of these lands. Peter Paterson the younger, having been admitted, the Court of Chancery was quite right in saying that they appointed the defendant in substitution of Peter Paterson, the younger, and in placing him in precisely the same position, as if Peter Paterson had surrendered the lands to him in his lifetime, and died before the surrender was complete. In such a case, it is conceded that only one fine would have been payable. The principle that would have applied to such a case must apply here. On these grounds, I am of opinion that only one fine was payable by the defendant, and consequently that our judgment must be for the defendant.

WILLES, J.—I am of the same opinion. Peter Paterson the younger, in whom the estate was last vested, died. The effect of his will was, that his widow might have claimed to be admitted as tenant of these copyhold lands, if she had chosen, to hold them as trustee. She, however, disclaimed this devise, and her disclaimer, though she took other property under the will, was effectual. Then, I take it, that, on her disclaimer, Peter James Paterson, in the absence of any interference on the part of the Court of Chancery, would have had a right to be admitted on the roll of this manor, as customary heir to Peter Paterson, Jun.; and he would in this case have had to pay a fine to the lord. I must observe that I further take it, that Peter James Paterson never interfered in the trusts, and never took them upon him, and that, except for the circumstance that he was heir to the person who last had them, he was never properly trustee. He certainly, however, had the legal estate, and that stamped with the trust. It is true that in one sense he may be considered to have been a trustee, but, as he never interfered in the matter, he never was, pratically speaking, a trustee at all. It was no doubt, then, expedient, under the circumstances, that the Court of Chancery should exercise its power of appointing a trustee, and also that the trustee so appointed should be in the place of Peter James Paterson. There were then in this case none of the circumstances that arose in the case of in *Re Blanchard*, 4 L. T. Rep. N. S. 426; 30 L J. 516, Ch., where the rights of existing trustees had to be considered. I cannot doubt then, that, under the circumstances, the Lords Justices had power, under the 32nd section of the Trustees Act 1850, to make the order that they made, and, as Mr Joshua Williams has pointed out, that order was founded on the 32nd section of the Act of 1850 and the 9th section of the Act of 1852. I do not criticise the terms of this order, but I take it as plain that the Lords Justices had power to make this order vesting these lands in the defendant, and vesting them in him as in continuance of the estate of Peter Paterson, Jun. It is, however, not necessary to go into this question, so I say nothing further

on the point. But the result of the order was to substitute a new trustee for the existing trustee. You may either take it, according to my notion, that the order was founded on the 9th section of the Act of 1852 (which provides for the case where there is no trustee), so that it created a continuous chain from Peter Paterson the younger to Mr Booth, or that it was founded on the 32nd section of the Act of 1850, in which case it may be said that Mr Booth was appointed in substitution of the person, who might technically be called, but never in reality was, the trustee. If you take the order in the former sense, then Mr Booth was substituted for the devisee and put in her place. The Act deals with two cases—the one, in which the trustee is lunatic or otherwise impracticable; the other, in which no trustee at all exists. Now supposing a case of the latter kind to arise where copyhold lands are concerned. There being no heir and no devisee of the last trustee, the court steps in and appoints a trustee. It is absurd to suppose that, in such a case, more than one fine would be payable. With respect to the section affecting copyhold lands (28th section of the Act of 1850), it does not appear to me to advance the plaintiff's case. I am quite aware that questions have arisen as to the construction of this section, amongst others the question whether the lord is before the court when an order to appoint new trustees of copyhold property is made. It is, however, quite sufficient to say that the order is not made in this case with the consent of the lord. The Act says that when the lord consents to the appointment of the new trustee no admission shall be necessary. The present case, however, is excluded from that provision. The subsequent part of the 28th section reserves the right of the lord to the usual payments, according to the custom of the manor. What then was the custom of this manor? That the heir should pay a fine on admission; but if the heir, without being admitted himself, surrendered to another, the surrenderee would have to pay the heir's fine, and his own too, before admission. But that custom does not extend to the case of a person put in the place of a devisee under the statute. The effect of the statute is, not to create a transfer from the heir or devisee, but to put the person designated in the same position as the heir or devisee. On these grounds, I am of opinion that only one fine was payable, and consequently that our judgment must be for the defendant.

KEATING, J.—I am of the same opinion. It seems to me that there can be no doubt that the Lords Justices had power under the statute to make the order they made. That order, if they had jurisdiction to make it, directs in express terms the substitution of the defendant for Peter Paterson the younger. The counsel for the plaintiffs contend that, upon a proper construction of these Acts, Mr. Booth ought not to be said to take from Peter Paterson the younger, but from Peter James Paterson, his customary heir. This Peter James Paterson was certainly the customary heir, but he never interfered in the trusts, and never, properly speaking, became a trustee. Why then should the plaintiffs claim a second fine? Mr. Archibald says, because the defendant must deduce his title from Peter James Paterson. But I do not think that it is the intention of these Acts that we should so regard him. The Acts give to the Court of Chancery a power of substituting one trustee for another, and the order made by the Lords Justices gives the defendant the same right to be admitted as if the last tenant, viz., Peter Paterson, Jun., had surrendered to him. I am unable to see then that the plaintiffs have made out their title to a second or double fine, and therefore give my judgment for the defendant.

BRETT, J.—I am of the same opinion. Mr Archibald is quite right in admitting that the Lords Justices had the power under the 32nd section of the Trustee Act 1850, and the 9th section of the Act of 1852, to make the order that they made. If so, the order expressly says that A. Booth is to "be appointed a trustee of the will of Peter Paterson the elder, in substitution for Peter Paterson the younger, deceased. . . . And it is ordered that . . . the copyhold or customary hereditaments devised by the will of the said Peter Paterson the elder, and held of the said manor of Woodford, do vest in the said Abraham Booth for the estate of the said Peter Paterson the younger therein." That being so, the claim of the lord to two fines, or a double fine on the admission of the defendant, is not brought within the custom of this manor. The defendant does not derive his title from the customary heir, but from the Court of Chancery. To be effectual at all the arguments used on behalf of the plaintiffs must go a deal further, and it must be contended that custom gives a different effect to the order to that conveyed by the ordinary terms. But there is no ground for our giving to the terms of this order any but the ordinary signification. On these grounds, I am of opinion that our judgment should be for the defendant.

Judgment for the defendant.

Attorneys for the plaintiffs, *Coverdale* and *Co.*

Attorney for the defendant, *Benjamin Bodman.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Friday, April 30.

STREET v. MORGAN.

Stock Exchange—Sale of shares—Purchase by country broker of London broker for an undiscovered principal—Failure of principal—Authority to London broker to "do what he thinks best"—Duty of London broker thereupon—Name of country broker given by London broker as the ultimate purchaser—Liability of country broker thereunder—Action against for calls.

The plaintiff, through his London broker, sold, on the 11th May 1866, eleven Overend and Gurney shares for the account day, on 15th May, to P. and Co., brokers on the Stock Exchange, who had previously, on the 27th April, been instructed by M., the defendant, a country broker, to purchase for him 1000 O. and G. shares for the same account day, of which 1000 shares the eleven shares in question formed part. O. and G. having stopped payment on the 10th May, M., the defendant, who had purchased the above 1000 shares for S., a customer, finding that S. was insolvent, and could and would pay nothing, wrote as follows to his brokers, P. and Co., "Our client cannot meet his engagements as regards the 1000 Overends, and we, unfortunately, cannot meet them; therefore we authorise you to do whatever you think best;" and at a personal interview on the same day M. prohibited P. and Co. from using or in any way recognising the name of S. in the transaction. On the name day, the 14th May, P. and Co. accordingly gave to the plaintiff's broker the name of the defendant M. as the ultimate purchaser and transferee, which was accepted, and the transfer to him was duly prepared and executed. In an action by the plaintiff against the defendant upon a contract of indemnity against future calls on the said eleven shares, it was

Held, by the Court of Exchequer (Kelly, C.B., and Martin, Bramwell, and Cleasby, BB.), that the defendant's letter to P. and Co. gave them a general and unlimited authority to exercise their discretion in the

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matter, and that inasmuch as, if any name were given at all, it must be either their own name or that of M., they were warranted by the terms of their authority in passing the name of the defendant.

And per Kelly, C. B.—Within the authority to purchase the 1000 *shares given by the defendant to P. and Co., on the 27th April, was included and implied an authority, whenever the name day should arrive, to give the name of the defendant as the ultimate purchaser, unless upon or before that day the defendant should have furnished them with another name which he had required them to give, a point which I think is settled by the principle of the decisions in* Grissell *v.* Bristowe, *in the Exchequer Chamber, and* Coles *v.* Bristowe *in the Court of Chancery.*

This was an action which was brought by the plaintiff, as the seller of eleven shares in the Overend and Gurney Company (Limited), against the defendant, as the transferee or ultimate purchaser of the said shares, on an agreement to indemnify the plaintiff against calls made upon the shares subsequently to the said sale. The action was tried before Kelly, C. B., at Guildhall, in February last, when the following appeared to be the facts of the case:—

The plaintiff was a gentleman who, on the 11th May 1866, subsequently to the failure and stoppage of the Overend and Gurney Company on the previous day, the 10th May, but before the alarm and consternation thereby created had become general, gave instructions to his brokers in London to sell eleven shares belonging to him in the said company for the next account day, the 15th May. On the same 11th May his brokers accordingly sold them to a jobber, who re-sold them on the same day to Messrs. Pater and Co., stockbrokers, of the London Stock Exchange, who purchased them for the defendant, a stockbroker at Norwich. The sold note, bearing date the 11th May 1866, was as follows: "Sold, on account, of — Street, Esq., eleven Overend and Gurney shares, 12 discount, for the 15th inst."

It appeared that the defendant Morgan had, as early as the 27th of the previous month of April, instructed his London brokers, Pater and Co., to purchase 1000 Overend and Gurney shares for the account day of the 15th May, which they accordingly did, the eleven shares, the subject of the present action, being a part of such 1000 shares so purchased by Pater and Co. for Morgan. The purchase was made by Morgan for a customer of the name of Smith, but that fact was not known to Pater and Co. at the time of the purchase, though it was known to them before the name day on the 14th May.

The stoppage of Overend and Gurney occurring on the 10th, became known to the public on the 11th May, and on that day the defendant, finding that his employer Smith, who at the time he gave the order was believed to be a rich man, was totally unable, and, in fact, declined to pay for the shares, or any part of them, sent a telegram to his London brokers, Pater and Co., informing them thereof. Thereupon a Mr. Brown, Pater and Co.'s managing clerk, went to Norwich on the 12th May, and had an interview with the defendant, who delivered to him a letter for his principals, Pater and Co., which letter was delivered by Brown to Pater and Co. on his return to town on the 14th, and was in the following terms:

Messrs. Pater and Co.

Dear Sirs,—Our client cannot meet his engagements as regards the 1000 shares, and we unfortunately cannot meet them, *therefore we authorise you to do whatever you think best.*

Pater and Co. were also then informed by Brown of the result of his interview with Morgan, the defendant, namely, that Morgan had bought the shares for Smith, but that he (Morgan) could not allow Pater and Co. to recognise Smith, or in any way use his name as that of the purchaser. There was some slight conflict in the evidence as to this part of the transaction, the witness Brown, on the part of the plaintiff, stating positively that the above was what occurred, whilst the defendant Morgan, who was called as a witness for himself, though he did not deny having made that statement to Brown, said he had no recollection of having told Brown that the name of Smith was not to be used, but he added that he was at the time "under much mental pressure and anxiety."

In consequence of the letter and message from the defendant, Pater and Co., on the 14th May, the name day, when it was absolutely necessary for them to give in the name of the ultimate purchaser, passed Morgan's name as the buyer to the plaintiff's (the seller's) brokers, by whom the transfer to the defendant was accordingly made out; and being executed, the defendant's brokers (Pater and Co.) took it and paid for the shares. The defence at the trial was that Pater and Co. had no authority to pass Morgan's name as the transferee or ultimate buyer, he having bought them as a broker only on behalf of another person.

The above facts being proved, the learned Lord Chief Baron directed the jury to find a verdict for the plaintiff, giving leave to the defendant to move to set it aside and enter it for himself on any points which could be fairly raised upon the facts disclosed in the evidence, or upon any inferences which the court were empowered to draw from the facts adduced upon the argument of the rule. Accordingly *Keane*, Q. C., in Easter Term last (April 19), moved for and obtained a rule to enter the verdict for the defendant upon the grouud that Pater and Co., the London brokers of the defendant, had no authority to give his name; and also on the ground that there was no privity of contract between the plaintiff and the defendant; and against that rule.

Powell, Q. C. and *Philbrick*, for the plaintiff, now showed cause. The first question is, was there any authority to the broker to insert the defendant's name in the note; and, secondly, whether there was any privity of contract. [BRAMWELL, B.—In my opinion it is not a Stock Exchange question at all.] As to the first question, whether Pater had authority to give Morgan's name, Brown, Pater's managing clerk, positively swore that the defendant refused to allow him to use Smith's name, and Morgan's evidence does not in fact contradict that. [BRAMWELL, B.—According to my impression of the evidence, Morgan's name was correctly inserted, and there was authority to do it. I do not think the Stock Exchange cases apply here; the doubt is, not whether Morgan gave authority to have his name used, but whether Pater and Co. ought not to have let the shares be sold against them, and have had their remedy against Morgan.] Conceding that the Stock Exchange cases do not apply, yet, if Morgan's name got into the contract by his authority he would be liable and be bound. His name was given according to the practice. [BRAMWELL, B.—What practice? Not of the Stock Exchange, for Morgan was not a member of it. The question of practice, if there is any such question, is, what is the practice as between a town and country broker.] The generality of the authority, "Do whatever you think best," included the authority to pass the defendant's name, and the defendant is liable, his name having been passed under such authority.

Keane Q. C. and *Lanyon*, for the defendant, *contra*, supported the rule. The authority is in effect this, "I can do nothing; do you, therefore,

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do the best you can,—that is, sell, or carry over, or what you like, but all on the understanding that *I can do nothing.*" To make the defendant liable to this extreme extent could not therefore be doing the best for him. [KELLY, C.B.—You must take this as the basis of the matter; that Pater and Co. could only have given one of two names without commiting a fraud—namely, their own or Morgan's. If they gave their own, they were ruined men; and from the beginning to the end the defendant Morgan never gave them any other name than his own.] According to the decision in *Maxsted* v. *Paine* in this court (20 L. T. Rep. N. S. 34; 38 L. J. 41, Ex., L. Rep. 4 Ex. 81), it might be contended that the jobber of whom Pater and Co. bought the shares was liable because he did not give the name of a *bonâ fide* purchaser. If Smith's name was known, as it was, before the name day, it should have been passed, or no name should have been given, and the shares have been sold over in accordance with rules 85, 96, 97, and 98, of the printed rules of the Exchange, or the whole matter have been passed over to the next account day. It was contrary to the rule of the Stock Exchange for one broker to make another broker a principal in any transaction between them.

KELLY, C.B.—I am of opinion that this rule should be discharged. The contract or rather the contracts, in this case, were originally made between different parties, and pursuant to and upon the basis of the usage and customs of the Stock Exchange. Notwithstanding the late important decisions upon that subject in the cases of *Grissell* v. *Bristowe* (in error from the Court of Common Pleas), 19 L. T. Rep. N. S. 390; L. Rep. 4 C. P. 36; 38 L. J. 10, C. P., and *Coles* v. *Bristowe* (in Chancery), 19 L. T. Rep. N. S. 408; L. Rep. 4 Ch. App. 3; 38 L. J. 81, Ch., some difference of opinion may still be entertained as to the operation of that usage upon contracts entered into for the purchase and sale of shares upon the Stock Exchange. But under the circumstances of this case it is unnecessary to deal with any of the points upon which it is possible that any such difference of opinion should arise. The plaintiff in the present case, in the month of May, became the seller of these shares in the Overend and Gurney Company (Limited). He sold them through brokers, and they were purchased by a jobber, and the day when the contract was to be performed, the account day, when the transfer was to be made, and whoever might then turn out, pursuant to the usage of the Stock Exchange, to be the ultimate purchaser who was to accept the transfer, was the 15th of the same month of May. It appears that before that day, as early indeed as the 27th April, the defendant Morgan had by a telegram, of which no copy has been furnished to the court, directed Pater and Co., the brokers, to purchase 1000 shares in Overend and Gurney. The purchase having been made by Pater and Co. on behalf of Morgan, and the 1000 shares ultimately including the eleven shares in question, nothing material appears to have taken place between the parties, until shortly after the 10th May, on which day, most unfortunately for all parties interested, the Overend and Gurney Company stopped payment. In consequence of that stoppage, Pater and Co.—who had purchased these shares, and who, according to the usage of the Stock Exchange, and indeed, according to the direct and necessary legal effect of the contract to purchase which they had entered into, had become personally liable to be treated as the purchasers, and to pay the amount of the purchase-money, and to become the owners of the shares, and liable also to all future calls upon them, unless they should, in the mean time give the name of an ultimate purchaser who should be accepted by the seller, who, in this case, with regard to these eleven shares, was the plaintiff—as early as the evening of the 10th May itself, wrote to the defendant, informing him of the stoppage of Overend and Gurney and requesting to be informed what course they were to take. The defendant makes no answer to that letter on that day or the next, but on the 12th May, having first sent a telegram, to which I need not more particularly refer, he writes to Pater and Co. in relation to the purchase and the disposition of the shares, and the failure of the Overend and Gurney Company, in these terms: "Messrs. Pater and Co. Dear Sirs,—Our client cannot meet his engagement as regards the 1000 Overends, and we unfortunately cannot meet them; therefore we authorise you to do whatever you think best." Now, it is said by the learned counsel for the defendant that four courses of action were open to Pater and Co. upon this emergency. They might, as it is said, and I shall not stop to consider whether the statement is perfectly accurate or not in relation to the usages of the Stock Exchange, have carried over the transaction from the 15th to the 30th May, which was the next account day; or they might have declined to give any name at all, or to complete the contract, and so have left it to the seller or his broker or jobber, or the jobber with whom they themselves had dealt, to sell against them, and then to call upon them for the difference; or thirdly, it is said they might have given the name of Morgan, as the ultimate purchaser and transferee; or they might have given no name at all, but have themselves become the purchasers and transferees of the shares. It has also been said that there was a fifth course which might and ought to have been taken, namely, that inasmuch as they had been apprised by the telegram instructing them to make the purchase of the 1000 shares, that Morgan, on behalf of whom the shares were to be made, was himself but the agent of a third person, whose name was not mentioned or made known to them by the defendant until a subsequent period of the transactions between them, when it was made known by Morgan to Brown the clerk of Pater and Co., and so to Pater and Co. themselves; therefore they might have given in the name of Smith. No doubt they might if they had thought fit to do so, but it is enough to say upon that subject that we have the evidence before us, which we are called upon to deal with, that when Pater and Co. had communicated to Morgan the defendant the failure of Overend and Gurney, and had sent down their confidential clerk Brown to communicate further with the defendant upon the subject, the defendant upon that occasion told Brown, and so, in effect, told Pater and Co. themselves, that he had indeed bought the shares for Dr. Smith, but that he could not allow Pater and Co. to recognise Smith in the transaction in any way. Now, supposing that any question is raised upon this evidence, quite independently of the letter of the 12th May to Pater, which followed; supposing that it had become the duty, or that it was one of the alternatives which was left to Pater and Co., to give the name of Smith as the ultimate purchaser, it appears to me, and I believe also to the rest of this court, dealing with this evidence, that there is no reason to doubt the testimony of Brown upon this occasion. He was the witness indeed for the plaintiff, but he had been the confidential clerk of Pater and Co. He had no interest whatever, therefore, to tell an untruth, or to misrepresent the case against Pater and Co., and in favour of the plaintiff. There was no reason, therefore, that I can see, to doubt the accuracy of Brown's testimony, more particularly when Morgan himself was called, who, if he could have done so, would have shown that he had said nothing of the kind to

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Brown. He did not deny having made that statement. What he did say—and it is perfectly reasonable to believe it, because it is an extremely probable statement—was this: "I have no recollection of having said to Brown that they were not to use the name of Smith," and then he added, "I was under much mental pressure and anxiety at the time." No doubt his memory was disturbed and troubled, and though he did not recollect what was said, there is not the slightest reason to doubt that he did say this to Brown, more particularly as we find by a letter written by his (Morgan's) attorney that he had for some reason or other forbidden or disapproved the use of Smith's name. But supposing any doubt to exist upon the testimony of Brown on this point, it really seems to become immaterial when we come to the letter of the 12th May, two days before the 14th, when the name had to be given in, and when some decisive steps must be taken to bring this unfortunate matter to a conclusion. We find by this letter that he addressed Pater and Co. in the terms which I have already referred to. Now the simple question, and it was really the only point that was made on the part of the defendant, for the opinion of the court is, whether the effect of this letter was not really to leave it in the hands of Pater and Co. to do what upon the whole they might think was just and expedient as between all the parties concerned. Now what was Pater and Co.'s condition? With regard to their carrying over to the next account day, or with regard to their allowing the shares to be sold against them, it is quite enough to say that they were men of knowledge and experience upon the Stock Exchange, well acquainted with business, capable of forming, at least, as correct an opinion as anybody else could have formed at that time, of the probabilities of the future recovery, or of the ultimate failure and ruin of Overend and Gurney, and it was left to them to do whatever they thought best. It appears they thought it was not best for whoever might be the party ultimately to become the purchaser, whether themselves, or Morgan, or Smith, or anybody else, either to allow the shares to be sold against them, or to carry over the transaction to the next account day. The only two alternatives therefore left to them were, either to give the name of Morgan, or to leave their own names as the ultimate transferees and purchasers, and they determined to give the name of Morgan. The question is, whether that was within the authority given to them by Morgan? I am very far indeed from holding that Morgan would have any right or power or authority in himself to forbid, or, at least, to effectually forbid, Pater and Co. to give in his name; but whether he had or not, that is not the question we are now called upon to decide. When Morgan well knew that, if a name was given at all it must be either his own name or the name of Pater and Co., if he had meant to intimate to Pater and Co. that they were not to give in his name, that they might give their own name, or adopt either of the other courses which have been referred to in the arguments, he might have said so plainly and distinctly in his letter, and he ought not to have left an uncontrolled and unlimited discretion in Pater and Co. to do the best they could under all the circumstances. Instead of doing that, however, he writes, "We authorise you to do whatever you think best." I am of opinion, and in that opinion my learned brethren concur, that that gave to Pater and Co. the authority to exercise their own discretion as to the mode in which this unfortunate transaction was to be brought to a conclusion; and one of these modes was to give in the name of Morgan as the ultimate purchaser. That name was accordingly given in, and was accepted by the seller, who thereupon executed the proper transfer within due time, according to the usage of the Stock Exchange and the terms of the contract. Under these circumstances I am of opinion that the defendant is liable, notwithstanding this objection, and the only one that has been made, to make good the contract which had been entered into, and consequently that he is liable to this action, and that the verdict for the plaintiff ought not to be disturbed.

CLEASBY, B.—I am of the same opinion. There is only one question which has been reserved and which has been raised in this argument. In giving Morgan's name, was Pater acting within the authority conferred upon him? If other objections had been made, other questions might have arisen which might or might not have been met by argument. But that is the only question we have now to deal with. Now, unquestionably the position of a broker, or any agent like Morgan, is in general this. He is not a person expected to pay for the shares, or to become the principal. In fact, a broker could not carry on his business unless he had a capital beyond all calculation, if he were expected to do that, because he has to live on the commission which he makes, which is a small one upon very large transactions indeed; and, therefore, unquestionably his position is that of being responsible only for the differences, which might be a very trifling matter in comparison, and which his capital may enable him to do. I mention this, that it may be seen that I have thoroughly appreciated Mr. Lanyon's argument on this part of the case. In ordinary transactions the broker is not intended to be the principal to pay for the shares, or to incur any of the liability of a principal, and that is confirmed in this case by the letter, which gives as a reason for giving the name, that there was some difficulty connected with the selling note. However, that is the position of the broker. Here we have this very exceptional state of things to deal with—the purchase was on the 27th April, the stoppage of Overend and Gurney on the 10th May; then all this consternation, the going down to Norwich, the having that conversation, and great difficulties on both sides, and it ends in a letter, which it is impossible to say is inconsistent with the statement of Brown, the witness, but which letter is, in my opinion, sufficient; because if a person chooses deliberately, when writing a letter, to put it in this general way, and to confer complete power upon another person as to how he is to act, and to place himself within the discretion of that person as to how he will carry a given matter into effect, he must be bound by the fair exercise of that person's discretion. What he says is this: "we authorise you to do whatever you *think* best." I cannot see that I can take upon myself to say that Pater and Co. did not think the best course to pursue at the time was the one they did pursue. If they did, they did that which was precisely what they were desired to do. If they had sold out, they would at once have made the defendant responsible. Instead of which, at that time, this was only the 14th or 15th May, they think the best thing is, to take the chance, and have the shares put in the name of a person who had given them this particular authority. They could not, under this authority, have dealt with any other name. Under these circumstances, I think the defendant. by placing it in the discretion of Pater and Co. in this way, has brought this fairly upon himself. He might have been a gainer by it, though it turns out that he is enormously a loser by it. It is his own fault for giving a general authority of this sort. My brother Martin, who has heard the whole of the argument, desires me to say that he entirely concurs in this judgment.

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KELLY, C. B.—My brother Bramwell also, who

has heard a great deal of the argument, entirely subscribes to the judgment of the court. I think I ought to add, speaking for myself alone, that I am clearly of opinion that, within the authority to purchase the 1000 shares given by the defendant to Pater and Co. on the 27th April, was included and implied an authority, whenever the name day should arrive, to give the name of the defendant as the ultimate purchaser, unless upon or before that day the defendant should have furnished them with another name which he had required them to give instead of his own. I say that, lest it should be supposed that I entertain any doubt on that point, which I think is settled by the principles of the decisions of *Grissell* v. *Bristowe* and *Coles* v. *Bristowe* (*ubi. sup.*), to which I have before referred. But in this latter observation I am declaring my own opinion, and my own opinion alone.

Rule discharged.

Attorneys for the plaintiffs, *Pattison, Wigy,* and *Co.*, 50, Lombard-street, E.C.

Attorney for the defendant, *J. S. Sydall*, 12, Southampton-buildings, Chancery-lane, W.C.

Saturday, Nov. 13.

MANN *v.* HARBORD.

Costs—Review of taxation—Costs of entering cause provisionally—Costs of appeal from master to judge at chambers.

The plaintiff had entered the cause provisionally for trial at the Liverpool Spring Assizes. Before the commission day, the defendant obtained an order from a judge at chambers for a commissioner to examine witnesses at Bombay, and the cause was consequently not tried at the spring assizes:

Held, that the plaintiff was entitled to the expenses of such entry as costs in the cause.

The costs of an appeal from a master to a judge at chambers are not costs in the cause, unless the judge upon the appeal expressly provides that they shall be.

A rule *nisi* had been obtained for a review of taxation in this case, under the following circumstances. It appeared that by an order made by Mellor, J. and Lush, J., the judges of assize at the Liverpool Spring Assizes 1868, it was directed that, for facilitating the entry of causes for trial at future assizes for the southern division of the county, and for the more convenient arrangement of the business of such assizes, causes for trial at Liverpool and Manchester respectively, might be entered provisionally at the office of the acting prothonotary and associate at Preston, on such days previous to the commencement of such assizes as might by the acting prothonotary and associate be appointed in that behalf, and further, that causes entered provisionally should stand in the list as actually entered for trial, unless withdrawn before the commencement of the entry on the commission day at assizes.

The plaintiff incurred charges in entering the cause provisionally for trial at the Liverpool Spring Assizes 1869. Between the date of such entry and the commission day, Mellor, J. made an order at chambers, at the instance of the defendant, for the issue of a commission to examine witnesses at Bombay, and the trial did not in consequence take place at the spring assizes. The application for the commission had in the first instance been made to a master, who refused it, upon which the defendant appealed to the judge. On the appeal nothing was said about the costs of it. Upon the return of the commission the defendant withdrew his pleas, and it was arranged judgment should go by default. Upon the taxation of costs the master refused to allow the plaintiff the costs of the provisional entry of the cause at Liverpool, on the ground that the entry had been rendered useless, and that where a cause had been so entered, and in consequence of some act done or order made before the commission day the trial did not take place, the plaintiff was not entitled to charge the defendant the expense of entering the case. The master allowed plaintiff all costs of the proceedings at chambers with reference to the commission down to the refusal of the commission by the master, but refused to allow the plaintiff the costs of the appeal to the judge, on the ground that it was like proceedings in a court of error when the judgment of the court below is reversed, and each party left to pay his own costs of appeal. In reference to both those matters it was now sought to review the taxation.

By the 4th section of the 30 & 31 Vict. c. 68, the Act to provide for the better dispatch of business in the chambers of the judges of the Superior Courts of Common Law, it is enacted

Every order or decision made or given under the Act by any master sitting at chambers, shall be as valid and binding on all parties concerned, as if the same had been made or given before the passing of this Act by a judge sitting at chambers: Provided always, that it shall be lawful for any person affected by any order or decision of the master, forthwith, or within such time as from time to time shall be appointed by any rule or rules to be made under this Act, and subject to such conditions as to costs as may be provided under any such rule or rules, to appeal from such decision to a judge sitting at chambers.

The Rules of Michaelmas 1867, made under the Act provide that "the costs of such appeal shall be in the discretion of the judge."

Lord showed cause against the rule, and contended that the master had rightly disallowed the items in question.

Herschell supported the rule.—If the master be right as to the costs of entering the cause all the advantages intended to be secured by the judges of assize will be lost. [The Court intimated that they were with him as to this item.] Then with reference to the costs of the appeal to the judge at chambers it is true that the costs are in the discretion of the judge, but it is the established practice at chambers that if a judge makes an order simply dealing with the matter in question, and says nothing as to costs, the costs are taken to be costs in the cause. In this case there is no injustice in this. The result of the commission showed that the evidence the defendant wished to obtain was useless, for he withdrew his pleas on its return. He cited *Pugh* v. *Carr*, 6 M & W. 20.

CHANNELL, B.—We are all agreed that as to the second item the party is not entitled to any relief. Whether any such inveterate practice as Mr. Herschell alleges existed with reference to the business at chambers or not, a new order of things is now called into existence. The Act provides that there may be an appeal from the decision of the master to a judge, and that the costs of such appeal shall be in the discretion of the judge. The judge in this case did not provide for the costs at all. He was never asked to exercise, and never did exercise, any discretion.

PIGOTT and CLEASBY, BB. concurred.

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CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 13.

(Before KELLY, C. B., MARTIN, B., BLACKBURN, LUSH, and BRETT, JJ.)

REG. v. RITSON AND ANOTHER.

Forgery—Deed—Ante-dating.

R. made an equitable deposit of title-deeds with G. for 730l., and afterwards assigned all his property to B. for the benefit of his creditors. He and his assignee B. then, for an additional advance, conveyed to G. the freehold of the property to which the deeds so deposited related. After this the prisoner R. executed a deed of assignment to the other prisoner of a large part of the land so conveyed to G. for a long term of years; but this deed was falsely ante-dated before the conveyance by R. and B. to G., and upon this deed the prisoners resisted G.'s title to possession of this part of the land:

Held, that this deed so ante-dated for the purpose of defrauding G., amounted to forgery.

Case reserved for the opinion of the court by Hayes, J.

The prisoners were indicted before me at the last Manchester assizes under the 24 & 25 Vict. c. 98, s. 20, for forging a deed with intent to defraud James Gardner.

William Ritson was the father of Samuel Ritson, and was a builder. He had been entitled to certain building land at Heaton Norris in Lancashire, which had been conveyed to him in fee, and he had borrowed on the security of it of the prosecutor, James Gardner, more than 730*l.*, for which advances he had given on the 10th Jan. 1868, an equitable mortgage by written agreement and deposit of title-deeds.

On the 5th May 1868, William Ritson executed a deed under the Bankruptcy Act of 1861, conveying all his real and personal estate to James Booth, a trustee, for the benefit of creditors, and on the 7th May 1868 by deed between James Booth, the trustee, of the first part, and William Ritson of the second part, and the said James Gardner of the third part, reciting the said deed of assignment, and that James Gardner had become mortgagee of the said building land, and that there was then due to him 789*l.* 6*s.* 2*d.* for principal and interest, and that the said James Booth and William Ritson having caused a valuation to be made had ascertained that the said sum was in excess of the value of the said hereditaments, and that there were some building materials on the land not fixed to the freehold, and that it had been agreed between the parties to the deed to convey the land and assign the materials for 50*l.* to the said James Gardner. It was witnessed that the said James Booth and William Ritson in consideration of the said sum paid as therein mentioned (viz., 49*l.* to Booth and 1*l.* to William Ritson), did respectively grant, convey, and confirm unto the said James Gardner the said freehold land (subject to the two indentures therein mentioned, being previous conveyances to other parties by the said William Ritson of two small plots thereof), and all the estate, claim, and demand of the said James Booth and William Ritson therein to and to the use of the said James Gardner, his heirs, and assigns for ever, with a covenant from the said James Booth and William Ritson, that they or one of them had full power to grant the said lands and hereditaments as aforesaid free from all incumbrances, except as appeared by the said deed, but which deed contained no mention of the deed found to be a forgery as after mentioned but only mentioned the conveyance of the said two small plots.

After the execution of the said conveyance to the prosecutor he entered into possession of the ground so conveyed to him.

About March 1869 the prosecutor had buildings erecting on adjoining land, and had employed William Ritson as a builder, and had given him permission to erect a shed on part of the ground so conveyed as aforesaid, which was done. The prosecutor afterwards wished to have it removed; but the two Ritsons, the son being then working with his father, refused to do so, and the prosecutor removed it himself. On the 20th April 1869 the prosecutor received a letter from a solicitor written on behalf of Samuel Ritson, claiming title to the land, and complaining of prosecutor having trespassed thereon by pulling down a building, and offering to show the deed under which Samuel Ritson claimed. And on the 26th April a writ in an action of trespass, at the suit of Samuel Ritson, was sued out and served on the prosecutor. The prosecutor then saw the attorney for Samuel Ritson, who produced the deed charged as a forged deed, and the prosecutor commenced the prosecution against the two prisoners before the magistrates.

This deed is dated the 12th March 1868, the date being before William Ritson's deed of assignment and the conveyance to the prosecutor, and purports to be made between William Ritson of the one part, and Samuel Ritson of the other part; it recites the original conveyance in fee to William Ritson, and that William Ritson had agreed with Samuel Ritson for a lease to him of part of the land, at a yearly rent of 18*l.* 3*s.* 4*d.*, and then professes to demise to Samuel Ritson a large part of the frontage, and most valuable part of the land, which had been equitably mortgaged and afterwards conveyed to the prosecutor, as mentioned above, for the term of 999 years from the 25th March then inst. The said deed contained no notice of any title legal or equitable, of the prosecutor, and contained the usual covenants between a lessor and lessee. It was executed by both William and Samuel Ritson, and professes to have been attested by a witness; but such witness was not called at the trial, nor was any evidence given as to the professional man or other person by whom the deed was prepared. Although the date of the deed was the 12th March 1868, it was proved by the stamp distributor who had issued the stamp, that it was not in fact issued from the office by him before the 7th Jan. 1869, nor was the deed ever mentioned by the prisoners before that year.

It was contended on the part of the prosecutor that the deed was a forged deed, made after the prosecutor's conveyance, and ante-dated for the fraudulent purpose of over-reaching that conveyance, and so endeavouring to deprive the prosecutor of his estate under the said conveyance, and of a considerable part of the property for a long term, and leaving only a valueless reversion in him in such part of the property. And in support of this view the counsel for the prosecution cited 1 Hawk. P. C. c. 21, p. 263, 8th edit.; and *Salway* v. *Wale*, Moo. 655; 5 Eliz. c. 14; and 2 Russ. Cr., 4th edit., 719; and see 3 Inst. 169, Bac. Ab. "Forgery."

The counsel for the prisoners contended that the deed could not be a forgery, as it was really executed by the parties between whom it purported to be made, and that there was no modern authority in support of the doctrine contended for by the prosecution. He also contended that the prosecutor had obtained his conveyance by fraud, and that it was void against the prisoners, and if so the lease would be rightfully made.

The jury found that there was no ground for imputing any fraud to the prosecutor with regard to his security and conveyance, and I having expressed an opinion in conformity with the autho-

rities cited on the part of the prosecution, and informed the jury that if the alleged lease was executed after the prosecutor's conveyance, and ante-dated with the purpose of defrauding him, it would be a forgery.

The jury found both the prisoners guilty.

And in pursuance of the request of the prisoners' counsel, I reserved the question whether the prisoners were properly convicted of forgery under the circumstances, for the opinion of this court.

G. HAYES.

Torr, for the prisoners.—The ruling of the learned judge at the trial was wrong, and the conviction cannot be sustained. The authorities cited for the prosecution were very ancient, and it is submitted that they cannot be supported at the present day. The authority of Lord Coke in the 3rd Inst. 169 is his comment on the stat. 5 Eliz. c. 14, which enacts, "If any person or persons, upon his or their own head or imagination, or by false conspiracy or fraud, shall wittingly, subtilly, and falsely forge or make, or subtilly cause or wittingly assent to be forged or made, any false charter, deed, or writing, sealed, &c., to the intent (*inter alia*) that the right title or interest of any person or persons of in or to tenements or hereditaments, freehold or copyhold, may be molested," &c. Lord Coke, in commenting on the words "or make," says, "These be larger words than to forge, for one may make a false writing within this Act, though it be not forged in the name of another, nor his seal nor hand counterfeited. As if A. make a true deed of feoffment under his hand and seal of the manor of Dale unto B., and B., or some other, raze out D the first letter of Dale, and put in S, and then where the true deed was of the manor of Dale, now it is falsely altered and made the manor of Sale. This is a false writing under seal within the purview of this statute. To forge is metaphorically taken from the smith who beateth upon his anvil and forgeth what fashion or shape he will." The case of *Salway* v. *Wale*, is no doubt an authority that to alter, by antedating a deed, is a forgery if it prejudices any third person's estate. The deed in the present case was not a forgery or false deed; it was made by the parties between whom it purports to be made, and there was no alteration in it at all. It may be a void instrument, but it is not a forgery. [MARTIN, B.—Mr. Russell, in his work, gives this definition of forgery at common law, "the fraudulent making or alteration of a writing to the prejudice of another," or, more recently, as "a false making, a making *malo animo*, of any written instrument for the purpose of fraud and deceit," the word "making" being considered as including every alteration of or addition to a true instrument.] It is contended that this is not a false deed, though the finding of the jury shows the date to be so. Deeds which contain false recitals or averments are not, therefore, false deeds within the provisions of the statutes relating to forgery. The present statute the 24 & 25 Vict. c. 98, s. 20, enacts, "Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory, having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." The question, therefore, is whether this deed is a forgery within the words of that statute, and it is submitted that it is not:

Com. Dig. Forgery, A. 1.

Addison for the prosecution.—The conviction is right, for, both upon principle and authority the making of the deed in question was a forgery. At common law the false making of a letter, or order, or guarantee, was a misdemeanor, but not a capital offence, but the false making of a deed is within all the statutes. There is the authority of Lord Coke, and the case in Moor. And Com. Dig. A. 1, "Forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another." This was a deed fraudulently antedated to the prejudice of the prosecutor's estate in the land. So in Bac. Abr. A., "The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another, which he is no way privy to, or, at least, to make a man's own act appear to be done at a time when it was not done, and by force of such a falsity to give it an operation, which in truth and in justice it ought not to have." That definition seems to comprehend this case.

KELLY, C. B.—I certainly entertained some doubt at one time upon this case, because most of the authorities are of an ancient date, and long before the passing of the statutes of 11 Geo. 4 & 1 Will. 4, and 24 & 25 Vict. However, looking at the ancient authorities and the text-books of the highest repute, such as Com. Dig. Bacon's Abr. 3 Co. Inst, and Sir Michael Foster, they are all uniformly to the effect not that every instrument containing a false statement is a forgery, but that every instrument which is false in a material part, and which purports to be that which it is not, or to be executed by a person who is not the real person, or which purports to be dated on a day which is not the real day, whereby a false operation is given to it, is a forgery. It is impossible to distinguish the present case from the authorities cited, and therefore the conviction must be affirmed.

MARTIN, B.—I am of the same opinion. Mr. Torr says that this is not an ordinary instance of a deed that is a forgery. The authorities are all to the effect that it is a forgery; and in Tomlin's Dictionary I also find this passage: "Forgery may be committed by a party making a false deed in his own name, as where a party made a feoffment of lands, and dated it prior to a former deed, whereby he conveyed the same lands, for he falsifies the date in order to defraud his own feoffee."

BLACKBURN, J.—I am of the same opinion. The 24 & 25 Vict. makes it a felony if any person with intent to defraud shall forge or alter any deed, &c. The material word is "forge," and it is necessary, therefore, to see what is the meaning of forgery. It is correctly defined in Com. Dig. to be the making of any false instrument with a fraudulent intent, that is an instrument that purports, on the face of it, in some material thing to be that which it is not. Then we have Gilbert, C. B.'s definition of forgery in Bac. Abr. (see *supra*). In this case the false statement is in the date which, in ordinary cases, would not be material, but here, by extrinsic evidence, the false date was shown to be very material, and the forged deed would have passed the estate to another

person than the prosecutor, if the deed had been executed on the day it bears date. Lord Coke, in his 3rd Inst. cites several cases from the Year Books to show that the forging a deed does apply to this very thing. The same was held in the case in Moor, and in *Lewis' case* in Foster, C. C. 116, and there is no authority against it. The conviction, therefore is right.

LUSH, J.—If the prisoner had put the true date to the deed in the first instance and then altered it, there could not have been a question as to its being a forgery within the statute. It seems absurd to hold that the making a deed falsely dated from the beginning, whereby a fraudulent operation is given to it, would not equally be a forgery. The Legislature used the word "forge" in the sense of the decided authorities, namely, the making of a deed which purports to be that which it is not.

BRETT, J., concurred.

Conviction affirmed.

ARCHES COURT.

Reported by DOUGLAS KINGSFORD Esq., Barrister-at-Law.

Friday, Nov. 19.

(Before the Right Hon. Sir ROBERT PHILLIMORE, Dean of Arches.)

THE BISHOP OF WINCHESTER v. WIX.

Resignation of bishop, the promoter in a suit—32 & 33 Vict. c. 111 — *Abatement — Amendment — Common law.*

A bishop, the promoter in proceedings against a clerk charged with an ecclesiastical offence, sent the case by letters of request to the Arches Court. Afterwards the bishop, acting under the provisions of 32 & 33 *Vict. c.* 111, *resigned his see.*

On a petition by the defendant to be dismissed from further proceedings:

Held, that the proceedings did not abate on the resignation of the bishop; and that the title of the suit might be amended by substituting the proper description of the promoter.

Ecclesiastical courts are not governed by rules or analogies drawn from common law.

In this case the late Bishop of Winchester was the promoter of the office of the judge, the charge against the defendant being one of offences against the laws ecclesiastical by using lighted candles and burning incense during the celebration of the Holy Eucharist, in his church at Swanmore, in the Isle of Wight; the offence charged being a contravention of the decision of the Privy Council in the case of *Martin* v. *Mackonochie*, 19 L. T. Rep. N. S. 503. The articles in the present suit were filed on July 7; on Oct. 28 the late Bishop of Winchester sent in a representation of his desire to resign to the archbishop of his province. Such representation was made under the provisions of the Act of last session (32 & 33 Vict. c. 111), which by sect. 2 provides that "on a representation being made to her Majesty in manner hereinafter mentioned, that any archbishop or bishop in England is desirous of resigning his archbishopric or bishopric by reason that he is incapacitated by age or some mental or permanent physical infirmity from the due performance of his duties as archbishop or bishop, it shall be lawful for her Majesty, if satisfied of such incapacity and that such archbishop or bishop has canonically resigned, by order in council to declare such archbishopric or bishopric to be vacant, and thereupon such vacancy may be filled up in the same manner and with the same incidents in all respects as if such archbishop or bishop were dead. . . . (And) for the purposes of this section a representation shall be made to her Majesty, in the case of a bishop desirous of resigning, by the archbishop of the province at the instance of the bishop," &c.

On Nov. 11, her Majesty, by order in council, accordingly declared the see vacant. On the previous day (Nov. 10) a petition was filed in the Court of Arches, praying that the defendant might be dismissed from the suit, on the ground that the suit had abated by reason of the resignation of the bishop, the promoter. This was met by an application on behalf of the promoter, that the title of the suit might be amended by striking out the description of the promoter as "the Bishop of Winchester," and substituting "the Rev. Charles Sumner, D.D., late Bishop of Winchester."

Arthur Charles, for the defendant, contended that the suit was instituted by the bishop, not in his individual, but in his episcopal character. He had sent the case at once by letters of request to the Court of Arches, while, under the Church Discipline Act, had the promoter been a private person, the ordinary course would have been for the bishop to grant a commission of inquiry as to the charge against the defendant. It was submitted that the suit abated by the resignation under the statute, just as it would have done had the bishop died. The Privy Council had decided that "letters of request constitute the vehicle by which the case is to be brought before the court, and when brought thither it must be proceeded with as of right," but here he would contend that there was no cause before the court. Doubtless the court was not bound by the rules of common law, but it would proceed on analogy with that law when reasonable to do so. That the resignation would have abated the suit at common law was clear from the authority of Comyn's Digest (title Abatement, H. 44, 46), where it was laid down that accepting the office of archbishop or bishop, pending the writ, by the plaintiff or demandant, would abate the suit; and so on deposition or resignation. It might be said that the present was a criminal proceeding, but in form it was a civil proceeding, and there had been nothing to vary the practice of this court, in respect of abatement, from that at common law, prior to the recent Common Law Procedure Acts. As to the application to amend, it would be submitted that, though the court had a discretion so to do, that discretion would not be exercised under the circumstances of the case.

Dr. *Deane*, Q. C., and Dr. *Tristram*, for the promoter, argued that the letters of request were the mere vehicle for bringing the case before the court at once, and the moment that was done, the promoter's functions, *quâ* bishop, were at an end. It might be that the suit would have abated by the natural death of the promoter, but that would have been because then there would have been no one before the court responsible for costs. But here the promoter, though no longer a bishop, would be before the court still in his private capacity. The charge in the suit would be one of form only, in the mere description of a party. The defendant could not be in any way prejudiced should the court refuse to allow that the suit had abated, nor by the amendment proposed. Arguments drawn from the old common law could have no weight with a court not bound by common law rules, especially when, as here, the common law relied on had been found in practice inconvenient, and had been altered by repeated statutes.

Charles replied.

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Sir ROBERT PHILLIMORE (Dean of Arches) in giving jugment said:—Two applications are before the court; one, on behalf of the defendant that he may be dismissed from all further proceedings, on the ground that by reason of the promoter's resignation of his office as bishop the suit has abated; and the other, on behalf of the promoter of the suit that an amendment of the title might be made. As a matter of practice the case is not easy to decide, since no precedent can be found directly in point. But the principle applicable to it is clear. There are two questions, has the court any discretion? And, if it has, ought that discretion to be exercised? Mr. Charles's argument, urging abatement, was an able one, but as was said in the case of *Sherwood* v. *Ray*, 1 Moo. 397, P. C., "the proceedings of the ecclesiastical courts are not favoured by the rules of the common law, or any analogies that they furnish." *A fortiori*, rules would not be adopted from the common law so as to guide the practice of this court, when the common law relied on was in a very imperfect state, and had been found to work so much injustice by its strict rules as to abatement, that those rules were altogether altered by several statutes. The case has been sent to this court by letters of request in proper form, and this court has accepted them. The bishop, doubtless, had more courses than one open to him, but he has adopted this, of promoting the office of the judge in his own person. The bishop was thereby promoting not his (the bishop's) office, but that of the Dean of Arches, as the official judge for the Archbishop of Canterbury: (see per Lord Stowell in *Maidman* v. *Malpas*, 1 Hagg. Consist. 210.) The question is a simple one, whether, the promoter having undergone a change of description or title, the suit ought to abate? It is doubtful whether the court has any discretion in the matter, but if it has, I should, without hesitation, decide that for the interests of the Church it would be better not to allow a mere technical point to prevail. I therefore order that the petition of the defendant to be dismissed from further proceedings be refused, and that the promoter's application for an amendment in the title of the suit be granted. As the promoter has not moved for this amendment at once on his resignation, he must pay the costs.

Dr. *Deane* objected to the order as to costs. The defendant's petition was too soon. The see was not vacant, under the statute, by the canonical resignation, but by the order in council declaring the see vacant. The date of the order in council was Nov. 11, while the defendant's petition was on the previous day.

After some discussion, the Dean of Arches said that he should reserve the question of costs.

UNITED STATES DISTRICT COURT—IN ADMIRALTY.

Reported by R. D. BENEDICT, Proctor and Advocate.

SOUTHERN DISTRICT OF NEW YORK.

THE STEAMSHIP RUSSIA.

Collision—Jurisdiction—Inevitable accident—Vessel at anchor.

Where a collision occurred in the harbour of New York, between the British steamer Russia *and the Austrian ship* Figlia Maggiore, *by which the latter was sunk, and the* Russia *being libelled in this court, was arrested within its jurisdiction, the witnesses, some of them being residents of New York, and there being in the case no special question arising under any local law of either Great Britain or Austria:*

Held, that the court had jurisdiction, and that there were no circumstances in the case which called upon the court to refuse to exercise it.

Where the ship, lying at anchor in a proper position, was run into by the steamship as she came in from sea, and the steamship alleged that the accident was inevitable, arising out of the fact that the steamship did not obey her helm, and it appeared that her not obeying her helm was caused by the meeting of two tides, causing a tide-rip, which would affect her helm as she entered it, but the tide-rip was well-known and plainly to be seen, and its course, and character and action upon a vessel entering it, were not fortuitous, or varrying, or uncertain:

Held, that the defence of inevitable accident was not made out, but the collision was, on the other hand, the result of negligence on the part of the steamship in not guarding against the effect of the tide.

BLATCHFORD, J.—This is a libel filed by the owners of the Austrian ship *Figlia Maggiore*, against the British steamship *Russia*, to recover for the damages caused to the ship and her cargo by a collision between her and the *Russia*, which took place in the harbour of New York, off the Battery, on May 25, about eleven o'clock a.m. The *Figlia Maggiore* arrived in port the day previous, from Marseilles, with a valuable cargo, and came to anchor off the battery at a place designated by her pilot, and was at anchor at the same place at the time of the collision. The *Russia* was coming in from sea on a voyage from Liverpool, and was bound to her wharf at Jersey City. The libel alleges that the *Figlia Maggiore* anchored from 300 to 400 yards distant from the battery, and at a place usual and customary for vessels to anchor. The tide was ebb, and the weather was clear. The ship's stern was sailing down towards the direction from which the *Russia* was approaching. The stem of the *Russia* struck the port side of the ship between the main mizzen rigging, angling somewhat forwards, and crushed her in so that she sunk in less than ten minutes, with all the property on board. The defence set up in the answer to show no fault in the navigation of the *Russia*, is that, owing to the crowded state of the middle and west side of the North River, the *Russia* was compelled to go over towards the battery; that when she was within a sufficient distance of the *Figlia Maggiore* her helm was starboarded, so as to cause her to pass on the port side of the *Figlia Maggiore*, but that, owing to an eddy which the tide made in that place, she did not mind her helm; that her engines were reversed, and her headway had been nearly stopped when the collision happened; that at the place where the accident occurred the tide makes eddies that are very irregular in their position, direction, and strength, and that it is impossible to foresee when and in what manner they will affect the course of a vessel getting into them. The case is thus sought to be made, on the part of the *Russia*, one of inevitable accident; and, to attempt to sustain such a view, testimony was put in on the part of the *Russia* as to the action of the tides from the north and east rivers at their junction. Griffiths, a Sandy Hook pilot, testifies that the ebb tide begins to run out of the East River about an hour and a half before it begins to run out of the North River; that at about half tide or about three hours ebb, which was the state of the tide at the time of the collision, it ordinarily runs out of the East River at the rate of about two knots and a half per hour; that at that time it runs out of the North River at the rate of about one knot and a half per hour; that at that time the two tides meet on a line drawn from the flagstaff at the battery to Bedlow's Island, the direction of the line being south-west by south; that as the tide from the East River runs about west-south-west, and

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that from the North river runs about south. and against it a regular bulkhead is formed, and a very large ripple is made, that a vessel on striking it is generally slewed around by it to the eastward or the westward, dependent upon how she strikes it; that at the first of the ebb the line of the tide-rip is up towards Castle Garden; that as the North River tide comes down, such line is forced down across the mouth of the East River, until, at half-tide, it runs about south-west by south, as before stated; that a vessel striking into that tide-rip will not mind her helm until she gets a length into it; and that the pilots generally try to keep out of such tide-rip. On cross-examination, he testifies that the rip is easily seen, and that it is risky getting into it. This testimony is confirmed by Van Pelt and Bloodgood, witnesses for the claimants, the former a Sandy Hook pilot, and the latter the master of a steam-tug. The latter also says, that if a vessel having slight way on her, runs heading up the North River, across the mouth of the East River at the stage of ebb tide referred to, her head will turn to the starboard exactly with the tide, from the East River. This testimony condemns the *Russia* instead of excusing her. In attempting to enter such a tide-rip, with a vessel at anchor as the *Figlia Maggiore* was, on her starboard hand, and near her course, she assumed all the risk of avoiding such vessel. The tide-rip was plainly to be seen, and its course, and character, and action upon a vessel entering it were not fortuitous, or varying or uncertain, but were, on the evidence, things to be foreseen and therefore, to be guarded against. To enter such a tide-rip, was to take, in respect to vessels at anchor ahead, all the risks of so navigating through it, as not to collide with such vessels. She entered it at an angle, so that, as the tide from the North River struck her on her port bow, the tide from the east River acted on her starboard side, and the effect was to sheer her head to starboard, although her helm was starboarded, and with the way she had on, to shoot her stern on, off to starboard, against the *Figlia Maggiore*. Another point raised in the answer remains to be noticed. It is, that as both of the vessels are foreign vessels, not owned by the citizens of the United States, this court ought not to entertain jurisdiction of the cause of action set forth in the libel. It is not maintained that this court is without jurisdiction of this suit, but it is urged that it ought not to busy itself with deciding a controversy between foreign vessels and foreigners. This case being one of a collision on navigable waters in the harbour of New York, is a civil case of admiralty and maritime jurisdiction; and, therefore, within the cognisance of this court by virtue of the 9th section of the Judiciary Act of Sept. 24, 1789 (1 U. S. Stat. at Large, 77), the *Russia* having been attached within the territorial jurisdiction of this court: (*The Propeller Commerce*, 1 Black. 474; *The Belfast*, 7 Wall. 624, 637, to 642.) The ground urged why this court should not exercise jurisdiction in this case is, that although it may have power to hear and determine this suit, it will regard the circumstances of the case as rendering it unfit that it should hear and determine it, because the libellant and the claimants are not citizens of the United States, and the colliding vessels are both of them foreign vessels. It is supposed that the court ought, from motives of international comity, delicacy, and convenience, to decline the suit, and it is maintained that justice does not require this court to interpose in favour of the foreign libellants. Although on these principles the Court of Admiralty forbears as a general usage to exercise its jurisdiction over controversies between foreign seamen and shipmasters (*The Napoleon*, Olcott's R. 208, 215), or over suits brought by foreign seamen against master or owners, being also foreigners, or against foreign vessels (*Davis* v. *Leslie*, 1 Abbott's Adm. R. 123, 134; *Bucher* v. *Klogeter*, H. 402, 405), yet the principle upon such court proceeds in determining in any case whether to exercise such jurisdiction or not is to inquire whether the rights of the parties will best be promoted by retaining and disposing of the case, or by remitting it to a foreign tribunal: (*One hundred and ninety-four shawls*, 1 Abbott's Adm. R. 317, 323 to 326.) I am not aware that jurisdiction, in a case of collision, has ever been declined by any court of Admiralty, either in the United States or in Great Britain, because the two colliding vessels were the property of foreign subjects. In the case of the *Johann Friedrich*: 1 W. Rob. 35, 37, which was a case *in rem* prosecuted in the High Court of Admiralty in England, on a collision in the high seas, between Dover and Dungeness, between a Danish vessel and a Bremen vessel, whereby the Danish vessel with a cargo on board belonging to British subjects was sunk and totally lost, Dr. Lushington said:—"It has also been said, in the course of the argument, that this court is not desirous of exercising its jurisdiction between foreigners; and, in support of this doctrine, some observations of Lord Stowell, in cases of seamen's wages, have been cited. But it appears to me that the cases cited are distinguishable from the present for the following reason—that all questions of collision are questions of *communis juris*, but, in cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of the claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not." Again, he said (p. 38):—"If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return at all; and, if she did return, there is no part of the world so distant to which they might not be sent for their redress. . . . From these considerations it is perfectly clear that a refusal to exercise the jurisdiction of the court in these cases would, in effect, amount to a total denial of justice." In conclusion the judge stated the following to be the grounds on which he exercised jurisdiction in the case. "First, that all causes of collision are causes *communis juris*; secondly, that the vessel at the time of her arrest was within Admiralty jurisdiction; thirdly, that the collision took place upon the high seas, close upon the English coast." He added, "If it had been necessary, I could have cited several authorities in support of the general jurisdiction of the court. But I decide the question on the grounds I have stated without taking into my consideration the circumstance that was adverted to in argument, that the cargo on board was the property of British subjects. This fact is undoubtedly of considerable importance, inasmuch as I am at a loss to conceive how I could refuse jurisdiction, and send the British owners to a foreign country, and what an anomaly would occur if in a transitory action, I could do justice to one set of owners and refuse it to another." In the case of the *Griefswald* (Swa. 430, 435), Dr. Lushington says, "In cases of collision it has been the practice of this country, and so far as I know of the European States and of the United States of America to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found." In the present case no reasons exist why this court should decline jurisdiction. The case is one of collision. The *Russia* has been arrested within the jurisdiction of this court. The collision took place in the harbour of New York. Several of the wit-

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nesses on both sides belong in New York, and were not on board of either vessel. There is no special question arising under the local laws either of Great Britain or of Austria to be determined in this case. These considerations, independently of the fact stated on the trial that some of the cargo of the *Figlia Maggiore* belonged to citizens of the United States—a fact which is, however, not averred in the libel or shown by proof—induce the court to regard this case as one in which it is eminently proper and conducive to justice that it should exercise the jurisdiction invoked by the libellant. There must, therefore, be a decree for the libellant, with costs. The reference to ascertain the damages will include damage to the cargo as well as to the vessel, the former being claimed in the libel to be recovered by the libellant as carrier in possession at the time the damage was done: *The Propeller Commerce*, 1 Black. 574, 582; *The Commander-in-Chief*, 1 Wallace, 50–52.)

C. Donohue and *T. Scudder*, for the libellant.

D. D. Lord for the claimants.

NISI PRIUS.

Reported by W. F. FINLASON, Esq., Barrister-at-Law.

COURT OF QUEEN'S BENCH.

SITTINGS AFTER TERM.

Saturday, June 12.

(Before COCKBURN, C. J.)

TAYLOR *v.* THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

Action for injuries caused by falling down an opening unprotected—Liability for negligence.

In an action for injuries caused to the plaintiff by his falling down an opening in the saloon of a steamer in which he was a passenger, and which was unguarded:

Held, that as he was there lawfully, and in the ordinary course of things would not expect any opening in the floor of a saloon, the company, owners of the steamer, were liable for the neyligence implied in the absence of any protection or precaution.

The declaration stated that the plaintiff was a passenger on board a steamer of the defendants' for hire and reward, and that by reason of their wrongfully and negligently allowing the opening in the floor of the saloon to be left unguarded the plaintiff fell down through the opening into the saloon, and was grieviously injured.

Plea: Not guilty.

Hawkins, Q. C. and *Keane*, Q. C., for the plaintiff.

Sir *J. Karslake*, Q. C., and *W. Williams* for the company.

The plaintiff had taken his passage by one of the company's steamers, and went on board. He went to the saloon into which the doors of the cabins open, and saw a clerk, of whom he asked which was his berth. He was directed to a certain cabin, and going towards it he fell through an opening in the floor into the hold beneath, and was grievously and permanently injured. The light was dim, and there was no one to warn him, nor was there any protection. It appeared that the hold beneath was what is called the bullion hold, and that some of the crew were actually at the time engaged in loading, two being in the hold and one above, sending down packages, while an officer sat close to the opening keeping a tally of the packages passed down. Upon these facts it was urged that there no negligence, or that the plaintiff had contributed to the accident by want of proper care and attention. On the other hand it was urged that no one spoke to him to caution him, and that as he was going along looking for the number of his cabin he would naturally not have his eyes on the floor, nor expect a dangerous opening in it.

COCKBURN, C. J. in summing up the case to the jury, left two points to them, first, whether there was negligence on the part of the company's servants leading to the accident; and, next, whether there was negligence on the part of the plaintiff himself which contributed to the result. If the jury should think that the plaintiff was rightfully on board, and that it was in the usual course that he should be in the saloon, the defendants were certainly bound either to keep that part of the ship in a reasonable state of safety, or to give the passengers notice and warning of any unusual danger; and it was incumbent upon all the company's servants to warn the plaintiff when they saw him rushing into danger. In his opinion, he said, there was nothing unreasonable in the plaintiff being in the saloon looking after his berth, nor anything careless in his walking along, looking, as he naturally would, rather at the numbers at the cabin doors than at his feet, as he would hardly expect that there would be a dangerous aperture in the floor. However it was for the jury whether there had been any negligence on his part, and whether the accident was caused by his negligence or the company's.

Verdict for the plaintiff, 3750*l.* (*a*)

Solicitors for the company, *M'Leod* and *Watney*.

SURREY SPRING ASSIZES.—KINGSTON.

(Before BRAMWELL, B.)

DARLING *v.* COOPER; BEAUCHAMP *v.* THE SAME.

False imprisonment and malicious prosecution—Reasonable cause—Evidence of malice.

farmer having lost two trusses of straw, and finding the plaintiffs soon afterwards at a place some two or three miles distant with some loose straw in a cart, gave them into custody, with some expression of irritation, and prosecuted them for stealing it:

Held, that if the straw were of the same kind as that lost, and in particular if it were clean and new, there was probable cause for suspicion; but if otherwise, there was not probable cause; and if the jury thought that he had acted under irritation, rashly, and rather under the influence of angry feeling than with reasonable care or due inquiry, there was evidence of malice on a count for malicious prosecution.

These were two actions for false imprisonment and malicious prosecution arising out of the same transaction, and tried by consent together. The defendant was a farmer at Egham, and had lost two trusses of straw. Shortly afterwards he was told that two men (the plaintiffs) were then going towards Brentford in a cart with clean wheat straw in it. He pursued and overtook them, and finding in the cart some loose straw, he gave them into custody at Brentford for stealing it, and they were locked up and brought before the magistrate, when, through some mistake he did not attend, and they were discharged. He was proved to have said that he would spend what the straw cost in prosecuting them, and he went before the magistrate and got a warrant against them, in Surrey, upon which they were again arrested and prosecuted and sent to trial, when they were acquitted. They then brought these actions without notice.

(*a*) Sir *J. Karslake* moved, but took nothing.

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There was contradictory evidence as to the weight, worth, and condition of the straw found in the plaintiffs' cart. According to their account it was loose refuse straw such as was ordinarly taken from farmyards. According to the defendant's evidence it was 50lb. of clean new straw.

It did not appear upon the plaintiffs' evidence that they had said where they got the straw; but that they gave the same account to the defendant at the time, and it was confirmed by the police.

Thesiger objected, first, that there was a misjoinder of action, or a mistrial, the first imprisonment having taken place in Middlesex, and the second in Surrey, and both being local; secondly, that there was no evidence of malice; thirdly, that there ought to have been notice of action.

BRAMWELL, B., however, declined to stop the case.

At the close of the case,

The learned JUDGE, in summing up the case to the jury, said it belonged to a class of cases which were of some importance, because, as there was no ordinary public prosecutor in this country, and criminal prosecutions were ordinarily in the hands of private persons, it was important that the protection which on that account the law threw around private prosecutors should be maintained and upheld. The public (he said) are greatly interested in prosecutors being protected, so long as they honestly intend only to pursue the law, and act upon reasonable grounds. In the present instance, as regarded the justification for the arrest, the defendant had acted hastily, at his own peril, in giving the plaintiffs into custody on the charge of stealing, without any reasonable inquiry; and with nothing beyond the mere fact of finding straw in their possession. The defendant might have been honestly satisfied that the straw was his; but a man had no right to be satisfied in such a case when he might make further inquiry. As regarded the maintenance of the action, he said he could not put the question better than in the words of Williams, J.: "Did the defendant honestly and reasonably believe in the existence of those facts which, if they had existed, would have afforded a justification?" As regarded the count for malicious prosecution, he told the jury, as matter of law, that if they were satisfied the defendant reasonably believed that two trusses of straw had been stolen from him, and that he very soon afterwards found in the plaintiffs' cart such straw as he had lost, there would be reasonable cause for the prosecution, and therefore, in that view of the case, the action would not be maintainable on that count. Whether that were so or not would mainly depend upon the view the jury might take of the facts, and especially as to whether or not the straw was clean and new. If so, then there would be a reasonable cause for the prosecution, and the count on that view failed. If otherwise, then arose the question of malice, and even though there was no reasonable cause for the prosecution, still the action would not be maintainable unless the prosecution was also malicious. It will not be enough (he said) that it appears that the prosecutor was in the wrong; it must appear that he was maliciously so, that is, obstinately and improperly in the wrong, through anger, ill feeling, or any improper motive or feeling, any motive different from a mere honest desire to put the law in force. There is some evidence of the existence of anger on the part of the prosecutor. It is for the jury to say (if they disbelieved his evidence) whether it amounts to evidence of an improper motive. If the prosecutor acted honestly, without any bad motive, and also had a reasonable belief on which he acted, then he is entitled to the verdict, for the law does not allow a private prosecutor to be made liable merely on account of a mistake or error in judgment; nor unless he acted maliciously or without reasonable cause. And as there has been no notice of action, the question arises substantially upon the whole case. Did the defendant act, honestly and reasonably?

Verdict for the plaintiff in each case, damages 25l.(a)

SURREY SUMMER ASSIZES.—CROYDON.

Monday, Aug. 16.

(Before KELLY, C.B.)

PHELPS v. THE GREAT EASTERN RAILWAY COMPANY.

Action against railway company for negligence—Evidence of negligence.

In an action for an injury caused to a passenger on a railway, by alleged negligence of the railway company's servants, it is necessary for the plaintiff to make out that the injury arose from causes which involved negligence on their part. And if the evidence leaves that point in doubt, the company are entitled to the verdict. Thus, where the carriage had broken from its fastenings and gone off the line, and thus had caused the injury; and it was a point in dispute upon the evidence whether this had arisen from insufficient fastening, or from a breakage caused by a latent flaw in the iron, the jury were directed that if they were in doubt upon this point the company were entitled to the verdict.

Action for injury to the plaintiff while travelling as a passenger on the company's line, caused, as alleged, by the carelessness of the company's servants. The declaration stated that the defendants were carriers of passengers for hire, and that the plaintiff became a passenger to be carried by them for reward; but that the defendants were guilty of negligence in this, that they used and employed and continued to use and employ, carriages and engines which were not reasonably safe and proper; and that the railway was not in reasonable repair, whereby the carriage in which the plaintiff was travelling became broken and damaged and the plaintiff was injured.

Plea: not guilty.

Hawkins and *J. P. Murphy*, for the plaintiff.

Ballantine and *Lanyon*, for the company.

In Nov. 1868 the plaintiff was a passenger by one of the company's trains from Colchester. He observed that the carriage in which he was rocked and jolted very much, and he complained of it. After this the jolting still continued, until, all of a sudden, a violent bumping occurred, and the carriage went off the line, and one of the tires was broken. He was thrown violently from side to side, and sustained severe injuries. In Dec. 1868 he made a claim to the company for compensation, but they took no notice of it beyond referring it to the superintendent. In May 1869 he made a claim for compensation to the amount of 1500l.; and on the 30th June there was a minute in the board book that the law clerk be directed to settle the claim on the best terms possible. The case for the plaintiff was that the accident had arisen from insufficient coupling, as shown by the jolting, and that from that cause the carriage had broken loose, and gone off the line. And the direction to the law clerk was also relied upon as an admission of liability.

The case for the company, in defence, was that the

(a) *Thesiger* got a rule for a new trial as against evidence, but the cases were compromised.

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accident had arisen from causes over which they had no control. It was proved that the carriage was made in 1863, and put into repair in Oct. 1868 (the accident occurring in the next month); and further, that new wheels had been put on three weeks before the accident. The engine driver was called to prove that he had duly examined the wheels and tires just before the journey, and found them apparently quite sound and safe. It was proved that the pieces of the broken tire were found on the line some distance above the spot where the engine was found to have gone off the line, and reliance was placed upon this as showing that the breaking of the tire had happened first, and was the cause and not the effect of the carriage going off the line. Moreover, evidence was given that in fact there was a flaw in the metal of the tire as disclosed by the fracture, and skilled evidence was given to show that a carriage could not have broken its tire from its having gone off the line, and could not have gone off the line through insufficient fastening or from jolting, and that the more violent bumping described by the plaintiff was caused by the carriage going over the sleepers after it had broken loose. Finally, there was evidence of experts that in fact the carriage had gone off the line through the breaking of the tire.

Kelly, C. B., in summing up to the jury, said that it was for the plaintiff to make out his case, and to show that the accident arose from such cause as would cast the liability upon the company; in other words, that it arose from the negligence of their servants. And if the evidence left this point in doubt they must find for the company. Unhappily it appeared that the evidence did leave that point in doubt, and what was clear was that the carriage had gone off the line; but the great question was how this had happened, and upon that the evidence was contradictory; and if the evidence, on the whole, was as consistent with the case for the company as for the plaintiff the case was left in doubt. The case for the company was founded upon the proposition that if the accident had arisen from a latent defect or flaw in the iron they would not be liable, and no doubt that was so. Then there was evidence to show that the accident could not have arisen from the cause suggested by the plaintiff, but had arisen from the breaking of the tire by reason of a secret flaw in the metal. If that were so, or even if it were left in doubt, the company were entitled to the verdict. With regard to the alleged admission of liability, it was not conclusive; though it certainly was fit for consideration, as tending to show a consciousness on the part of the company and their servants that they were in the wrong, though it might only have been the result of prudential considerations. The question then was whether the jury were satisfied that the injury had arisen from causes over which the company had control, and had been caused by the negligence of their servants. If not so satisfied they must find for the company.

Verdict for the company.

Plaintiff's attorneys, *Reed, Phelps,* and *Sidgwick.*

SURREY SPRING ASSIZES—Kingston.

(Before Byles, J.)

Reg. v. Williamson.

False pretences—Misrepresentation as to value of business—A false representation as to the value of a business will not sustain an indictment for obtaining money by false pretences.

On an indictment for obtaining money by false pretences, it appeared that the prisoner, on engaging an assistant from whom he received a deposit, represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless, and he had been bankrupt.

Held, that the indictment could not be sustained upon either of the representations.

Indictment for obtaining money from one S. by means of false pretences, the pretences laid being, (1) that the prisoner was then doing a good business; (2) that he said that he had sold a good business for 300*l.*; (3) that it was necessary for his safety, if he engaged S. as his assistant, that he should have from him a deposit of 50*l.*

There was a second indictment charging that the prisoner obtained money from one W., by falsely pretending, (1) that he was then doing a business with returns of 100*l.* a week; (2) that he had sold a business for 300*l.*

Lilley for the prosecutor.

Oppenheim for the prisoner.

On the first indictment the prosecutor, S., who had been engaged by the prisoner as assistant, was called to prove the representations, and to show that upon the faith of the representation he entered into an engagement with the prisoner for a small salary and half profits, and also deposited 50*l.* as a security, whereas in truth the business was worthless, and the prisoner a bankrupt. He stated that he had deposited the money in the belief that the prisoner "had a good business."

Byles, J. (to the counsel for the prosecution.—On which of the pretences do you rely? It is like the case of a sale of a business with exaggerated representations of its value, upon which, though fraudulent, an *indictment* will not lie.

Lilley said he relied on the prisoner's representations that he was doing a good business, and that he had sold a business for 300*l.*

Byles, J.—The latter is too remote. You might as well go back to any former transaction of which he had given a representation—that is too remote. As to the other, have you any case in which it has been held that on the sale of a business—the vendor saying it was a good business—he has been thus indicted? (No such case was cited.) (*a*) This appears to be rather a case for false representation than for a criminal prosecution.

Lilley urged that here the pretence was more entirely false than in any previous case, for the man was a bankrupt.

Byles, J.—There is no pretence laid that he was *not* a bankrupt. The pretence laid is that he had a good business. It is like the case of a sale of a business upon such a representation. No doubt, if the business was worthless, there was a gross exaggeration, probably fraudulent; but is it a case for an indictment for obtaining money by means of false pretences? If so, an indictment would lie in every case of a false and fraudulent representation of the value of a business. Unless some authority to the contrary can be cited, I must rule against the prosecutor.

No case being cited,

Byles, J. directed the jury to acquit the prisoner, on the ground that such a representation, although grossly fraudulent, was not the subject of a criminal proceeding.

Verdict not guilty.

No evidence was offered on the other indictment.

(*a*) And see *Reg.* v *Watson*, 20 L. J. 18, M. C., *contra.*

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Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Wednesday, Nov. 3.

(Before Lord Justice GIFFARD.)

Re THE NATAL INVESTMENT COMPANY (LIMITED); *Ex parte* SNELL.

Company—Contributory—Subscriber of memorandum of association—Application for shares—Payment of deposit—Withdrawal before allotment—Power to accept surrender of shares—Companies Act 1862, *s.* 23.

S. applied for twenty shares in a company about to be established, and paid the required deposit money; he also signed the memorandum of association for that number of shares, and consented to act as a director. Circumstances came to his knowledge which led him to change his intention, and before any allotment of shares to him he wrote to withdraw his application, and request return of the deposit. The directors had power under the articles to accept a surrender of shares, and they returned him the money which he had paid, and from that time he had no communication from the company until after the commencement of the winding-up, nor was his name entered in the register of shareholders:

Held (reversing the decision of the Master of the Rolls), that S. was not liable as a contributory, although until withdrawal he had been; and that it was competent for him, under the circumstances, to surrender the shares, and for the company to accept that surrender, although his name had never, in fact, been entered as a shareholder, the 23rd section of the Companies Act 1862 *having no application to a case of this description.*

This was an appeal by Mr. Snell, an alleged contributory of the company, now being wound-up in the chambers of the Master of the Rolls, against an order whereby his Lordship settled his name on the list of contributories as the holder of twenty shares, under the following circumstances:

The company was incorporated in July 1864, and shortly before that time Mr. Snell was invited to take shares and to become a director, and he attended a meeting of the proposed directors, at which he consented to become a director. The necessary qualification for the directorship was the holding of twenty shares, and accordingly Mr. Snell sent in a written application for that number, and paid to the company's bankers the required deposit of 1*l.* a share. He also subscribed the memorandum of association for twenty shares, and that memorandum was then registered.

In a few weeks Mr. Snell discovered that the circumstances of the company were not such as had been represented to him when he consented to take shares and act as a director, the intention having been at that time that the company should be brought out by the Crédit Mobilier Company, an intention which it was found impossible to carry into effect. Upon making this discovery Mr. Snell at once intimated to the board his intention of resigning his seat and withdrawing his application for shares. Accordingly on the day after he had made the discovery, as he alleged, he wrote to the directors that the arrangements which they then had for establishing the company were very different from what they were represented to him to be when he consented to join the direction; he, therefore, respectfully resigned his seat at the board, and also requested the company to cancel his application for shares, and to return the amount which he had paid as deposit money, his application having been made under a misapprehension.

The board took this letter into its consideration shortly after it reached them, and on the 15th Sept. 1864 the secretary wrote to Mr. Snell, enclosing the company's cheque for 20*l.*, requesting the bankers' receipt in return. Mr. Snell received the 20*l.* from the bankers, and forwarded to the company the receipt they asked for. No shares were ever allotted to Mr. Snell; his name was never entered on the register of shareholders, and until after the winding-up order he never received any further communication from the company.

By the 38th paragraph of the articles of association, the directors were empowered to accept surrenders and forfeitures of shares; the clause will be found in the judgment, as will also the 23rd section of the Companies Act 1862, upon which the counsel for the liquidator mainly relied.

The chief clerk, however, settled Mr. Snell's name on the list, and the Master of the Rolls refused with costs his application to have it removed. Hence this appeal.

Sir *Richard Baggallay*, Q. C. and *Marten* supported the appeal.

Jessel, Q. C. and *Fitzroy Kelly*, for the liquidator of the company, resisted it, referring to *Evans's case*, L. Rep. 2 Ch. 427; 16 L. T. Rep. N. S. 252.

Without calling for a reply,

Lord Justice GIFFARD said:—I confess that I cannot agree with the opinion which the Master of the Rolls has expressed in this case, because, as it seems to me, there being special power in these articles enabling the directors to accept a surrender of shares, everything was done that it was requisite to do in order to sever the connection of Mr. Snell with this company. First of all, no doubt, by signing the memorandum of association (I think he signed it for twenty shares), he became to all intents and purposes a shareholder in respect of twenty shares; and no doubt, according to the strict ordinary practice, when the articles were registered, which I believe was contemporaneously with the memorandum of association, his name ought to have been entered in the register of shareholders. It was not so entered, and things went on for some time after that. Mr. Snell was a director. There was a power given to resign his directorship, and he did resign his directorship. At the same time he wrote a letter suggesting that the company was a different company to that which he supposed it was. I think there was a suggestion almost of fraud, and that he desired to sever the connection between himself and the company. That transaction no one impeaches as being otherwise than perfectly *bonâ fide;* and the case between himself and the directors of the company is, that there was that which amounted in reality to a severance, if severance there could be, as between him and the company. True it is, that at that time he was not registered as a shareholder; true it is that no specific shares, in point of allotting shares, had been allotted to him; but for all purposes of liability, although the shares had not been allotted to him, he was a shareholder in that company, and therefore what one has to consider is this, whether or not there was power in the directors to do that thing which was done, and whether the Act of Parliament rendered invalid what was in point of fact done, if what was done was really the true and *bonâ fide* intention of all parties. The articles contain this clause: "The directors may, if they think fit, at any time accept the surrender and forfeiture of his shares by any shareholder desirous of surrendering and forfeiting them, on such terms as the directors may think fit." The result of that

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unquestionably is, and it has been admitted at the bar, that if Mr. Snell had had his name written in the list of shareholders and had had an allotment of shares, he could have done the very thing which the parties intended to do; he could have surrendered and forfeited the shares, and so have severed, subject to his liability to creditors for twelve months, his connection with the company. The whole question is whether he could do that antecedently to his name being written in the register of shareholders. The 23rd section of the Act of Parliament which is relied upon is this: "The subscribers of the memorandum of association of any company under this Act, shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and, upon the registration of the company, shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of the company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." Now can it be, where the substance of the transaction is really that these parties intended to sever their connection, that this transaction should be taken as nugatory, because Mr. Snell's name was not written in the register of shareholders? In my judgment, the Act of Parliament does not apply to a case of this description. I think, if there is a signature to a memorandum of association, where the articles also are registered, and there is in those articles a power to cancel and forfeit shares, and that cancellation *bonâ fide* takes place antecedently to the name being put on the register, the Act of Parliament in no sense applies, and it must be taken to apply only to putting on the register the name of a person who is to all intents and purposes an uncancelled shareholder at the date of his name being put upon the register. For these reasons I am of opinion that one may look at what is the truth and substance of this case—that there is no matter of form standing in the way whatever; and as Mr. Snell and the directors have agreed that Mr. Snell's shares should be cancelled, and as there was the power to carry out that agreement, that power was duly exercised and the agreement duly performed. Of course the cancellation, as one knows perfectly well, as between Mr. Snell and the other shareholders, would be a cancellation *ab initio*, but, as between Mr. Snell and the creditors, Mr. Snell would no doubt be liable for the twelve months from the date of his being a shareholder, and until the date of his cancellation he was a shareholder.

For these reasons I am of opinion that the order of the court below must be discharged. Mr. Snell will have his costs in the court below, but not any costs of the appeal. The official liquidator will have his costs of the appeal and in the court below out of the estate.

Solicitors for Mr. Snell, *Thomas* and *Hollams*.

Solicitors for the liquidator, *Stevens*, *Wilkinson*, and *Harries*.

Friday, Nov. 5.

Re THE AGRICULTURIST CATTLE INSURANCE COMPANY;

DIXON'S CASE.

Company—Contributory—Bonâ fide dispute—Compromise—Cancellation of shares—Power of directors—Lapse of time.

In 1846, *W. an officer of the above named company, took ten shares in the company in the name of D., in order to qualify him to become a director, D. having given his consent only on an oral undertaking by W. that until an Act of Parliament limiting the liability of the shareholders should have been obtained, he should not be asked to sign any contract, or be considered as an ordinary shareholder. The shares were allotted to D., and registered in his name, but the deposit money was paid by W. D., however, acted so far as a shareholder, and so far only, that he appointed a proxy to vote for him at a meeting of the company, and received, and gave a receipt for, a dividend on the ten shares. The company failed to obtain the Act referred to, and D. soon after, on receiving a circular containing an application for a call, wrote to W., reminding him of the terms on which the shares were allotted, and representing that he was not fairly a shareholder; and in consequence of this, upon an explanation by W. of the circumstances, the directors agreed upon payment of the calls made to allow the shares to be cancelled, and a resolution to that effect was passed, and D.'s name was removed from the list. This was never confirmed by the company; the calls were paid by W., not by D., who was unaware of the arrangement, but from* 1849 *to the winding-up order in* 1861, *D. was never treated as a shareholder.*

Held, under these circumstances (reversing the decision of the Master of the Rolls), that the case was one of cancellation of shares and release of a man who had been actually a shareholder, which was ultra vires of the directors; and that it was in this respect to be distinguished from Lord Belhaven's case, 3 *De. G. J. & Sm.* 41; 12 *L. T. Rep. N. S.* 595, *in which there was a bonâ fide controversy between the company and the shareholder, which the articles empowered the directors to compromise, whereas here the question was only between the shareholder and W.*

In the consideration of such a case the long lapse of time was quite immaterial.

This was a motion by the official manager (the case being under the old Winding-up Acts) to reverse the decision of the Master of the Rolls (reported in 21 L. T. Rep. N. S. 288), that the name of the respondent, Mr. Thomas Griffies Dixon, was not to be included in the list of contributories of the company, which was one of unlimited liability.

The whole of the circumstances appear in the report of the hearing at the Rolls.

Southgate, Q. C. and *Bush* were for the appellant.

Sir *Richard Baggallay*, Q. C. and *G. N. Colt* for the respondent Mr. Dixon.

The authorities referred to were

Re The Agriculturist Cattle Insurance Company, Lord Belhaven's case, 3 De G. & Sm. 41; 12 L. T. Rep. N. S. 595;
Re the same Company, Brotherhood's case, 31 Beav. 365; 7 L. T. Rep. N. S. 56; and on appeal, *ib.* 142;
Spackman v. *Evans*, L. Rep. 3 Eng. & Ir. App. 171; 19 L. T. Rep. N. S. 151;
Evans v. *Smallcombe*, L. Rep. 3 Eng. & Ir. App. 249; 19 L. T. Rep. N. S. 207;
Re The Agriculturist Cattle Insurance Company, Stanhope's case, L. Rep. 1 Ch. App. 161; 14 L. T. Rep. N. S. 468;
Houldsworth v. *Evans*, L. Rep. 3 Eng. & Ir. App. 263; 19 L. T. Rep. N. S. 211;
Re The Canadian Native Oil Company, Fox's case, L. Rep. 5 Eq. 118;
Re The Vale of Neath and South Wales Brewery Company, ex parte Morgan, 1 M. & G. 225;
Clegg v. *Edmondson*, 8 De G. M. & G. 787;
Tatum v. *Williams*, 3 Hare, 347;
Prendergast v. *Turton*, 1 Y. & Coll. 98.

Lord Justice GIFFARD said:—I certainly wish most sincerely that I could follow the very able

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judgments, for very able judgments they were, both of Lord St. Leonards and Lord Romilly in the House of Lords in *Spackman* v. *Evans*, and other cases of that class; but unfortunately I cannot, for able as those judgments were, they failed to prevail with the majority of their Lordships, and I must take the law to be this—namely, that in this particular company there is no power simply to cancel shares, no power simply to discharge a shareholder. If this transaction is simply a cancellation of shares, or the discharge of a shareholder, the mere lapse of time must be considered, standing by itself, as quite immaterial, and as no ground for taking this gentleman's name from the list of contributories.

That being so, I am brought to the consideration of *Lord Belhaven's* case, and I take the effect of *Lord Belhaven's* case to be this: It proceeded entirely upon the fact that there was a controversy between the alleged shareholder and the company, and a compromise of that controversy. In *Lord Belhaven's* case, Lord Belhaven, beyond all question, rightly or wrongly, asserted that he was not a shareholder; the company were perfectly well aware that he made that assertion, and took from him a sum of money upon the footing that they were to accede to his assertion, and if he had been a shareholder he ceased to be a shareholder, and the whole thing was to be settled and compromised upon those particular terms. What I have to consider is whether the facts of this case come up to *Lord Belhaven's* case; in other words, whether there really was, looking at all this correspondence and at what took place, a controversy between Mr. Dixon on the one hand and the company on the other, as to whether Mr. Dixon was or was not a shareholder. In examining that I must certainly take Mr. Dixon to be bound by Mr. Wilkie's letters and Mr. Wilkie's communications with the company, and bearing that in mind we must, first of all, start with this, that the cancellation took place in March 1849, and, as I said before, I regret that I cannot pay any attention to the lapse of time, as the decision of the House of Lords has precluded me from doing it. The transaction itself took place somewhat early in the year 1846, and took place entirely between Mr. Dixon and Mr. Wilkie, and as detailed in the first paragraph of Mr. Dixon's affidavit, and I do not at all see any grounds for disputing the truth or accuracy of that affidavit. But subsequently to that we find that in May 1846 he distinctly signs a proxy which, on the face of it, represents himself to be, and alleges that he is, a shareholder in this company. We find further than that, that in Jan. 1847 he receives a dividend, and the Act of Parliament which he alleges was at the outset to be obtained before he could be held responsible as a shareholder, was not really applied for until the year 1848. In that state of things there come subsequently requests to Mr. Dixon to make payments of calls. He takes no notice of those circulars, and then he writes this letter, which is in the fifteenth paragraph of his affidavit, to Mr. Wilkie; he does not communicate directly to the company at all; but at that time, beyond all question, he must have known that he was a shareholder. I do not know that I have got the exact date, but the letter is set out in the fifteenth paragraph, and it is in these terms: "As I have received a circular connected with the Agriculturist Cattle Insurance Company, I think it proper to remind you of the position in which I am regarding that company. You will recollect that, at the time you put down my name and paid a deposit, you distinctly stated to me that you wanted my name for the purpose of appearing in a list of extraordinary directors in Scotland, when such should be advertised, and when an Act of incorporation was got limiting the responsibility of the shareholders; and that, until that was got, you would not ask me to sign any contract, or consider me responsible as an ordinary shareholder. I have never considered myself properly entitled to interfere with the affairs of the company, and I will be obliged if you will explain these circumstances to the board if you have not done so already, and set the matter at rest. I may remind you that you put down my name and paid the deposit yourself, and you have never asked me to repay you the amount, whatever it is. I wish well to the company, and have uniformly insured my stock with it; but I do not think that, under the circumstances, I can fairly be held a responsible shareholder." Now that does not deny the fact of his being a shareholder: on the contrary it admits very plainly that he was a shareholder, and I can only infer from that letter, which is quite consistent with what he stated in the earlier part of his affidavit, that Mr. Wilkie, to his knowledge, had put him down as a shareholder; but in reality there was an arrangement between him and Mr. Wilkie that he should be indemnified. Then the next letter is dated the 2nd March 1869; it is from Mr. Wilkie to the company, and that letter is in these terms:—"This gentleman's (the respondent's) name appears in the list of shareholders, but as he considers he is not properly so, it is necessary for me to explain how he stands. For this purpose I inclose you the copy of a letter he wrote me after the Bill was withdrawn from Parliament. This letter I had with me while attending the general meeting in the beginning of November last, and which I brought for the purpose of showing you and explaining, and stupidly forgot in the excitement of other matters to do so. I cannot deny what Mr. Dixon states as the terms upon which he allowed me to retain his name as a shareholder on the list. I have never asked him to repay me the deposit, and did not consider myself entitled to do so until we got an Act limiting the shareholders' responsibility. It was on this condition that I obtained his consent to allow his name to remain after I had put it down, and from this also that I did not receive his name to the deed of agreement." That is sent to the company, and the answer to that is very natural. You must observe in both those letters—in Mr. Dixon's own letter he does not assert he is not a shareholder; he only says he was put down as a shareholder with some arrangement that he was not to be liable; neither does Mr. Wilkie assert that he was not a shareholder—the answer on the part of the company is this: "No Act of Parliament will limit the responsibility of shareholders, and a special Act is now being prepared by the Government to effect this most important alteration in the law; but I do not see that Mr. Dixon can expect to get out on such a plea." Mr. Wilkie then writes in answer to this: "I notice what you say in answer to my letter regarding that gentleman's position. In law he may probably be considered bound, but it is thought that it would only be considered equitable that he be released. Would the directors not agree to cancel his name upon payment of the calls that have been made, according to the number of shares for which he is entered? If the directors will be willing to do this, I shall advise him to agree to do so. I really wish this were agreed to, for from my having pledged my word, as I explained in my last letter, it would go far to make gentlemen lose all confidence in me as acting for the company, and this under our present circumstances would have a very bad effect." Now, stopping there for one moment, it is impossible to say upon those letters that there was a controversy between the company and Mr. Dixon and Mr. Wilkie as to whether Mr. Dixon was or was not a shareholder. There was a distinct admission by Mr. Dixon himself that he was a shareholder, and there was a distinct admission

by Mr. Wilkie that he was a shareholder, and that was sent to the company, and the only ground suggested for releasing Mr. Dixon is that confidence would be lost in Mr. Wilkie, and consequently that the company might be damaged; but as to there being any compromise of any disputed question, certainly there is nothing of that sort. Then the next letter is from the company. "I think the directors will accept payment of calls and allow these shares to be cancelled; under the circumstances it would, I think, be advisable." That must proceed, if it proceeds upon anything at all, upon the erroneous supposition of these parties that they had the power to cancel the shares. Then the money is paid by Mr. Wilkie, and there are resolutions passed which are, in terms, to cancel and forfeit. Under those circumstances I have no hesitation in saying that I cannot distinguish this case from *Spackman* v. *Evans* and *Stanhope's* case, and that class of cases which were decided in the House of Lords. I cannot see any grounds upon which, when one comes carefully to analyse these letters, this can be brought within *Lord Belhaven's* case, because there really was no question in controversy between Mr. Dixon and the company. He was admittedly a shareholder; there was no suggestion as to his not being a shareholder, and there was nothing of the sort to compromise. It was a mere attempt to cancel shares and to discharge the shareholder, by agreement as distinct from compromise. Unfortunately for Mr. Dixon, these directors had no power to do anything of that description.

Upon these grounds, therefore, Mr. Dixon's name must be upon the list; but under the circumstances, of course I cannot make Mr. Dixon pay any costs.

Solicitors for the official manager, *Horne* and *Murray*.

Solicitors for Mr. Dixon, *Kingsford* and *Dorman*, agents for *Wilson* and *Farrar*, of Cranbrook, Kent.

ROLLS COURT.

Reported by HENRY PRAT, Esq., Barrister-at-Law.

Friday, Nov. 12.

GRENVILLE MURRAY *v.* EARL OF CLARENDON.

Pleading—Allegation of trust—Demurrer.

M., who had held a diplomatic post in Her Majesty's service, filed a bill against the Secretaries of State for Foreign Affairs, alleging that he had been unjustly dismissed from his post, and that various sums were due to him from the defendants; also alleging that a certain sum was annually drawn by the Foreign Office from the Treasury for the purpose of paying the salaries and pension of the diplomatic and consular services, and that such sum was received by the defendants as a trust-fund in trust to pay thereout such salaries, &c. The bill prayed that an account of what was due to the plaintiff might be taken, and that the defendants, as such trustees, might be ordered to pay what should be found due.

On a demurrer by the defendants:

Held, that the general allegation of a trust was not sufficient to give the court jurisdiction, but that it was necessary to set out the facts, deeds, or instruments in which the trust originated:

Held, also, that the court had no jurisdiction to take such an account as that asked by the bill, the Foreign Office having a discretion as to the application of the fund, and not being responsible to the Court of Chancery.

Demurrer accordingly allowed.

This was a suit instituted by Eustace Clare Grenville Murray against the Earl of Clarendon, the principal Secretary of State for Foreign Affairs, and James Murray, the permanent superintending Under Secretary of State for Foreign Affairs.

The bill alleged that in the year 1841 the plaintiff was employed by the late Lord Palmerston in the service of Her Majesty's Government in the Foreign Office department, and that he served without emolument thenceforward till the year 1852, when he was appointed paid attaché at Vienna, with a salary of 350*l.* per annum; that after holding various other diplomatic appointments, the plaintiff was in 1858 appointed Consul-General for the Russian ports in the Black Sea and the Sea of Azof, which appointment he held till May 1868, when he was, as the bill alleged, wrongfully dismissed by Lord Stanley, who was then the principal Secretary of State for Foreign Affairs. The bill also alleged that the plaintiff by divers means incurred the enmity of the defendant, James Murray, who for many years carried on a system of persecution of the plaintiff, and by reason of his great influence in the Foreign Office caused the plaintiff to be refused and deprived of his just rights and emoluments in the service, and to be refused any account of the sums of money due to the plaintiff by reason of his services, and the reasonable expenses incurred by him therein; that the defendant James Murray had conspired with others to procure his dismissal from Her Majesty's service, and to prevent his being paid the pension to which he was entitled in respect of his services.

The bill also alleged that the Foreign Office department of Her Majesty's Government draws annually from Her Majesty's Treasury the sum of 600,000*l.* or upwards for the purpose of paying the salaries and pensions of the diplomatic and consular services, and the expenses incurred by the members of such services respectively, in and about the affairs of the Government, and that the said sum of 600,000*l.* is received by the defendants as a trust fund in trust to pay, or cause to be paid thereout, the salaries, pensions, and expenses aforesaid; that the defendant, James Murray, as superintending permanent Under Secretary of State for Foreign Affairs, has the complete management and control of such trust-fund, and ought to have paid, or caused to be paid, to the plaintiff the sums of money which, upon the several accounts therein mentioned, are or might have been found due to the plaintiff, and that the same ought now to be paid to the plaintiff by the defendants. It also alleged that the said sum of 600,000*l.* is much larger than the sum allowed by Act of Parliament for the purpose of paying the salaries, pensions, and expenses of the diplomatic and consular services, as aforesaid, and that the defendant, James Murray, as permanent Under Secretary of State for Foreign Affairs, had not, during all the time of his superintendence of the financial arrangements of the Foreign Office, as aforesaid, rendered, or caused to be rendered by the Foreign Office department of Her Majesty's Government, any account to Her Majesty's Treasury of the manner in which such sum of 600,000*l.* a year has been disposed of; and that if an account were taken of the manner in which the said sum of 600,000*l.* a year, so drawn and paid as aforesaid, had been spent in each year, it would be found that the sums of money due to the plaintiff upon the several accounts thereinbefore mentioned, had been retained by the defendant, James Murray, for his own use and benefit out of the said trust-fund or sum of 600,000*l.* a year.

The bill prayed that accounts might be had and taken of what was due to the plaintiff from the Foreign Office department of Her Majesty's Government, in respect of the several matters of account thereinbefore stated; that the moneys which should

be found due to the plaintiff upon taking such accounts might be paid to the plaintiff by the defendants, as such trustees as aforesaid; that if it should be found necessary for the proper taking of such accounts, an account might be had and taken of all the moneys drawn from, and paid by, Her Majesty's Treasury to the Foreign Office, in trust as therein mentioned, since the time in the year 1858, when the defendant, James Murray, became the permanent Under Secretary of Foreign Affairs superintending the financial business of the Foreign Office down to the filing of the bill, and that the defendant, James Murray, might be ordered to render an account, and that an account might be had and taken of how the said moneys or trust funds had been disposed of. The bill also prayed for an inquiry what damage had been sustained by the plaintiff by reason of his having been deprived of the emoluments of his office during the time therein mentioned, and of his pension, &c., and that what should be found upon such inquiry to be the damage occasioned to the plaintiff by reason of the circumstances therein complained of, might be ordered to be paid to the plaintiff by the defendants, as such trustees as aforesaid.

The Earl of Clarendon demurred to the bill, and, for cause of demurrer showed that the said plaintiff had not, by his bill, made such a case as entitled him in this court to any discovery or relief from or against the defendant touching the matters contained in the bill or any of such matters.

Sir *Roundell Palmer*, Q. C. and *Wickens*, in support of the demurrer, submitted that assuming the truth of all the allegations contained in the bill, the plaintiff was not entitled to any relief which this court could give. A proceeding against the Foreign Office was really one against the Queen, against whom a subject could only proceed by petition of right. If the plaintiff had proved that a certain sum was due to him, and was in the hands of the Foreign Office, his remedy was by writ of *mandamus* in the Court of Queen's Bench. They submitted that the demurrers must be allowed, as otherwise the effect would be an interference of this court with the performance of its duties by the Executive Government.

Southgate, Q. C. and *Gill*, for the plaintiff, contended that the defendants having, for the purposes of the demurrer, admitted that the defendants, who were public officers, had money in their hands issued by the Treasury for the use of the plaintiff, this suit could be maintained against the defendants for the recovery of the money. They cited

Priddy v. *Rose*, 3 Mer. 86, 102;
Rex v. *The Lord Commissioners of the Treasury*, 4 Ad. & Ell. 286;
Reg. v. *The Lords Commissioners of the Treasury*, 16 Q. B. 357;
Reg. v. *Commissioners of Woods and Forests*, 15 Q. B. 761;
Ellis v. *Earl Grey*, 6 Sim. 214;
Hill v. *Reardon*, Jac. Rep. 84;
Slingsby's Case, 3 Swanst. 178.

Lord ROMILLY.—I am of opinion that this demurrer must be allowed. In my opinion the plaintiff is entitled to no relief in equity on his present bill. General allegations will not suffice to support a bill against a demurrer. It is true that a general demurrer admits the truth of every statement in the bill for the purposes of the demurrer, but this rule must be taken with this qualification, that general allegations are not to be accepted as true when inserted merely to support the bill, where the particular facts do not entitle the party to relief. This was laid down by an eminent equity judge, Alexander, C. B., in *Frietas* v. *Dos Santos*, 1 Y. & J. 576. It is not enough, therefore, to allege that the Foreign Office holds a fund in trust for a certain person, to give the court jurisdiction over it, unless there are facts to show that the relationship of trustee and *cestui que trust* does exist. Otherwise it would be impossible for a demurrer ever to succeed, as it might be defeated by the introduction of some general allegations in the bill. A general allegation of a trust is not sufficient; but, to give the court jurisdiction, it is necessary to set out the facts, deeds, or instruments, in which the trust originated. [His Lordship examined the statements in the bill as to the plaintiff's alleged unlawful removal from his office, &c., which are immaterial to the present report, and continued.] The material point in the bill is the allegation that the Foreign Office fund is a trust-fund. If so, it is held in trust for the general purposes of the Foreign Office, namely, for the payment of salaries, pensions, and expenses, and not in trust for individuals. The application of the fund is left in the discretion of the Foreign Office, and there is nothing to connect the plaintiff with any specific portion of it. No trust, therefore, can be said to exist on behalf of the plaintiff. But it is alleged that if an account were taken of the fund since 1858, it would be found that the sums of money alleged to be due to the plaintiff have been retained by the defendant James Murray for his own use and benefit. In order to make this out, it would be necessary to examine the accounts of the Foreign Office for the past ten years, a task which even Parliament has never attempted. It is impossible for this court to do so, it has not jurisdiction to do so. The Foreign Office is not responsible to the Court of Chancery, but to Parliament alone. The demurrer must therefore be allowed.

A demurrer by the defendant James Murray was allowed without argument.

Solicitors for the plaintiff, *Cookson, Wainwright, and Co.*

Solicitors for the defendants, *Raven* and *Bradley*, for the *Solicitor to the Treasury*.

Nov. 12 and 15.

WOLLASTON *v.* TRIBE.

Marriage settlement—Voluntary trusts in favour of collateral relations—Power of revocation.

By a marriage settlement made in 1858, certain property belonging to the lady was invested in trustees upon certain trusts for the benefit of the wife and husband during their respective lives, and the children of the wife by the then intended or any future marriage, and in default of such children upon trust for the wife's nephews and nieces absolutely. The settlement contained no power of revocation, and gave the wife no power of appointment amongst her nephews and nieces, and no power to lease, to appoint new trustees, or to change investments. The husband died in 1865, leaving no issue. On a bill by the wife to set aside the settlement:

Held (on the ground that the plaintiff had executed the deed in ignorance of its effect, which had not been sufficiently explained to her, and that the nephews and nieces were mere volunteers, and not within the consideration of the marriage), that the trusts of the deed must be declared void, and the trustees be ordered to retransfer to the plaintiff the property comprised in the settlement.

By an indenture dated the 27th Sept. 1858, and made between Robert Wollaston, of the first part, Mrs. Wollaston, by her then name of Catherine Anne Boghurst, of the second part, Edwin Henty and William Tribe, of the third part, and Henry

John Gore and the said Edwin Henty, of the fourth part, in consideration of a marriage then intended, and shortly afterwards solemnised, between the said Robert Wollaston and Catherine Anne Boghurst, the latter, with the consent of Robert Wollaston, granted and conveyed the freehold hereditaments therein mentioned unto and to the use of the said Edwin Henty and William Tribe, their heirs and assigns, upon trust after the solemnisation of the said intended marriage, to receive the rents, issues, and profits of the said hereditaments and premises, and to pay the same to the separate use of Mrs. Wollaston during her life, without power of anticipation, and after the decease of Mrs. Wollaston, in trust for the said Robert Wollaston, and his assigns, during his life, and immediately after the death of Mrs. Wollaston and of the said Robert Wollaston, if he should survive her, which should last happen, in trust for all and every, or such one or more, of the children of Mrs. Wollaston, by her said intended or any future husband, or the issue of such child or children born in the lifetime of Mrs. Wollaston, in such shares, &c., and in such manner as Mrs. Wollaston should, in manner thereinmentioned, appoint, and in default of appointment, in trust for all such children, share and share alike. But in case there should be no child of Mrs. Wollaston by her said intended or any future husband, or no such child who should attain the age of twenty-one years, or who, dying under that age, should leave no issue living at his, her, or their death, in trust for such of the nephews and nieces of Mrs. Wollaston, the children of her two sisters, Elizabeth, the wife of the said Henry John Gore and Laura Frances, the awife of the said Edwin Henty, as should be living t the time of the death of Mrs. Wollaston, and the death of the said Robert Wollaston, and the failure of issue of Mrs. Wollaston, which should last happen, and their respective heirs and assigns as tenants in common, and not as joint tenants.

By the settlement similar trusts were declared concerning the personal estate of Mrs. Wollaston, which had been assigned to Henry John Gore and Edwin Henty. The indenture contained a covenant by Mr. and Mrs. Wollaston for the settlement of all the lady's after-acquired property upon the like trusts. It also contained a power to appoint new trustees in which no consent or concurrence of Mrs. Wollaston was required.

Robert Wollaston died on the 22nd Aug. 1865. There was no issue of the marriage, and Mrs. Wollaston had not married again.

In Aug. 1868 Mrs. Wollaston filed the present bill, praying that the trusts and provisions contained in the indenture of settlement of the 27th Sept. 1858, respecting the real and personal property comprised therein, in favour of the issue of the plaintiff by a future husband, and in favour of the nephews and nieces of the plaintiff, and also the covenant to settle after-acquired property might be declared to be void as against the plaintiff; and that the defendants, the trustees of the said indenture of settlement might be decreed to reconvey and transfer the real and personal property comprised therein to the plaintiff, her heirs, executors, administrators, and assigns absolutely.

At the date of her marriage Mrs. Wollaston was a spinster of the age of forty-one; she had two sisters, one of whom had four children, and the other only one. She consulted her brother-in-law Mr. Henty about the settlement, and told him that she wished her property to go to her nephews and nieces in equal shares in the event of her dying without issue. Mr. Henty gave instructions for the settlement to Mr. William Foard Tribe, who had previously acted as solicitor for him.

Mr. William Foard Tribe made an affidavit, in h he stated that he read the more material parts of the settlement, and explained its general effect to Mrs. Wollaston before she executed it; but that he did not explain to her what her position would be if her husband died in her lifetime, leaving no issue of the marriage, and that he did not suggest that a power of revocation should be inserted in the deed.

The plaintiff now sought to set aside the deed on the ground that she had executed it in ignorance of its effect.

Joshua Williams, Q. C. and *Martin Ware*, for the plaintiff, submitted that as the solicitor had not fully explained the effect of the settlement, and had not reserved or suggested the reservation of a power of revocation, the deed could not be upheld; it was clear that the plaintiff had executed it in ignorance of its effect. All the interests within the consideration of the marriage had expired, and the nephews and nieces were mere volunteers; the proper course would therefore be to declare the settlement void *in toto*, and not to rectify it by inserting such clauses as it ought to have contained. They cited

Huguenin v. *Baseley*, 14 Ves. 272;
Harbridge v. *Wogan*, 5 Hare, 258;
Nanney v. *Williams*, 22 Beav. 461;
Hindson v. *Weatherill*, 5 De G. M. & G. 30;
Forshaw v. *Welsby*, 4 L. T. Rep. N. S. 170; 30 Beav. 249;
Coutts v. *Ackworth*, 21 L. T. Rep. N. S. 224; L. Rep. 8 Eq. 558;
Phillipson v. *Kerry*, 9 L. T. Rep. N. S. 40; 32 Beav. 628;
Lister v. *Hodgson*, L. Rep. 4 Eq. 30
Cooke v. *Lamotte*, 15 Beav. 234.

Sir *Richard Baggallay*, Q. C., *Southgate*, Q. C., and *Bovill*, for the defendants, contended that it was now too late after the lapse of so many years to set aside the deed. The plaintiff should have come to seek the aid of the court as soon as the mistake was discovered. Moreover this settlement was partly for a good consideration, and only in part voluntary, and it could not be set aside as there had been no fraud or undue influence in the matter. The utmost relief to which the plaintiff was entitled was to have such clauses inserted as the settlement ought originally to have contained. They cited

Toker v. *Toker*, 8 L. T. Rep. N. S. 525; 31 Beav. 629; on appeal, 8 L. T. Rep. N. S. 777; 3 De G. J. S. 487;
Pulvertoft v. *Pulvertoft*, 18 Ves. 84;

Nov. 15.—Lord ROMILLY, without calling for a reply, said:—I think this is a case in which the settlement cannot stand. It is purely voluntary in so far as it relates to the persons who now seek to uphold it. [His Lordship stated the settlement and the facts of the case, and continued:] In default of children the settlement gives all the property to the nephews and nieces absolutely; this is a purely voluntary gift, for it is clearly settled by the authorities that they are not within the consideration of this marriage settlement. But that is not in itself a sufficient reason for setting it aside, for a voluntary settlement is quite good, if the person making it knows the effect of it, and wishes to carry it into execution. But this lady does not seem to have known what she was doing, or what was the effect of the deed. The form of the settlement is very unusual; the usual course would have been to insert a general power of appointment in default of children, and to have given the property to the nephews and nieces in default of appointment. Mr. Henty, the brother-in-law of the plaintiff, gave the instructions for the settlement, and not the lady herself; there is no doubt that she wished to benefit the children of her sisters, but it does not appear that he wished to do so in

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an irrevocable manner. She acted as if she were making her will, and she wished the settlement to give effect to her intentions at that time, but there is no evidence that she intended to make an irrevocable disposition of her property. Mr. Tribe, the solicitor who prepared the settlement, gives his evidence very fairly; he says that he read the more material parts of the deed to the plaintiff, and explained the general effect of the deed, but that he did not explain to her what her position would be if her husband died in her lifetime leaving no issue of the marriage, and that he did not suggest that a power of revocation should be inserted in the deed; but this is the very thing that he ought to have done. I think nothing of the time that elapsed before the plaintiff took any steps to set aside the deed; it is of no consequence, as the parties are all in the same position as before, and it is not a sufficient reason to cause the court to hold the plaintiff bound by her deed. The settlement is very faulty in many respects; the trustees have all the power, and, as the plaintiff very justly complains, she is reduced to the position of an annuitant of her own property; in case of the death of a trustee she has no power to appoint a new trustee, but that power is given to the surviving trustee; her consent is not required to any change in the investments, and she has no power to lease. It is, therefore, clear that the settlement cannot stand; there will be a declaration that the trusts now subsisting, and also the covenant to settle future acquired property, are void; and there must be a reconveyance and reassignment by the trustees of all the trust property vested in them.

Solicitors for the plaintiff, *Wollaston* and *Davison*.

Solicitor for the defendants, *H. S. Willet*, for *Melville Green*, Worthing.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Nov. 8 and 9.

POWELL *v.* ROBERTS.

County Court—Equitable jurisdiction—Redemption suit—Right to redeem resisted—28 & 29 Vict. c. 99, s. 1.

The County Courts have jurisdiction, under 28 & 29 Vict. c. 99, in suits for redemption, notwithstanding the right to redeem is resisted.

Where, therefore, the defendant, a first mortgagee, with a power of sale, upon giving six months' notice, sold the property before the six months had expired, and the plaintiff, a second mortgagee of the same property, objecting to the sale, filed a plaint in the County Court to redeem:

Held, on appeal (affirming the decision of the court below), that the County Court had jurisdiction to entertain the suit, and that the plaintiff was entitled to a redemption decree.

This was an appeal from the Denbighshire County Court.

The question raised turned upon the power of the County Court judge (under the County Courts Equitable Jurisdiction Act) in suits of redemption, where the right to redeem is resisted. The facts, which were extremely complicated, were briefly these.

By an indenture, dated the first Jan. 1863, John Jones mortgaged certain allotments, numbered 17, 18, and 19, in the county of Denbigh, to Gabriel Roberts, with a power of sale, upon giving six months' notice, to secure 160*l.* and interest.

By another indenture dated the 28th Nov. 1862, but executed on the 28th Nov. 1863, Jones further mortgaged lots 17 and 19 with a power of sale on giving three months' notice to John Powell, to secure 110*l.* and interest.

On the 1st March 1866, Roberts gave notice of sale, and on 31st Aug. 1866 (before the expiration of his six months' notice) joined in a contract for the sale of the property included in both mortgages. Before the contract was entered into Powell through his solicitor made several applications offering to redeem Roberts's mortgage, but was answered that it had been satisfied.

It appeared that some time prior to the contract Jones had executed a deed whereby he had assigned the equity of redemption to trustees for the benefit of his creditors, and their solicitor had given Roberts a cheque for his principal and interest. This cheque Roberts had cashed, but shortly before the contract for sale he repaid the money to the solicitor of the trustees, receiving from him in exchange a promissory note for the amount, and it was alleged that the cheque was given to Roberts as an indemnity on his signing the creditors' deed. The contract for sale was carried into effect, and a deed of conveyance executed, the purchaser taking with notice of Powell's claim to redeem.

On the 23rd May 1867 Powell filed a plaint in the County Court against Roberts, praying that the defendant might be ordered to convey the mortgaged premises to the plaintiff upon payment of 160*l.* and interest, and for an injunction. Subsequently, on an objection taken by the defendant, the plaint was amended by making the purchaser also a defendant, and by praying that the sale and conveyance might be set aside, and that the defendants might be ordered to convey the property to the plaintiff.

On the 8th Feb. 1868, the judge of the County Court made a decree in the plaintiff's favour, and against that decree the defendants now appealed.

Freeling and *A. E. Miller*, for the appellants, contended that the County Court had no jurisdiction to set aside the sale. The 1st section of the Act of 28 & 29 Vict. c. 99, although it gave to the County Court all the power and authority of the Court of Chancery in suits for foreclosure and redemption, did not extend that power to suits for redemption where the right to redeem was resisted. On the doctrine of the consolidation of mortgages, the plaintiff could not redeem the mortgage on allotment 17 and 19 without redeeming that on allotment 18:

Tassell v. *Smith*, 2 De G. & J. 713;
Neve v. *Pennell*, 2 H. & M. 170;
Beevor v. *Luck*, L. Rep. 4 Eq. 537.

Further, the power of sale had been properly exercised, and the plaintiff had full notice: (*Watts* v. *Symes*, 1 De G. M. & G. 240.) There could be no doubt that Roberts's mortgage was a subsisting mortgage at the time of the execution of the conveyance. As to the cheque given to Roberts by the solicitor of the trustees it was not a payment by the mortgagor, and did not affect the mortgagee's power of sale. Lastly, the plaintiff's remedy, if any, was at law, not in equity. They also cited.

Major v. *Ward*, 5 Hare, 604;
Vint v. *Padgett*, 1 Giff. 446; on appeal, 2 De G. & J. 611.

Dickinson, Q. C. and *Langworthy*, for the respondent, were not called upon.

The VICE CHANCELLOR.—I think that this decree cannot be altered, and that the appeal must be dismissed with costs. The first objection to the decree is on the ground of jurisdiction, and the learned judge seems to have been impressed with that as a serious objection, although he overruled it. But

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it seems to me that this suit is more clearly within the language of the Act of Parliament than the learned judge thought. The words of the Act of Parliament are, that the County Court shall have jurisdiction "in all suits for foreclosure or redemption." A suit for redemption in which the right to redeem is resisted is still a suit for redemption, and it seems to me impossible to read this Act as saying that it gives jurisdiction in all suits for redemption except those in which the right to redeem is resisted. I can put no such construction upon the words "all suits for redemption," for they seem to me as wide as can well be. I have looked to see whether it is the practice to treat suits where the right to redeem is resisted as any other than suits for redemption, and I find in all the text books, as well as in the reports, that a suit for redemption, in which the right to redeem is resisted, is still treated as a suit for redemption. In 1 Seton on Decrees, 376, under the heading of "Suits for Redemption," this is said: "If part of the costs" (that is, in a suit for redemption) "have been caused by the resistance of the mortgagee to a redemption decree he will pay so much of the costs of the suit and receive the rest." I have turned to Sir Thomas Plumer's decree in the case of *Harvey* v. *Tebbutt*, 1 J. & W. 203, which was a suit where the right to redeem was resisted on the ground that there had been a decree by the Court of Exchequer for foreclosure (a more formidable resistance to a right to redeem than setting up a decree by which the mortgagor is said to be foreclosed cannot well be imagined); and I see that Sir Thomas Plumer treated the suit as one for redemption, for, he says, "The question is whether upon a bill filed to redeem this mortgagee is to be deprived of that which is usually allowed to mortgagees, namely, the payment of his costs." In the decree in that case there is a declaration that the plaintiff ought to be allowed to redeem, and in dealing with the costs it was "ordered that the said master do tax all parties the costs of this suit so far as the same have been occasioned by the defendant's controverting the plaintiff's right to redeem." All this shows that in the view of the court technically, as well as in the ordinary interpretation of language, a suit to redeem where the right to redemption is resisted is still a suit to redeem. Therefore I feel in no degree embarrassed with those doubts as to the jurisdiction which the learned judge entertained, and I think he came to a right conclusion in holding that there was jurisdiction in the court to entertain the suit. I see that the learned judge seems to have been struck with the fact that the County Court had no power to cancel the deed; but in cases of this kind it is no part of the direction that the deed should be cancelled. In the case which I have quoted of *Harvey* v. *Tebbut* there was no direction other than that notwithstanding that decree the plaintiff should be let in to redeem. Here the judge stated, very properly, I think, his opinion that the sale was void. It could not be sustained, and there is no reason why the plaintiff should not be allowed to redeem. As to cancelling the deed, it is a thing in no degree necessary, and indeed, I think would not be proper in a suit of this kind. The other objections to this decree are wholly unsustainable. Where a mortgagee has a power of sale this court has always been careful to see that that power is regularly and fairly exercised, if the exercise of it is insisted upon. In the case of *Jenkins* v. *Jones*, 2 Giff. 99, decided by me some time ago, it happened that although the mortgagee knew that the mortgagor was anxious to redeem, there was no legal tender. At the sale the mortgagor attended and struggled to be allowed to redeem and said that he was ready to do so, but there was nothing like a legal tender. The court set aside that sale, and held that, notwithstanding all formalities had been properly observed, there was not a fair and proper exercise of the power. This case, I must say, seems to me to be a gross one. It is a case in which the mortgagee, after payment of his money, proceeds to sell by private contract. An attempt has been made to show that, although he received the money it was not by any payment of the mortgagor, and that it was afterwards paid back again; but the circumstances of the transaction are quite sufficient to induce the court, when the question is as to the due exercise of a power of sale (which is a prodigious power) to say that it has not been properly exercised. The case does not rest there; after having the money which was paid to him by Adams, who was the solicitor of the trustees of a deed which was executed by the mortgagor for the benefit of the creditors, he not only by word of mouth, but by letter, said that he had been satisfied. But the case does not stop even there. The terms of the power of sale are upon default in payment within six months after notice. The notice is dated the 1st March 1866, and the sale was on the 31st Aug. The suit has occasioned much expense, and the only objection I am disposed to take to the decree is that it does not decree the plaintiff the payment of the costs of so much of the suit, as was done in the case of *Harvey* v. *Tebbutt*; but, as the plaintiff is contented with the decree as it stands, it is not, I think, for the court now to alter it; therefore my only duty is to dismiss the appeal with costs. I do not think it necessary to notice the argument as to the consolidation of the mortgages. There was no right in Roberts, as against Powell, who was mortgagee of both these properties, to say that Powell should not redeem his mortgage without redeeming another mortgage which was made by his mortgagor.

Miller.—Your Honour recollects that Roberts was mortgagee of all the lots.

The VICE-CHANCELLOR.—I think it necessary to observe this: This decree is in an unusual form, and I think, considering the amount of the property, it is a convenient form. It does not direct an account of what is due to the plaintiff, the mortgagor, or anybody. It only says that an account is to be taken of what is due from the plaintiff on the mortgage. It then goes on to direct payment of what shall be so found due by the plaintiff into court within six months. I think, considering the nature of the question between the trustees under the creditors' deed and Gabriel Roberts, that that was a very convenient and proper form of decree. As to the other objection that the proper relief was at law, and not in equity, really it is difficult to understand how it could arise.

Miller.—Your Honour will excuse me for one moment, but I do not know whether your Honour has clearly understood that Gabriel Roberts was mortgagee of both these properties.

The VICE-CHANCELLOR.—I quite understand it, but what has Mr. Powell to do with that? I think the decree is perfectly right, and that the cases cited have no application. The case has been misunderstood, and I should not have thought it a case necessary to be brought before this court.

Solicitors for the appellants, *Rooke, Kearick* and *Harston*, for *Adams*, Ruthvin.

Solicitor for the respondent, *J. D. Finney*, for *Louis*, Ruthvin.

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V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Thursday, Nov. 11.

SOLLORY v. LEAVER.

Receiver—Annuity in gross—General charge of debts—Legacy and an annuity.

A testator gave an annuity to his son T., and all his real and personal estate to his son J. absolutely, subject and charged with the payment of debts funeral, and testamentary expenses, legacies, and the annuity. The annuity was paid for twenty years, and then fell into arrear, and T. filed a bill, and moved for a receiver:

Held, that under the 4 Geo. 2, c. 18, T. had a power of distress, and his remedy was at law. Motion refused.

This was a motion for a receiver, the question being whether the court would make the order where an annuity was given, and all the real estate was generally charged with debts, legacies, and the annuity. There were two suits, the present by the annuitant for arrears, a receiver, and, if necessary, for administration, and a creditor suit, in which it was stated that probably a like motion would be made. The bill stated that John Sollory, by his will, dated the 9th April 1824, as far as was material, gave as follows:

I give and bequeath unto my son Thomas Sollory (the plaintiff), for his life, one annuity or clear yearly sum of 36*l.*, which I direct shall be paid by my son James Sollory, his heirs, executors, or administrators, by four even quarterly payments in the year, the first payment to begin and be made at the end of three calendar months after my decease. And subject and hereby charged with the payment of my debts (whether due on mortgage or otherwise), funeral and testamentary expenses, and the legacies or sums of money and annuity hereinbefore mentioned, I give, devise, and bequeath all my messuages, tenements, and dwelling-houses, lands, hereditaments, and premises situate in Bridleswith-gate and Byard-lane or elsewhere in the said town of Nottingham, with their and every of their rights, members, privileges, and appurtenances; and also all my household furniture, book and other debts due and owing to me at the time of my decease, tools, implements of my trade as a plumber and glazier, and all other my goods, chattels, personal estate and effects whatsoever unto my son James Sollory, his heirs, executors, administrators, and assigns.

That the testator died more than twenty years since, and James Sollory took possession of his personal and real estate, and he, or those claiming under him, had ever since remained, and were now in such possession. James Sollory made his will, dated the 2nd Sept. 1842, and thereby directed payment by his executors of his debts, funeral and testamentary expenses, and devised and bequeathed the messuages and hereditaments (mentioned in the will of John Sollory), with other property, to Mary Sollory (a defendant) and John Stock (since dead) absolutely upon trust for Mary Sollory for life, or so long as she continued his widow, for her separate use, and subject thereto, as to one moiety, upon trusts for Mary Sinclair and her children; and as to the other upon like trusts for Emma Phœbe Huggins and her children. James Sollory died on the 8th Jan. 1843, and his estate was administered to by Mary Sinclair. On the 3rd Nov. 1868 a creditor's bill was filed asking for a receiver, and to restrain Mary Sollory from receiving the rents. On the 16th Jan. 1869 an application for a receiver was made in that suit, which stood over, and no receiver had been appointed. The plaintiff's annuity was paid down to the 1st June 1867 regularly, since which time only a few small sums had been paid in respect of it, and ultimately this bill was filed, charging that the parties in the other suit, though willing, had no power to assist the plaintiff, and he had no means of enforcing payment of his annuity except by the aid of this court. There was no personal representative of John Sollory except Mary Sinclair, whom the plaintiff charged sufficiently represented his estate.

A. E. Miller, in support of the motion, contended that this was the case of an annuity in gross, without a power of entry or distress, and must be regarded in the light of a legacy, being coupled with legacies in the general charge in the will. It was not the case of a rentcharge, and the annuity could not be regarded as issuing out of land in the strict sense. In *Boyes* v. *Rusborough*, Kay, 71, which was affirmed by the House of Lords, where there was a simple devise of land in fee, it was held that there was a right to file a bill to have the will carried out. There was land in Ireland and England, and the heir recovered in ejectment, and the devisee filed a bill as against him in respect of the English property. A mortgage for 1200*l.* had been made by James Sollory. In *Francis* v. *Grover*, 5 Hare, 39, there was a charge upon leaseholds; and in *Pritchard* v. *Fleetwood*, 1 Mer. 54, it was held that a trustee of an estate, subject to an equitable interest must submit to a receiver.

Field for the mortgagee in the other suit, supported the motion.

Chitty, for Henry Sollory, opposed it, and argued that the plaintiff had his legal remedy by distress under the statute (4 Geo. 2, c. 28, s. 5), and showing no impediment to taking that course, he could not come into equity: (*Buttery* v. *Robinson*, 3 Bing. 392.) Here there was a direct gift of an annuity to the plaintiff to be paid by James Sollory out of real estate, and he had a fee simple given to him. It was therefore a legal rentcharge with power of distress under the statute. There was no trust, and the fact that there was a mixed gift of realty and personalty made no difference: (*Buxton* v. *Monkhouse*, Geo. Coop. 41.) The will was demurrable, but the demurrer was not before the court.

Miller in reply.—The case of *Buttery* v. *Robinson* did not apply here, there being no particular charge. The personal estate was primarily liable, and the annuitant would have no right to resort to the land. [*Chitty*.—The doctrine of the application of assets was unknown at law.] In *Carrow* v. *Ferrior*, L. Rep. 3 Ch. App. 719; 19 L. T. Rep. N. S. 79, it was held that the court would not interfere with a legal title. No doubt the appointment of a receiver was in the discretion of the court; but a mere legatee, and the plaintiff was no more, could not distrain. The plaintiff had been advised that he could not proceed at law.

The VICE-CHANCELLOR.—This annuity is given to the plaintiff, and subject to the payment of defendant's funeral and testamentary expenses and legacies, and this annuity (the only one given and particularly mentioned), there is a gift of all the real and personal estate to James Sollory. The result is, that every part of the estate is devised to James Sollory, subject to the payment of this annuity. The bill admitting payment of the annuity to within two years, states that it is now in arrear, and for some reason, for which no satisfactory explanation is given, the annuitant remains unpaid. It also appears that mortgages were executed by James Sollory, subject to the annuity, and the parties claiming under James Sollory also ask for a receiver. Now, considering the state of confusion into which the estate has got, I have not a shadow of doubt that it would be the very best thing for the plaintiff, for Mary Sollory, and everyone concerned, that a receiver should be appointed; but, whatever my inclination may be, the question is, what power have I, and what is my duty in

administering the doctrines of this court? It is clearly settled then wherever an annuity is charged on land, without a power of distress and entry, that is not a rentcharge but a rent-seck. To enable the annuitant to enforce payment of the annuity, the statute 4 Geo. 2, c. 18, applies, and a power of distress is superadded. That was decided in the case of *Buttery* v. *Robinson* (*sup.*); and I believe that that has been recognised ever since as an authority. Here there is an annuity charged on real estate admittedly of different value, and such charge is without power of distress, and therefore it is a case in which the statute adds the power and the plaintiff is an annuitant with power of distress, and he asks me to appoint a receiver. Am I at liberty to do so? The doctrine of the court is that it will not appoint a receiver on the application of those who do not need it. Therefore it is that in the case of a first mortgagee with a legal estate who asks for a receiver, the application will be refused, because the court does not help those who will not help themselves; because a first mortgagee can enter and receive the rents, and give notice to the tenants to pay them to him and get into possession. A second mortgagee, having no such remedy, can get a receiver appointed. The question is whether I can appoint a receiver on the application of an annuitant who has the power of helping himself just as much as a first mortgagee. It appears to me I have no such power, and it makes no difference whether the estate is large or small. If I recognised any such doctrine I might do it in every case where an annuity was in arrear. This case is not within the authority of the case in Sir George Cooper's reports, although there a power was given by deed, and here it is superadded by the statute, but the parties are in precisely the same situation. There a receiver was appointed *ex parte* on motion, in 1810, and Lord Eldon says, "I think this receiver improperly appointed, the plaintiff being a trustee with power of entry and distress on the leasehold estates." The very reason given by Lord Eldon was, not that the annuitant had power, but that it was vested in a trustee, and therefore he decided that the appointment of the receiver was wrong. So here the annuitant has vested in himself a power of distress and entry, and I think it is an analogous case to a first mortgage, and the doctrine ought to be applied that the court will not help those who will not help themselves. I am not able to accede to the motion, which must be refused.

Solicitors for the plaintiff, *Duncan* and *Murton*, agents for *W. J. Braithwaite.*

Solicitors for the defendant, *Pritchard* and *Son*, agents for *Dawson.*

Saturday, July 31.

Re WHITELEY'S SETTLED ESTATES.

Practice—XLI. Consol. Ord., rule 14—*Names and addresses of petitioners—Advertisement.*

Where petitioners in a petition under the XLI. Consol. Ord., rule 14, *and the* 20*th section of the* 19 *&* 20 *Vict. c.* 120, *are very numerous, the name of one, and the description of the property, and place for service on all, is a sufficient compliance with the order.*

In this case a petition had been presented under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), and the Lord Chancellor's secretary considered that the petition had not been properly advertised. By the XLI. Consolidated Order, rule 14, in connection with sect. 20 of the Act, it was provided that every petition under the Act should set forth the name, address, and description of the petitioner, and also a place in London where he might be served, &c.

In this instance the petitioners were very numerous, no less than twenty-six in number, and therefore, for brevity's sake, as giving the full names and addresses would have rendered the advertisement enormously long, it was merely stated that the petition was presented by Robert Tolson and others; the property proposed to be affected being described, and the place for service of the petition.

W. Barber mentioned the matter to the court, and referred to two unreported cases, one before Stuart, V. C. (*Re Burley*), on May 25th, 1868, and the other before this court (*Re Nune*) on the 15th March 1867, where words of description were omitted, and yet the order was made.

The VICE-CHANCELLOR.—Advertisements issued in these cases are for the purpose of giving all persons full information. In this case the property is described, and the place for service on the petitioners, and the name of one. The court has, as appears by the case referred to before Stuart, V. C., and one before myself, dispensed with a strict compliance with the terms of the order. All that is requisite is a substantial compliance. I do not think, therefore, in this case that a new advertisement is necessary; the giving all the names and addresses would afford no further information.

Solicitors: *Redsdale* and *Cradock.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Saturday, Nov. 6.

HALL (app.) *v.* POTTER (resp.)

Public Health Act 1848—*Notice to do works.*

A notice given to the owner of premises under sect. 69 *of the* 11 *&* 12 *Vict. c.* 63 (*Public Health Act* 1848), *containing directions, some of which are ultra vires, will be good, and may be enforced in respect of such directions as are legal.*

A local board acting under the above section, gave the respondent notice to sewer, level, pave, flag, and channel certain premises, including the gardens in front of the houses:

Held, that although that part of the notice applicable to the gardens was invalid, the rest was lawful, and that the notice therefore could be enforced pro tanto.

This was a case stated under the 20 & 21 Vict. c. 43 upon the refusal of justices to make an order upon the respondent under the 11 & 12 Vict. 63, s. 69.

The case stated as follows:—Whereas at a petty sessions holden at the police court, Strangeways, Manchester, in and for the division of Manchester, on the 16th Dec. last before me, complaint was preferred by the above-named appellant, John Hall, clerk to the local board of health of the district of Rusholme, in the said county of Lancaster, that one Michael Potter, the respondent above-named, was on the 7th April 1867, owner of certain premises fronting, adjoining, or abutting upon a certain street called Victoria-street, in Rusholme, within the said district of the said local board of health, which said street was not then a highway repairable by the inhabitants at large, and was not then sewered, levelled, paved, flagged, and channelled to the satisfaction of the said local board of health, and that the said local board of health had, by a certain entry dated the 7th Aug. 1867, sealed with the seal and signed by five

of the members, and also by the clerk of the said local board of health, given to the said Michael Potter as owner of the said premises, fronting, adjoining, or abutting upon the said street, notice within the space of two calendar months from the date of the said notice, to sewer, level, pave, flag, and channel so much of the said street as the said premises fronted, adjoined, or abutted upon in manner in the said notice mentioned; and the said notice further required the said respondent to execute the said works in accordance with a plan and section therein mentioned as being deposited at the office of the said local board.

And whereas the said Michael Potter, as required by the said notice, did not within two calendar months after the date of the said notice, execute the works in the said notice mentioned.

And whereas the said local board executed the works required in the said notice to be done by the said Michael Potter, as above mentioned, except that they did not flag certain gardens included in the said notice and plan, and mentioned in the ninth paragraph of this case. The said board also executed works of sewering, levelling, paving, and flagging, and channelling other parts of the said street.

And whereas an apportionment of the expenses incurred by the said board in doing such work as was done by the said local board in the said street was duly made as required by the said Act (11 & 12 Vict. c. 63, s. 69), and notice thereof, so far as related to the said premises of the said Michael Potter, was duly given to him.

And whereas the amount of the said expenses apportioned, in respect of the said premises of the said Michal Potter for the work so done, as apportioned by the surveyor, amounted to 94*l.* 11*s.* 7*d.*; and such sum was duly demanded of the said Michael Potter on the 2nd July 1868, and he refused to pay the same.

And whereas the said Michael Potter was duly summoned before me to show cause why an order should not be made upon him for the payment of the said sum of 94*l.* 11*s.* 7*d.* so as aforesaid demanded of him.

And whereas at a petty sessions holden on the 12th Jan. last, by adjournment from the said 22nd Dec. last, the said complaint was heard and determined by me, a stipendiary magistrate appointed for the division of Manchester, in the county of Lancaster, and sitting at the police court appointed in that behalf, and the said parties being there present by attorney and counsel, and upon such hearing I dismissed the said summons.

And whereas the appellant being dissatisfied with my determination upon the hearing of the said complaint, as being erroneous in point of law, &c., I do hereby state and sign the following case.

The facts mentioned in the recitals hereinbefore contained were proved, and it was also proved that the said premises of which the said Michael Potter was the owner, fronted, adjoined, or abutted upon the said Victoria-street to the extent of 201ft. 3in., coextensive with such street. It was also proved that a portion of such premises, viz., 154ft. 6in. in length, and 2yds. 21in. in breadth, was composed of small gardens enclosed in front of the houses there situate, of which the said Michael Potter was owner. It was also proved that no part of the said gardens had ever been dedicated to or used by the public. The notice so given to sewer, level, pave, flag, and channel referred to a plan deposited in the office of the said local board, and included the land forming the said street, and also the land forming the said gardens; the length of the said street, as shown in such plan, was 638ft. 6in., and the width thereof 36ft., including nevertheless in such 36ft. the said gardens, so far as the same were co-extensive with the said street as aforesaid.

I held the notice to pave, sewer, level, flag, and channel to be informal and invalid, because it required the respondent to do that which the said local board had I considered no authority to require the respondent to do, inasmuch as it required the respondent to flag the land forming the said gardens in front of the respondent's house. I request the opinion of the court on the following question: Was the said notice of the 7th Aug. 1867 a bad notice, and altogether invalid, on the ground abovementioned, or a good and valid notice, so far as it related to the said works so actually executed by the said board?

If the court shall be of opinion that the notice of the 7th Aug. 1867 was bad and altogether invalid, for the reason above stated, then my determination is to stand; otherwise, the case is to be remitted back to me, with the opinion of the court thereon, for the further hearing of the case before me.

H. L. TRAFFORD.

W. H. Cole appeared for the appellant.—Admitting that the notice is too extensive it is good *pro tanto*, and the magistrate ought not to have dismissed the summons, but have heard it and have made an order in respect of that part which was good. That part of the order which referred to the paving of the garden might be bad, whilst the remainder of the notice may have been perfectly good. He cited

The Mayor of Manchester v. *Cheatham*, 31 L. J. 173, M. C.; 1 L. T. Rep. N. S. 541;
Reg. v. *The Newport Local Board of Health*, 32 L. J. 97, M. C.;
Caley v. *The Local Board of Hull*, 5 B. & S. 815.

Quain, Q. C. (*Baylis* with him) appeared for the respondent.—The notice was bad, inasmuch as it contained an order to pave a garden, which was *ultra vires*. With such a notice the respondent would be quite unable to ascertain what he was really required to do. He cited

Parkinson v. *The Mayor of Blackburn*, 33 L. T. Rep. 119.

COCKBURN, C. J.—I think that the contention of the appellant is correct. He gave the respondent a notice which it is admitted is bad as to part, inasmuch as it called upon him to pave and flag a part of his garden, and represented that as part of the work to be done under the plan served along with the notice. There was thus a mistake as to this part of his notice, while the other part of the notice which required the respondent to pave and flag the road abutting on his property was good. The question is, whether the notice was valid *pro tanto?* and I think it was. It is true the board could not call upon him to pave and flag part of the property represented on the plan; but the owner must have known this, inasmuch as it was his own property, and so that the notice could not apply to that portion of the plan. It would lead to great inconvenience and confusion if every time the board went beyond the line and included in their notice something which they could not enforce, the owner could remain acquiescent until a certain time elapsed and then turn round and set up the partial mistake as freeing him from all his obligations to comply with the parts of the notice which were valid. As it would lead to great mischief if that view were adopted, I think this notice was valid *pro tanto*, and that our judgment should be for the appellant.

LUSH, HANNEN, and HAYES, JJ. concurred.

Judgment for the appellant

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Monday, Nov. 8.

DIGNAM *v.* BAILY.

Practice—Costs—Plea bad, but verdict for defendant on the merits.

In an action against a sheriff for an escape, the defendant pleaded (1) *not guilty; and* (2) *the production by the debtor of a certificate of the registration of a composition-deed under sect.* 198 *of the B. A.* 1861. *The plaintiff demurred to the second plea, and replied that he was not a creditor bound by the deed, as his cause of action first accrued after the making and registration of the deed. The defendant demurred to the replication, and the demurrers being argued, judgment was given for the plaintiff that the plea was bad, and the replication good. The issues of fact being afterwards tried, the verdict was entered by the court for the defendant on the replication to the second plea:*

Held, that the defendant, notwithstanding that his plea had been held bad, was entitled to the postea, he having succeeded on the merits of the case.

Declaration: That the plaintiff, on the 11th Dec. 1866, obtained judgment against one Thomas Brassington; that a *ca. sa.* was sued out and delivered to the defendant as sheriff of Kent, commanding him to arrest Brassington, to satisfy the plaintiff's debt and interest from the 11th Jan. 1866, on which day the judgment was entered up; that the defendant arrested Brassington, and afterwards allowed him to escape.

Pleas: 1. Not guilty; 2. That after the defendant's officer had taken Brassington in execution, Brassington produced to the officer, and gave him a copy of, the certificate from the Court of Bankruptcy of the due registration of a deed made and executed between Brassington and his creditors, within the true intent and meaning of sect. 198 of the Bankruptcy Act 1861 (24 & 25 Vict. c. 134), whereupon the defendant's officer released Brassington from custody.

1st replication, traverse. 2nd replication, that the plaintiff's cause of action against Brassington, in respect of which the judgment was recovered, first accrued after the making and after the registration of the deed, and the plaintiff was not a creditor of Brassington in respect of the said cause of action when the deed was made, nor when the same was produced and left for registration, nor until after the certificate was granted; and the defendant was not one of the creditors referred to or intended to be bound by the deed.

There was also a demurrer to the plea; and the defendant demurred to the replication.

Issue and joinder in demurrer.

After argument of the demurrers, judgment was pronounced on the 17th Jan. 1868, in favour of the plaintiff, viz., that the plea was bad, and that the replication was good.

Afterwards the issues of fact were tried by a jury, when it appeared that the plaintiff's cause of action against the debtor was in respect of a bill of exchange accepted by the debtor, and which was outstanding at the date of the deed, though the debtor had neglected to plead the deed. The verdict was for the plaintiff on the plea of not guilty, and on the 2nd replication; the damages being assessed at the amount of the judgment-debt, and leave being reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that the debt of the plaintiff was barred by the deed. A rule *nisi* was obtained to enter the verdict for the defendant, and the rule was afterwards made absolute by the court on the ground that the only question raised on the pleadings was whether the plaintiff was a creditor bound by the deed.

An application having been made to Mellor, J. at chambers, an order was made by him, directing the verdict to be entered for the plaintiff on the plea of not guilty, but ordering the *postea* to be delivered to the defendant in order that he might tax the general costs of the cause.

A rule *nisi* calling on the defendant to show cause why the latter part of the judge's order should not be rescinded, and the *postea* delivered to the plaintiff, having been obtained by *J. O. Griffits.*

Raymond now showed cause against the rule, and contended that the order was right, and that the *postea* should be delivered to the defendant, he having succeeded on the merits of the case; and the damages in favour of the plaintiff being assessed only contingently. Each portion of the pleadings must be treated by itself. "There never was such an idea before," said Buller, J., in *Kock* v. *Nowill*, 1 T. R. 124, "as the counsel against the rule have suggested, that one plea might be supported by what was contained in another. Each plea must stand or fall by itself; they are as unconnected as if they were on separate grounds." So Patteson, J. in *Gwynne* v. *Burdell*, 1 Scott. N. R. 770, "It seems to me to be essential to the due course of pleading, and to avoid confusion, that no blending of pleas should in any instance be permitted, and that, whatever may be the number of pleas placed upon the record, each plea should be treated both in itself and in its consequences, as if it were the only plea on the record." To the same effect, Parke B., in *Galloway* v. *Jackson*, 3 Scott's N. R. 771, "Each set of pleas is independent of the other, and the defendant below has a right to have the case disposed of as if each plea had been the only one on the record." If the court sees that on the whole of the record either party is entitled to judgment on the merits, it is bound to award the costs according to the very right of the case. [COCKBURN, C. J.—How is the defendant entitled to judgment on the merits?] Because the plaintiff was in reality bound by the deed, as the court held in *Dignam* v. *Baily* L. Rep. 4 Q. B. 376. The plea contained a slip, which was amended by what followed. [COCKBURN, C. J.—You say, in fact, that if there had been no pleadings, and the facts had been stated as they now stand, the defendant would be entitled to succeed.] So I submit. The sheriff according to the verdict, had substantial right on his side. Littleton says, sect. 366 (Co. Litt. 226a), "Also albeit a man cannot in any action plead a condition which toucheth and concernes a freehold without shewing writing of this, as is aforesaid, yet a man may be aided upon such a condition by the verdict of 12 men taken at large in an assise of *novel disseisin*, or in any other action where the justices will take the verdict of 12 jurors at large (l'ou les justices voilent prender le verdict de xii. jurors a large)." In Gray on Costs, p. 33, the law is thus stated, "When the issues have been found by the jury, the first question which presents itself is, which party is entitled to the *postea*? There is no doubt that as a general rule, if the plaintiff has succeeded on any part of his declaration, he is entitled to it; and he also succeeds if the pleas on which issues are found for the defendant do not answer the whole of the cause or causes of action contained in the declaration. The plaintiff is in that case entitled to recover damages in respect of that portion of the cause of action not so answered. His action has been effective, and he has what is called the general verdict. But if the pleas on which issues are found for the defendant do answer the whole of the cause or causes of action in the declaration, the plaintiff is entitled to no damages.

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His complaint or cause of action has been entirely answered, and the defendant has the general verdict, and is entitled to the *postea*, although various other issues may be found for the plaintiff, those issues arising in consequence of the defendant setting up distinct answers to the same part of the cause of action under the statute 4 Anne, c. 16, already considered; for it will be found that it is only where there is double pleading that the defendant can have the general verdict, and yet the plaintiff have issues found for him. In some cases a confusion is created on this subject from damages being found for the plaintiff, and entered on the *postea*, although the defendant has the general verdict in the manner already explained. *Staley* v. *Long*, 3 Bing. N. C. 781; *Smith* v. *Brown*, 5 Dowl. 736, are examples of this." In *Staley* v. *Long* (*ubi sup.*) the action was one of trespass, *quare clausum fregit*, to which the defendant pleaded (1) not guilty; (2) not plaintiff's close; (3) right of way, and a verdict having been found for the plaintiff on the 1st and second pleas with 1*s.* damages, and for the defendant on the third, the court ordered the *postea* to be delivered to the defendant. Tindal, C. J. said: "The entry of 1s. damages is a mere slip of the associate; he, perhaps, thought the plaintiff entitled to the general costs in the cause. I am inclined to think the defendant is; it is not necessary to decide that now. But the *postea* must be delivered back to the associate;" and Coltman, J.: "The *postea* should be delivered to the party who has substantially succeeded. That is the defendant."

Griffits, for the plaintiff, in support of the rule.—The defendant's plea being demurred to, and decided by the court to be bad in law, it is submitted that everything subsequent to that is immaterial. After that decision of the demurrer, the record would be inconsistent if judgment should be afterwards given in accordance with the plea. [LUSH, J.—We must look at all the facts as they are now found.] The replications cannot in any way be called in to aid the plea, and as that was bad, and was the only defence on the record, the plaintiff is entitled to the verdict for the damages found by the jury. One pleading cannot be referred to in aid of another. Even if the replications could properly be called in aid of the plea, it would not appear that the action on which the judgment has been obtained was brought after the protection had been obtained, because the defendant did not plead the protection. [HANNEN, J.—That point was not taken at the trial.] As a fact the point intended from the first to be raised on the trial was whether a person who had obtained protection under a composition-deed, if sued by a creditor bound by the deed, was not bound to plead the protection; and whether, if he did not plead it, the protection could avail against a judgment obtained in the action.

COCKBURN, C. J.—We think the order made at chambers was quite right. Looking at the record and the state of the facts as they now stand, however the case might be if certain things mentioned by Mr. Griffits had formed part of it, there is no doubt, on the finding of the jury and as the result of the whole, that the defendant is entitled to the *postea*. We are of opinion, therefore, that the order of my learned brother was perfectly correct.

LUSH, J.—I am of the same opinion. The replication, which is found to be true by the jury, amends the defendant's plea; and the facts as they stand on the whole record are such as entitle the defendant to the *postea*.

HANNEN, J.—I am of the same opinion.

MELLOR J. concurred.

Attorneys for the plaintiff, *Harper*, *Broad*, and *Manby*.

Attorneys for the defendant, *Palmer*, *Palmer*, and *Bull*.

Wednesday, Nov. 17.

COCKER (app.) v. CARDWELL (resp.)

Nuisances Removal Acts—18 & 19 *Vict. c.* 121, *ss.* 10, 11, 12—23 & 24 *Vict. c.* 77, *s.* 13—29 & 30 *Vict. c.* 90, *ss.* 14, 21—*Complaint by an inhabitant—Notice.*

Where proceedings are taken by an inhabitant under sect 13 *of the* 23 & 24 *Vict.* (*The Nuisances Removal Amendment Act* 1860), *for the abatement of a nuisance, he is not required under sect.* 21 *of the* 29 & 30 *Vict. c.* 90 (*The Sanitary Act* 1866), *before taking such proceedings, to serve a notice on the person by whose act the nuisance arises requiring him to abate the same.*

This was a case stated by justices under the 20 & 21 Vict. c. 43, as follows:

The respondents were summoned before two justices on an information by the appellant laid under sect. 13 of the 23 & 24 Vict. c. 77, charging them with having on the 23rd March 1869, committed a nuisance by allowing a certain chimney at their mill at Savile town, near Dewsbury, to send forth black smoke in such quantity as to be a nuisance. On the 19th April 1869 the information came on to be heard. The appellant proved that he was an inhabitant of the parish or place in which the nuisance complained of arose, and he gave evidence in support of the information. Mr. Wilson Hemingway also proved that on the 8th June 1868 he informed the defendants of his appointment as smoke inspector of the Dewsbury Union district by the West Riding Association for the suppression of the smoke nuisance, and that on the same 8th June he left a copy of the notice hereinafter set out at the respondents' place of business. Also on the 20th Oct. 1868 he personally served the appellant, James Cardwell, with a notice, of which the following is a copy.

West Riding Association for the Suppression of the Smoke Nuisance, statutes 18 & 19 Vict. c. 121; 23 & 24 Vict. c. 77; 29 & 30 Vict. c. 90.

I hereby give notice that having been appointed by the above-named association to the office of smoke inspector for the Dewsbury Union district, I have already commenced discharging the duties of that appointment, and am now making observations of such chimneys as appear to me to be most noxious with the view of laying information according to law for the abatement of nuisances arising from dense smoke. All the chimneys within the district will be inspected as early as possible, and if you have not already adopted some proper and satisfactory means for the prevention of smoke, you are hereby required to do so without further delay, or summary legal proceedings will be taken against you without further notice for any nuisance which may arise from your neglect.—Yours, &c.,

Westgate, Dewsbury. WILSON HEMINGWAY.

Upon the hearing the following questions arose:—Upon an information by an inhabitant under sect. 13 of the Act 23 & 24 Vict. c. 77, is a notice required to be given as under sect. 21 of the 29 & 30 Vict. c. 90, by the nuisance authority or chief officer of police? and, if so, was the notice given to the respondents sufficient for that purpose? The justices were of opinion that a notice was required, and that the notice given was insufficient. The question for the opinion of the court is, whether the said justices were right in holding that a notice was required, and that the notice before referred to, and given at the time proved, was insufficient?"

Jelf for the appellant.—The question is whether an inhabitant who prefers a complaint before the

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justices of the existence of a nuisance in his parish under sect. 13 of the 23 & 24 Vict. c. 77 is bound to give the notice that the inspector of nuisances is required to give under sect. 21 of the 29 & 30 Vict. c. 90. There are three Acts of Parliament material to the point—18 & 19 Vict. c. 121, s. 12; 23 & 24 Vict. c. 77, s. 13; and 29 & 30 Vict. c. 90. By sect. 14 of the last Act all three Acts are to be construed as one Act. By sect. 12 of the 18 & 19 Vict. c. 121, the local authority may cause complaint to be made, and the justices may order an abatement of the nuisance. By sect. 13 of the 23 & 24 Vict. c. 77 an inhabitant may make a complaint of the existence of a nuisance before a justice, who may issue a summons requiring the person by whose act the nuisance arises to appear before two justices, who shall have power to inquire into the complaint, and act in relation thereto as in cases where complaint is made by a local authority under sect. 12 of the 18 & 19 Vict. c. 121, and as if the person making the complaint were such local authority. By sect. 21 of the 29 & 30 Vict. c. 90, the nuisance authority shall, previous to taking proceedings before a justice, under sect. 12 of the 18 & 19 Vict. c. 121, serve a notice on the person by whose act the nuisance arises, to abate the same within a certain time. It is contended that this latter notice is not required to be given where the proceedings are taken by an inhabitant. Sect. 21 of the 29 & 30 Vict. c. 90, deals with the duty and powers of the local authority. By the 18 & 19 Vict. c. 121, s. 10, notice of the nuisance may be given to the local authority by the person aggrieved. By sect. 11 the local authority have power of entry under certain conditions in order to ground proceedings by them under sect. 12, which section shows what proceedings are to be taken by them where a nuisance is so ascertained to exist. The notice required by sect. 21 of the 29 & 30 Vict. c. 90 is clearly inapplicable to the case of a complaint preferred by an inhabitant under sect. 13 of the 23 & 24 Vict. c. 76, as in the latter case the justices, after a summons is issued, have to inquire into the existence of the nuisance, and can adjourn the inquiry. Again, as these Acts are to be construed as one Act, suppose the three Acts formed but one Act, then it is obvious that sect. 21 of the 29 & 30 Vict. c. 90 refers only to the proceedings taken under sect. 12 of the 18 & 19 Vict. c. 121.

No one appeared for the respondent.

COCKBURN, C. J.—I am of opinion that the construction put upon the 12th section of the 23 & 24 Vict. c. 77, by Mr. Jelf is the right one. The first Act of Parliament to which our attention has been called, the 18 & 19 Vict. c. 121, by sect. 11, gives power to the local authority to enter upon certain conditions being complied with upon premises in order to ascertain the existence of the nuisance. Sect. 12 specifies the proceedings that are to be taken by the local authority where a nuisance is so ascertained to exist. The second Act of Parliament, 23 & 24 Vict. c. 77, by sect. 13, enables the justices, on the application of any inhabitant, to order the removal of nuisances, the justices being required to proceed to inquire into the complaint, "and act in relation thereto as in cases where complaint is made by a local authority under sect. 12 of the 18 & 19 Vict. c. 77, and as if the person making such complaint were such local authority." Then follows a proviso that "it shall be lawful for the said justices, if they see fit, to adjourn the hearing for an examination of the premises where the nuisance is alleged to exist." Then comes the third Act, 29 & 30 Vict. c. 90, and it is upon the 21st section that the question arises, whether in the case of proceedings taken by an inhabitant under sect. 13 of the second Act, 23 & 24 Vict. c. 77, it is incumbent upon such inhabitant previous to taking such proceedings to serve a notice on the person by whose default the nuisance arises in compliance with clause 21 of the 29 & 30 Vict. c. 90. That section says that "the nuisance authority . . . shall, previous to taking proceedings before a justice under the 12th section of the Nuisances Removal Act 1855, serve a notice on the person by whose act . . . the nuisance arises . . . to abate the same, and for that purpose to execute such works . . . as may be necessary within a time to be specified in the notice." This is a distinct and positive clause requiring the nuisance authority to give a notice to the defaulting party before the nuisance is abated. It is hardly applicable to the case where proceedings are taken by an inhabitant. Certain powers are given in this section to the nuisance authority, which the Legislature has not entrusted to an inhabitant. These Acts are to be construed as one, and must therefore be taken in *pari materiâ;* and although the acts appear to have been very inartificially drawn, I think that this clause being silent as to the notice to be given in the case of proceedings taken by an inhabitant, we cannot import words which are not contained in the section.

BLACKBURN, J.—I am of the same opinion. It is almost impossible to construe these Public Health Acts. It is now about twenty years or upwards since the first Public Health Act was passed, and the Legislature have since from time to time passed Acts amending the former ones, and it is really not surprising that the justices who have to interpret these Acts find very great difficulty in understanding them. However, I have endeavoured with the assistance of Mr. Jelf to arrive at the meaning of this 21st section of the 29 & 30 Vict. c. 90. I agree with my Lord in holding that no notice is required by this section where proceedings are taken by an inhabitant under sect. 13 of the 23 & 24 Vict. c. 77. It seems to me that the Legislature in passing the last Act forgot that they had passed the second Act. It is a *casus omissus.*

MELLOR, J. concurred.

HANNEN, J.—I only wish to add that I concur in the judgment given by my Lord and my brother Blackburn. These Acts are very clumsily and inartistically drawn, and the construction to be placed upon them has necessarily become very difficult.

Case to be remitted to the justices with the opinion of the court.

Attorneys for the appellant, *Chester* and *Urquhart.*

MERCER *v.* WOODGATE.

Way—Limited dedication—Inconvenient to the user of the way by the public.

The public had, as far back as living memory went, used a footpath across a field. During the same period the owner or occupier of the field had, at the proper season of the year, ploughed up the field and the soil of the footpath. Upon this evidence the occupier had been convicted before the justices of unlawfully destroying the highway. On a case stated, the court quashed the conviction, holding, first, that the proper inference from these facts was that the occupier had dedicated the path to the public, subject to his right of ploughing up the same at the proper seasons of the year; secondly, that such a limited dedication by the owner of the soil of a way to the public was good.

Upon the hearing of a certain information preferred by the respondent against the appellant under

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sect 72 of the 5 & 6 Will. 4, c. 50, that the said appellant on the 25th Sept. last, at the parish of Bellbroughton, in the said county of Worcester, did unlawfully and wilfully destroy and injure the surface of a certain highway there situated leading from Bellbroughton to Fairfield and Bromsgrove by then and there ploughing up the same a certain distance, to wit, fifty yards and more, thereby doing injury to the said highway to the amount of 20s., contrary to the statute in that case made and provided, the appellant was convicted of the said offence, and was ordered to pay the sum of 1s., to be paid and applied according to law, and also to pay to the said respondent the sum of 16s. for his costs.

The following facts were either proved before us or admitted by both parties.

The appellant is a farmer, and the occupier of a certain field of arable land, in the parish of Bellbroughton, across which is a public footpath leading from the village of Bellbroughton to the Stourbridge and Bromsgrove turnpike road, and the hamlet of Fairfield. The appellant, on the 26th Sept. 1868, in due course of farming, ploughed the field, and in so doing ploughed up and destroyed all trace of the footpath in question.

The appellant *bonâ fide* claimed the right to plough, and to continue to plough, the said footpath, and the previous occupier had so ploughed at all times within living memory.

There was no evidence before us of the existence of the footpath or the tillage of the land before living memory, and no witnesses were called on behalf of the appellant, nor was any evidence given by the appellant of any partial or limited dedication of the land, or of any reservation by him of the right to plough up the land along the line of the footpath, except as otherwis appears by this case.

On the part of the respondent it was contended that the footpath was a highway within the meaning of 5 & 6 Will. 4, c. 50, and that under the circumstances the justices should convict the appellant under sect. 72 of that Act for the destroying and injuring the surface of a highway.

On the part of the appellant it was contended that the footpath was not a highway within the meaning of the 5 & 6 Will. 4, c. 50, but that if it were, he and the previous occupiers having ploughed it up as long as it was known to have existed, the public had a right only to the use of the footpath, subject to its being so ploughed up.

We, however, being of opinion that the footpath was a highway within the meaning of 5 & 6 Will 4, c. 50, and that the appellant having destroyed and injured the surface of the footpath, we were bound in law to find appellant's acts to be unlawful, no further evidence than herein appears having been offered to us of any reservation by the owner at the time of dedication, or presumed dedication, of a right to plough up the surface of the footway, and accordingly we gave our determination against the appellant in the manner before stated.

The question for the opinion of the court is whether the footpath is a highway within the meaning of the 5 & 6 Will 4, c. 50, and, if so, whether we were bound in law under the circumstances above stated to convict the appellant of an unlawful act, or whether, upon the facts set forth, we should have been justified in finding the acts complained of to be lawful, and whether we had jurisdiction.

If the court should be of opinion that we were bound to convict the appellant, and that our jurisdiction was not ousted in consequence of the land having been ploughed at all times when necessary within living memory, then the conviction is to be affirmed, otherwise it is to be quashed.

Harrington, for the appellant, contended upon the authority of *Pelham* v. *Pickersgill*, 1 T. Rep. 660, that the fact of the path having been ploughed up during all the time that the path had been used by the public, showed that the occupier had dedicated the way to the public, subject to the right of ploughing at seasonable times. If that is not so, then the case of *Stafford* v. *Coyney*, 7 B. & C. 257 shows that there may be such a limited dedication, and if not, then there was no dedication at all. A way may be dedicated to the public by the owner subject to a dangerous nuisance: (*Fisher* v. *Prowse*, and *Cooper* v. *Walker*, 31 L. J. 212, Q. B.; 6 L. T. Rep. N. S. 711.) Therefore a way may be dedicated, subject to a nuisance which is not dangerous, but only inconvenient.

Rew, for the respondent. — A way cannot be dedicated, subject to such a right, for the exercise of the right destroys the way. The dedication of the way may be good, but the condition is void. It is an indictable nuisance for the occupier of a field to plough up a public way across it:

Wellbeloved on Highways, p. 443, edit. 1829;
James v. *Hayward*, Cr. Cas. 184;
Griesley's case, 1 Vent. 4;
Todie v. *Arnold*, 2 Salk. 458;
Bateman v. *Burge*, 6 C. & P. 391;
Reg v. *Charlesworth*, 16 Q. B. 1012.

[HANNEN, J.—How do you distinguish the present case from *Fisher* v. *Prowse*? BLACKBURN, J.—What is there to prevent a way being dedicated to the public with a limitation as to its future user?] *Morant* v. *Chamberlain*, 6 H. & N. 541, shows that the inference cannot be drawn that this way was dedicated subject to the right of ploughing up the way. [HANNEN, J.—But it shows that a highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of adjoining land for the purpose of depositing goods thereon. COCKBURN, C. J. referred to *Rex* v. *Northampton*, 2 M. & S. 262.]

COCKBURN, C. J.—I am of opinion that our judgment should be for the appellant. I entertain no doubt that it is competent for the owner of the freehold to dedicate a way across his land to the public, subject to his right of ploughing up that way at seasonable times. From the evidence before the magistrates it appears that as far back as living memory goes, while on the one hand the public have exercised a right of passage across this field, on the other hand the owner or occupier of the field has from time to time, without any regard to the user of the way by the public, ploughed up the way. Take it, therefore, as the proper inference that the exercise of this right of ploughing by the owner has been coeval with the user of the way by the public. On this state of facts we must infer that the right of the public to use the path in the original dedication was subject to the grantor's right of ploughing it up at the proper seasons of the year. It must not be lost sight of that there was no obligation on the part of the owner to dedicate the way at all; but it must be taken that he did dedicate it with the reservation of the right to plough up the footpath; there was no obligation on the part of the public to accept the dedication. It would be most unjust to the owner of the freehold to hold that he was bound by an absolute dedication, and that the reservation was void. It seems to me that the owner of the soil only intended to grant a limited right, as in the case of *Reg.* v. *Northampton*, where it was held that a bridge might be a public bridge used by the public at all such times as it was dangerous to pass through the river. That case is clearly an authority for holding that there may be such a partial dedication. If not, I agree with my brother Blackburn, in the dilemma put by him in the course of the argument, either this is a limited

dedication or it is not. If it is not a dedication, then *cadet quæstio;* if it is a limited dedication, then the public accept it as qualified by the conditions attached thereto. These ways are common enough in agricultural districts, and to hold that the owner could not, in dedicating a foothpath across his field for the use of the public, reserve such a right, would be manifestly to the inconvenience of the public, inasmuch as no owner would ever dedicate a way at all.

BLACKBURN.—I am of the same opinion. I quite agree with Mr. Rew that when the owner of the soil dedicates a way across his land to the public, it is a voluntary act on his part, and if nothing more were said or done by him the public would be entitled to a right of way not obstructed by any nuisance, such as the ploughing up of the way itself. But in the present case it appears that the owner of the soil dedicated the way, not *simpliciter*, but that he dedicated it with this qualification, namely, that the public might use the way, subject to his right to plough up the path at proper times. The case is clearly within the principle laid down in the judgment of this court in *Fisher* v. *Prowse*, at p. 218, "But the question still remains whether an erection or excavation already existing, and not otherwise unlawful, becomes lawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public, and accepted by them, subject to the inconvenience or risk arising from the existing state of things. We think that the latter is the correct view of the law. It is, of course, not obligatory on the owner of the land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions, and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere use. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired; it would be doubly so if the consequence was that he was bound to fill up or fence off his canal." In the present case, therefore, there is no injustice in holding that the public have the benefit of the way, coupled with the inconvenience of its being ploughed up from time to time.

MELLOR, J.—I am of the same opinion.

HANNEN, J.—I am of the same opinion. The authorities cited by Mr. Rew go to this extent: that where there is an unrestricted dedication, the ploughing up the way would be an indictable nuisance, but that question is not raised here. The case falls within the principle of *Fisher* v. *Prowse*. If the reservation is void there is no dedication as was pointed out by Parke, B. in *Poole* v. *Huskinson*, 11 M. & W. 830, where he says, "There may be a dedication to the public for limited purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public. In that respect the direction of the learned judge was quite correct; not so the alternative—that as such a partial dedication was invalid in law, it would nevertheless operate against the intention of the owner of the soil, in favour of the whole public. I think it would be merely void." Therefore in this case if the reservation is of no effect I think that there was no dedication at all.

Conviction quashed.

Attorneys for appellant, *Wood, Street,* and *Hayter.*

Attorneys for respondent, *Skilbeck* and *Griffith.* for *Harward, Shepherd,* and *Harward,* Stourbridge.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Monday, Nov. 15.

THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY (apps.) v. MYERS (resp.)

Railway company's private Act—Maximum charge for carriage per mile—Mileage not necessarily by the most direct route.

By the private Act of the London and South-Western Railway Company (9 & 10 Vict. c. cxxxi.), s. 13, the maximum charge for carriage is limited to a certain sum per mile:

Held, that the mileage is not necessarily to be counted by the most direct and shortest route; but that if the route adopted by the company in the carriage of goods entrusted to them as common carriers be a reasonable one under the circumstances, they are entitled to charge the maximum rate for the number of miles over which they actually carry the goods.

This was an appeal from a decision of the judge of the County Court of Hampshire, holden at Southampton, upon the following case stated by the said judge:—

This was an action for alleged excess charged on the carriage of a consignment of machinery (value 160*l.*) and paid under protest, viz.:

Charged 2 tons 6 cwt. 1 qr., at 50*s.*	£5	15	8
Should be 2 tons 6 cwt. 1 qr., at 34*s.*	4	0	2
	1	15	6
For damage by non-delivery of above as directed.....	2	2	0
	£3	17	6

With regard to the second item of the plaintiff's claim, it was held that there had been no undue delay in the delivery of the goods, and judgment was given for the defendants.

With regard to the first item of the plaintiff's claim this case is stated.

The defendants are a railway company, carrying on the business of common carriers. Luton is a station on the Great Northern Railway.

The goods in question were collected from plaintiff's premises at Southampton by defendants to be carried by them as common carriers, and to deliver according to the direction, which was "Luton to order *viâ* Great Northern." The defendants signed a receipt-note as follows:

To The London and South-Western Railway Company, Southampton Station.

802. March 7th, 1868.

Receive the under-mentioned goods from Mr. Myers, of Caxton Works, to be conveyed by the London and South-

Western Railway Company as mentioned below, and on the conditions stated on back.

No. of Trucks.	Name.	Address.	To what Stations.	Goods. No.	Goods. Description of Package.	Goods. Contents.	Weight.	Paid on.	Paid.
		Luton to order *via* Great Northern.	say	13 3	Pieces. Cases. Total, 16.	Printing Machinery.			

Charges to be paid by (signed) HUNT.
J. J. MYERS, Sender.
Checked by Outwards Entered.

N.B. It is particularly requested that any goods brought to any of the company's stations to be forwarded by the London and South-Western Railway may be accompanied by one of these notes, properly filled up for each separate station to which goods are to be sent, and signed by the sender.

*** This note is to be carefully filed.

N.B. A copy of the full address must be inserted on this note with any instructions that may be given on the address as to route, &c., &c.

On the back of the note was a printed notice, of which the following is material to the present case:—

London and South-Western Railway.
Consignment note.

Goods traffic. The Blossoms Inn, Lawrence-lane, Cheapside, has been opened by this company as their receiving house for goods and parcels; and 53, King William-street, as a parcels receiving office. The company undertake the collection and delivery of goods in London, in connection with the traffic on the railway. Goods delivered at the Blossoms Inn before six p.m. for goods. Trains are despatched the same evening. It is particularly requested that all goods or parcels to be forwarded by this line be specially directed "By London and South-Western Railway Company." The undermentioned are also appointed receiving houses for this railway, in addition to the station at Nine Elms: Blossoms Inn, Lawrence-lane, Cheapside, &c.

N.B.—Unless goods and parcels are delivered at any of these offices, the company cannot be responsible for the proper charges being observed; and parties in the country will do well to advise their London correspondents as to this. If not delivered at these offices constant irregularities will occur. Goods sent direct to Nine Elms Station cannot be received after 6.30 p.m., as the station gates then close.

ARCHD. SCOTT, Traffic Manager.

Notice as to goods—The London and South-Western Railway Company hereby give notice that they will receive, forward, and deliver goods, solely subject to the conditions hereunder stated:—1. That the company shall not be responsible for the loss of or injury to any goods or articles put into returned wrappers, boxes, packages, cases, or baskets, delivered or received as "empties." 2. Nor for the non-delivery or mis-delivery of parcels or packages of any kind improperly or insufficiently directed, nor for the loss of or injury to goods mis-described or improperly packed, or so packed that the breakage or leakage of one or more of the articles would be likely to injure the rest, nor for loss by leakage occasioned by bad or imperfect casks or cooperage, nor for the loss, waste, or damage by fermentation. 3. Nor for the loss of or injury to any goods, packages, or parcels left till called for, or delivered to order, or warehoused for the accommodation of any of the parties interested therein, unless such loss or damage shall be shown to have happened by the default or negligence of the company and its servants. 4. Nor for the loss of or injury to any of the articles specified and enumerated in the Act, 1 Will. 4, c. 68, commonly called the Carriers Act, and in the notice posted up in the company's receiving offices, under the provisions of the 2nd section of the said Act, unless declared and insured according to the rates set forth in such notice. By order of the directors,

FREDERICK CLARKE, Secretary.

London, 5th Oct. 1854.

The goods were conveyed in the same trucks without unloading on the defendants' railway from Southampton to Nine Elms, from thence back to Clapham Junction, also on the defendants' railway; from Clapham Junction to Blackfriars, on London, Chatham, and Dover Railway; from Blackfriars to King's-cross, on the Metropolitan and Great Northern Railways; and from King's-cross to Luton by Great Northern Railway.

The plaintiff contended that the defendants were under the statutes affecting and regulating the railways over which the plaintiff's goods were conveyed bound to charge no more for those goods than 3*d.* per ton per mile over the whole journey, taking the most direct route, with the exception of 2*s.* 6*d.* per ton at each end for loading and unloading.

It was contended by the defendants that they were not so bound under the above circumstances.

The County Court judge held that the amount charged by the defendants was a reasonable amount, and the route adopted a reasonable one under all the circumstances of the case, but held that the defendants were bound, by the statutes referred to, to make no higher charge than at the rate of 3*d.* per ton per mile over the whole journey by the nearest route, so contended for by the plaintiff; the defendants having charged 1*l.* 15*s.* in excess of that rate; and the judge gave judgment in favour of the plaintiff, and granted this case.

The judge having ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the court, and the same having been paid accordingly, the question for the opinion of the court is whether in a case like the present, in which the defendants undertook to have the goods conveyed from Southampton to Luton, the plaintiff is entitled to recover back the amount claimed from the defendants as an excessive charge.

If the plaintiff is so entitled the appeal is to be dismissed; if not so entitled, judgment is to be entered for the defendants.

Denman, Q.C. (with whom was *Mangles*) argued for the appellants, the railway company.—Cap. cxxxi. of 9 & 10 Vict. is the local Act with regard to this company, and upon the 13th section the County Court judge based his decision. It will be seen, however, that the limit of the maximum charge there laid down does not apply to other railways than the South-Western, nor is the charge limited to the number of miles of the shortest distance between the places of departure and arrival. The words of the section are: "That notwithstanding anything in the said recited Acts or this Act contained, the maximum charges to be made by the company in respect of all the tolls and charges for the use of the said London and South-Western Railway, and the railways from time to time purchased, hired, or otherwise acquired and held by the said London and South-Western Railway Company, and of any carriage, and for locomotive power, and for every other expense incidental to such conveyance, except loading and unloading, where such service is performed by the company, shall not exceed the sums following, that is to say," &c. For machinery, 3*d.* per ton per mile. Here clearly there is nothing about the charge which the appellants may make for carrying articles over lines other than their own; and the Railway Clauses Act 1845 (8 Vict. c. 20) does not apply in any way to this railway company. By the 1st and 2nd sections that Act is made applicable only to railway Acts "hereafter to be passed." Moreover, this point is not raised here; the only matter about which the County Court judge entertained any doubt was whether the appellants were justified in charging for more miles on their own line than the shortest distance necessary for them to carry these goods by that line. There are no words in the appellants' Act compelling them to charge only by the shortest route; and although the course here was somewhat zigzag, the judge has found that the route adopted was reasonable under the circumstances. This being so, the company may surely charge for the actual number of miles of that reasonable route over which they have carried the respondent's goods. [Stopped by the court.]

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Bere, Q. C. for the respondent.—The railway company are not entitled to charge for the extra and unnecessary distance over which they pass merely for their own convenience. But that is not my only contention in support of this decision; I am prepared to show that the other railway companies, over whose lines these goods were taken, are limited in their charges in the same way as the South-Western, and therefore the charge was excessive even if the appellants were justified in counting the miles between Clapham Junction and Nine Elms and back again. [By the COURT.—We cannot consider this last point; for it was clearly never intended to be raised upon this special case.]

BOVILL, C. J.—It seems to me to be impossible upon the facts stated, to hold otherwise than that this decision was wrong. The question is whether the mileage is to be counted by the nearest route; confining our judgment to the only point raised, I am certainly of opinion that the railway company are not so bound to limit their charges. They are common carriers, and it is not necessary for them to take any but a reasonable course. If they adopted the usual and accustomed route, they have done all they are bound to do. They are not bound to adhere to one line, or to cart the goods they carry from one line to another in order to convey them in the straightest direction. The appeal will be allowed.

WILLES, J.—I am of the same opinion. Coaches going between the same places by different roads may charge for whatever distance they travel over; so, if their route be reasonable, railways may charge for the actual number of miles over which they carry goods. There is in so doing no transgression of the Act.

KEATING, J.—I am of the same opinion. I think if the point referred to by Mr. Bere had been intended to be raised in this court, the case would have been stated very differently. The company certainly have a right to make a mileage charge for their usual and accustomed route. I think no other points are raised by the special case. Judgment will be for the appellants.

BRETT, J.—I fail to gather from the case an explicit statement of any other point but this, and it lay upon Mr. Bere to show that the company had no right to charge for the distance of that route which they were accustomed and it was reasonable for them to take, provided they might have saved a few miles by a more inconvenient route. Upon this point I think he had no case to argue.

Judgment for appellants.

Attorney for appellants, *L. Crombie.*

Attorney for respondent, *J. Vincent.*

Wednesday, Nov. 17.

REGISTRATION APPEAL.

BREWER (app.) v. THE TOWN CLERK OF BRADFORD (resp.)

Borough vote—Tenant of a dwelling-house who allowed a lodger the use of his sitting-room—Joint occupation—Representation of the People Act 1867 (30 & 31 *Vict. c.* 102) *s.* 3—*Costs upon the affirmance of an appeal from a revising barrister.*

An inhabitant occupier, as tenant of a dwelling-house within a borough, otherwise duly qualified under the second clause of sect. 3 *of the Representation of the Act* 1867 *to vote for the borough, had let a furnished bedroom to a lodger, and had allowed the lodger the joint use with himself of another room for his meals:*

Held, that the words "joint occupier" in the proviso at the end of the 3rd section did not apply to lodgers, being limited to the sense in which they are used in the enacting part of the section, viz., as owner or tenant of a dwelling-house. Therefore the circumstances of this case did not render the tenant of the dwelling-house a joint occupier within the meaning of the proviso.

The Court of Common Pleas reserves to itself discretion as to granting or refusing costs, upon affirming an appeal against the decision of a revising barrister.

At a court held at Bradford, in the West Riding of the county of York, for the revision of the list of voters for the borough of Bradford, before the revising barrister duly appointed to revise the list of voters for the said borough, Joseph Brewer claimed to have his name inserted in the list of voters for the township of Horton, in the borough of Bradford, as entitled to vote in the election of members for the borough of Bradford in respect of his occupation of a dwelling-house in the township of Horton, within the said borough.

It was established by the evidence that the appellant was of full age, and it did not appear that he was subject to any legal incapacity.

That the appellant was on the last day of July 1869, and during the whole of the preceding twelve calendar months had been an inhabitant occupier as tenant of a dwelling-house within the township of Horton, in the said borough of Bradford, which dwelling-house was not of the clear yearly value of 10*l.*

That the appellant was during the time of such occupation rated as an ordinary occupier in respect of the premises so occupied by him to all rates made for the relief of the poor in respect of such premises, and had paid all rates up to the 5th Jan. 1869 in respect of the said occupation.

That the appellant was the sole tenant of the house in respect of which the claim was made and was alone liable for the payment of the rent and rates payable in respect thereof.

The appellant had during three months of the year preceding the last day of July 1869 let a furnished bedroom in his house as a sleeping apartment to a lodger, who also had the joint use of another apartment as a sitting-room. The appellant provided board for his lodger, and received a fixed weekly sum for such lodging and board; but such lodger was not in any way responsible for the payment of the rent or rates, and his occupancy might at any time have been terminated on one week's notice given by either party.

It was alleged that there are in the said borough a large number of persons, probably 1000, whose right to be on the register of voters for the said borough was not on this occasion in dispute, but who are in a position similar to the appellant in having lodgers, and whose only claim to be on the register is founded on sect. 3 of the Representation of the People Act 1867.

Upon this state of facts the barrister decided that the appellant was a joint occupier of his dwelling-house within the meaning of the proviso at the end of sect. 3 of the Representation of the People Act 1867, and on that ground disallowed his claim to be placed on the register of voters for the said borough.

He was of opinion that the words of the proviso "joint occupier of any dwelling-house" did not either by express words or necessary intendment mean "joint occupier of any dwelling-house, as owner or tenant." That the words "as owner or tenant" being omitted in the proviso, the words

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"as joint occupier of any dwelling-house" were comprehensive enough to include lodgers occupying a part of the house. That by sect. 4 of the same statute lodgers are qualified to vote if occupying apartments of 10*l.* value unfurnished, "separately, and as sole tenants;" and that the interpretation clause, sect. 61, defines "dwelling-house" to be "any part of a house occupied as a separate dwelling." He thought that the claimant did not occupy any part of his house as "a separate dwelling" within this definition. On reference to the 27th section of the 2 Will. 4, c. 45, the 10*l.* occupation franchise is there defined to be by express words "an occupation as owner or tenant." And as the Legislature had left out those words in the proviso to the 3rd section of the Representation of the People Act 1867, he was of opinion that if the intention was to exclude only joint occupiers of any dwelling-house as owners or tenants in the same respect under that section, apt words would have been introduced to express such intention, and that the words as they stood included lodgers as occupiers as well as owners or tenants.

Secondly, the barrister was of opinion that the lodger was a joint occupier with the claimant of the said dwelling-house, as tenant; that there is nothing in the section to import a tenancy under the same landlord, or in the same right, nor was this held to be necessary under the old Reform Act: (*Rogers* v. *Harvey*, 28 L. J. 17, C. P.) A lodger is a tenant (*Cook* v. *Humber*, 11 C. B. N. S. 43). and so called in sect. 4 of the Representation of the People Act 1867. And it has been held in the case last quoted, "to be immaterial under what denomination of tenant he is classed, whether as a lodger, a farmer, or a lessee." It seemed to him further, under the authority of *Cuthbertson* v. *Hains*, L. Rep. 4 C. P. 525, that the lodger was a joint occupier of the same dwelling-house with the claimant, because the claimant was not separately rated for that part of the house which he occupied as a separate dwelling, so as to constitute that part of it a separate dwelling within the meaning of the 61st section of the Representation of the People Act 1867.

In the case of two other persons claiming to be placed on the list of voters for the borough of Bradford, the same objections were raised to the sufficiency of their qualifications, as in the case of the above-named Joseph Brewer, and their claims were disallowed for the same reason; and John Henry Wade, of Kirkgate, in Bradford, on behalf of the several claimants, duly handed into court a notice in writing that they were severally desirous to appeal from the decision in each of the cases, as erroneous in point of law. The barrister allowed the several appeals, and declared that they ought to be consolidated, as each depended upon the same decision; and he named the town clerk of the said borough of Bradford to be the respondent in such consolidated appeal.

The opinion of the court is asked—Whether the barrister was right in disallowing these several claims? If he was, the respective claims are each to be disallowed. If his decision was wrong in point of law then the respective claimants are to have their names inserted in the list of voters for the borough of Bradford.

H. James, Q. C. argued for the claimant (the appellant), and cited from Lee's Cases (*temp.* Lord Hardwicke), *Fludier* v. *Sir Thomas Lombe*, p. 307, in which it was held that where persons were householders of houses above the value of 10*l.* a-year, and paid scot and lot, but had let part of their houses to lodgers, and thereby reduced their rents to be under 10*l.* per annum, they were occupiers of houses and entitled to vote under the statute 11 Geo. 1, c. 13, for regulating elections in London; Lord Hardwicke then said, "a lodger was never considered by anyone as an occupier of a house. It is not the common understanding of the word, neither the house, nor even any part of it can be properly said to be in the tenure or occupation of the lodger." "Lodgers are inmates, and surely the taking in inmates does not make a man cease to be in the occupation of his house." [He was stopped by the court.]

Francis, for the respondent, contended that on the facts stated there was only a joint occupation by the claimant of part of his dwelling-house, which was, therefore no qualification under sect. 3: although a "dwelling-house" is defined by sect. 61 to include any part of a house occupied as a separate dwelling, the claimant's occupation cannot be said to come within that definition, for he is sole occupant of no part of the house structurally divided from the remainder. The joint use of the sitting-room should, under this section, deprive the claimant of his vote, even if the lodger's occupation of the bedroom is not within the terms of the proviso. This is not the case of a mere lodger; the joint use of the sitting-room makes the rule laid down by Lord Hardwicke inapplicable to these circumstances.

BOVILL, C. J.—Throughout the Act of 1867 a clear distinction is drawn between occupiers of dwelling-houses and lodgers in dwelling houses. In this case the claimant came within the meaning of the second clause of the third section of the Act, being an inhabitant occupier as tenant of a dwelling-house within the borough. Then a question arises whether he was a joint occupier under the proviso at the conclusion of that third section. He had let part of his house to a lodger, and the lodger had the sole use of a furnished bed-room, and the joint use with the claimant of another room, a sitting-room. This, however, does not, in my opinion, make the claimant a joint occupier within the proviso. The lodger was not the occupier of a dwelling house at all; he was an inmate of the house rather than an occupier. This appeal must be allowed, and the appellant must be held to be entitled to the franchise.

WILLES, J.—I am of the same opinion. It is quite out of the question that we should presume to put such a construction upon this statute as that contended for by the respondent, consistently with the view we take of what the Legislature intended to do. The only safe course is to take the language used, and to give it a plain meaning. The words of the section applicable to this case are, "every man shall be entitled to be registered as a voter for a borough who" . . . "has been for twelve months an inhabitant occupier, as owner or tenant of any dwelling-house within the borough," . . . "provided that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house." We should next consider whether what is *primâ facie* the intention of this section 3 is in accordance with previous legislation and decisions. The occupier must be the person who has the general control of the outer door, and this would clearly be the condition of the claimant here, except for the proviso concerning a joint occupier. But by that proviso I think it was never meant to exclude an owner or tenant upon the ground that his lodger had a right to take his meals in a room other than that which he occupied as a lodger. The words "as owner or tenant" are not necessarily excluded from the sense of the proviso, because they are not therein repeated. This section deals only with owners and tenants, and the proviso cannot apply to

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any other occupiers; by reference to the section the proviso should be read as if the words "as owner or tenant" followed "joint occupier." This lodger has a divided occupation of one room, not as an owner or tenant, but as a lodger. The 4th section provides that a lodger shall be entitled to be registered as a voter who has occupied lodgings separately and as sole tenant;" these words seem to be used in opposition to the words "joint occupier," and they are sufficient to describe the position of the appellant with regard to his dwelling-house. Now, turning to the interpretation clause, sect. 61, we find "dwelling-house shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor;" this definition does not exclude a house in which there is such a joint occupation as this. As the position of the claimant does not depend upon the respective values of the two parts of this house, it is not necessary to refer to sect. 29 of the Act of 1832, by which joint occupiers were qualified to vote under certain circumstances. This conclusion reconciles former legislation with the present, and the present with itself. The decision of the revising barrister was, in my opinion, wrong, and the appeal will therefore be affirmed.

KEATING, J.—I am of the same opinion. I cannot help thinking that this section is quite clear upon this point when we consider the previous state of the law. The last Act was passed with the object of extending the franchise. Under the former law, joint occupation, if the rent of each joint occupier amounted to 10*l.* a year, gave votes to each. Now it is provided that the limit in amount is to be done away with, and that the rent need not be 10*l.* a year, but it has been thought necessary to put in a proviso that the franchise shall not be reduced in the case of joint occupation, and that nobody who is a joint occupier shall be affected by this third section. During the last three months of the qualifying year the claimant let off a room, and permitted his lodger to use another room occasionally, but he kept the control of the outer door, and was just as much an inhabitant occupier of the dwelling-house as he was before. It is said, however, that allowing the lodger the joint use with himself of a house other than that which he occupied separately and as sole tenant, disqualified the claimant, because it made him the joint occupier of part of the dwelling-house. In my opinion that proceeding had no such consequence. I think we must come to the conclusion that the appellant is entitled to be registered.

BRETT, J.—I am of opinion that the appellant is entitled to vote under this sect. 3. The proviso puts a certain limitation upon the direct enactment, but when it appears that the section itself relates only to "an inhabitant occupier, as owner or tenant," it is clear that the subsection can have only the same relation. By sects. 3 and 4 the Act deals with the two classes of persons qualified to be voters for boroughs, and in the former of those sections "an occupier" is meant to refer to every kind of occupation different from that of a lodger. By previous law a vote was given for joint occupation over the value of 10*l.* a year; but, in order that no analogy might be drawn from that law to the new extension of the franchise, this proviso was put in, but with no reference to the new class of lodgers.

Judgment for appellant.

James, Q. C. applied for costs on the appellant's behalf.

BOVILL, C. J.—It is not usual to grant costs against the decision of a revising barrister.

WILLES, J.—Under the circumstances of this case, there ought to be no order as to costs.

Attorneys for appellant, *Johnson* and *Weatheralls*, for *Rawson*, *George*, and *Wade*, Bradford.

Attorney for respondent, *John Cann*, for *McGowen*, Bradford.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Tuesday, Nov. 16.

Re THE BEVERLEY COMMISSIONERS; *Ex parte* FLINT AND FITZGERALD.

*Bribery commissioners—Jurisdiction of—Adjournment—Power to hold independent meetings—Committal for contempt—Consent of Secretary of State to adjournment—*15 *&* 16 *Vict. c.* 57, *ss.* 1, 4, 6.

By sect. 4 *of* 15 *&* 16 *Vict. c.* 57, *the commissioners appointed under the Act to make inquiry as aforesaid in relation to any county, division of a county, city, borough, university, or place, shall, upon their appointment, or within a reasonable time afterwards, go to such county, &c., and shall from time to time hold meetings for the purposes of such inquiry, at some convenient place within the same, or within ten miles thereof, and shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county, &c., or within ten miles thereof, as to them may seem expedient; and such commissioners shall give notice of their appointment, and of the time and place of holding their first meeting, by publishing the same in some newspaper in general circulation, in such county, &c., or the neighbourhood thereof, provided always that such commissioners shall not adjourn the inquiry for any period exceeding one week without the consent and approbation of one of Her Majesty's Principal Secretaries of State:*

Held, that commissioners appointed under the Act had power to hold separate independent meetings from time to time, and were not obliged to adjourn at the close of every meeting in order to keep their power alive and enable them to meet again.

In this case Sir *J. Karslake*, Q. C. had obtained a rule *nisi* for a *habeas corpus* on behalf of the applicants, who were confined in York Castle, under the following circumstances.

Three commissioners had been appointed to inquire into alleged corrupt practices at the last election for the borough of Beverley, under the 15 & 16 Vict. c. 57. They went down to Beverley, and held various meetings, each meeting being regularly adjourned to the next succeeding meeting, and on the 18th Sept. their secretary wrote to one of the Secretaries of State, requesting permission to adjourn the inquiry until the 19th Oct., in the following terms:

Sir,—I am directed by the commissioners to inform you that by the end of next week the principal business of the commission will be concluded, and they accordingly desire your permission to adjourn the inquiry from Monday, Sept. 27th to Monday Oct. 19th, at which latter date they hope to complete the inquiry in a few days.

On the 22nd the Secretary of State answered, giving the required permission. On the date of the receipt of that answer the commissioners agreed upon such adjournment, and an announcement that such adjournment would take place was publicly made in the town hall, at a meeting held by the commissioners on the 25th Sept. On the 25th the commissioners adjourned to the 27th, on which day two only of the commissioners attended, examined witnesses, and adjourned to the 19th Oct. On that day the three commissioners again met, and ad-

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journed to the 21st. On the 21st they again met, and the applicants, Flint and Fitzgerald, having been summoned as witnesses, appeared, but refused to be sworn, and were accordingly committed by the commissioners for contempt.

The *Attorney-General*, the *Solicitor-General*, and *Archibald* now showed cause against the rule.—First, there was no necessity for an adjournment at all in order to keep the commissioners' powers alive; secondly, what really took place amounted to a valid adjournment. This is a commission for the purpose of instituting an inquiry, and to that end of examining witnesses and making a report. It pronounces no judgment. It is not therefore in any sense a court, inasmuch as its functions are not judicial. Now the presumption seems to be in favour of such a body's having power to hold independent meetings from time to time. The other side seems to seek to shift the onus of proof on to us, and to assume that the commissioners' functions cease in the absence of an adjournment. They import the analogy of the court of quarter sessions, but that if considered cannot help them; for to sustain such an analogy they must contend that the functions of the commissioners are limited to one day in the absence of adjournment. There is no analogy whatever between a court of quarter sessions and this commission. Adjournment in relation to the former signifies the power of dissolving and reconstituting the court on a future day; if the court separates without an adjournment there is an end of it, for the act of adjournment can only be done by the court which has ceased to exist. Now there is nothing like dissolution and reconstitution of the commission. Having shown, therefore, that the analogy of a court is fallacious, let us look to the words of the statute. The first part of the 4th section clearly gives the power to hold distinct independent meetings. This general power ought not to be held to be cut down except by clear and express words. Now the subsequent words of the statute, not purporting to be restrictive, ought not to be construed as such, inasmuch as a most reasonable meaning can be otherwise given to them. Various cases might arise in which the power of continuing one meeting to a subsequent occasion might be most eminently useful. With respect to the proviso at the end of the section, it is clear that that cannot have the effect of making an adjournment necessary. The provision there is against an adjournment of the "inquiry," not of the "meeting." The word "adjournment" is clearly only used here in the popular sense of postponement. Then, if an adjournment were necessary, it is submitted that there was a valid one here. All three commissioners announced their intention to adjourn at the meeting of the 25th, and the meeting of the 27th was a mere nullity if the other side be correct [KELLY, C.B.—Does that amount to an actual adjournment? It is only an expression of intention.] The adjournment, however, on the 27th was valid according to our contention. All three commissioners had agreed upon it, and exercised their discretion in reference thereto; it would lead to the utmost absurdity and inconvenience if the announcement of it by two were insufficient. If one commissioner were taken suddenly ill or faint, or a railway accident prevented his arrival at the place of meeting in time, the whole of the proceedings would come to an end if, as contended, neither the commissioners present could adjourn nor all the commissioners subsequently hold a fresh meeting. They cited

King v. *Whitaker*, 9 B & C. 648;
Grindley v. *Barker*, 1 B. & P. 229;
Reg. v. *Coroner of Dover*, 10 Jur. N. S. 1150; 11 L. T. Rep. N. S. 488;
King v. *Justices of Middlesex*, 5 B. & Ad. 1113 6 C. & P. 90.

Sir *J. Karslake*, Q. C. *Sleigh*, Serjt., and *Morgan Howard* supported the rule.—In the first place, the meeting must be adjourned; secondly, there was no such adjournment here. It is not contended that there is a precise analogy between the commissioners and a court, but, inasmuch as they derive their powers from the Act, they must follow the provisions of the Act in the exercise of them. Now, it is clear from the consideration of the whole of the provisions of the 4th section that though the commissioners might from time to time hold meetings, all meetings subsequent to the first were to be held by adjournment from it. Provision is made for notice being given of the first meeting, but not for any of the subsequent meetings, obviously because it was contemplated there would be an adjournment. The word "adjourn" has a well-known legal meaning; it is not to be assumed that the Legislature which was using the word in its proper sense in various contemporaneous Acts did not mean to use it in the same sense here. The power given to adjourn would be nugatory and superfluous if the commissioners had power to meet from time to time afresh, without adjournment. The arguments derived from the possible inconveniences which might arise from the necessity of adjournment apply equally well to the necessity of adjournments of the court of quarter sessions. Yet the Legislature in that case have thought it proper that an adjournment should be necessary. The provision at the end of the section shows unmistakeably what was intended. There is no difference between the "inquiry" and the "meeting." It is clear that it was intended that the meeting should be adjourned from time to time, but in order to prevent protracting the inquiry unnecessarily no adjournment was to be for more than a week without the approval of the Secretary of State. This provision only applies to adjournment, and if the contention on the other side be correct, a fresh meeting might be held at any interval. Thus giving the word "adjourn" its proper legal signification, a reasonable construction is found for the whole of the provisions of the 4th section. Surely this is to be preferred to a construction which gives a wholly incorrect meaning to the word "adjourn," and makes great part of the section surplusage. Then, if an adjournment was necessary, there was not a valid one here. The adjournment must be the act of the commissioners acting *quâ* commissioners. They have an important discretion to exercise as to time and place. They cannot delegate the matter to one of their number; all three must exercise their discretion, and so all three ought to be present to make up their minds at the time and place of adjournment. Moreover, an adjournment for an interval of more than a week without the permission of the Secretary of State is void. Here the adjournment till the 19th Oct. was without authority, for the permission given by the Secretary of State was to an adjournment from the 27th Sept. to the 19th Oct. The Secretary of State has a discretion to exercise in the matter, and it might well be that he would have refused to allow an adjournment from an earlier period than the 27th; he might have said, "Why do you propose to waste the time until the 27th?" The permission given by him cannot be exceeded, and it presupposed a valid meeting on the 27th. [KELLY, C. B.—Suppose "adjourn" in the section merely means "postpone?"] I contend that the same reasoning would apply. [CHANNELL, B.—Giving the application a fair and reasonable construction, may not its substance be an application to postpone the inquiry till October shortly, without reference to the exact date of the meeting from which the postponement

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was to be?] All the facts are against such a construction. The other commissioners never agreed to or applied for a postponement from the 25th, but only from the 27th. They cited

The Shaftesbury case, Falc. & Fitz. 374;
The Lisburn case, Wolf. & Br. 225, 233;
3 & 4 Will. 4, c. 22, s. 89;
4 & 5 Vict. c. 45, s. 12;
11 & 12 Vict. c. 98, s. 73;
28 & 29 Vict. c. 8 ;
R. v. *Polstead*, Str. 1263;
D'Arcy v. *The Tamar, &c. Railway Company.* L. Rep. 2 Ex. 158; 14 L. T. Rep. N. S. 626.

KELLY, C.B.—The questions raised in this case are of great importance, inasmuch as they not only involve the liberty of the subject, but our decision must govern the proceedings which may take place under future commissions. Under these circumstances we thought it right to grant a rule, in order that the matter might be fully discussed, and the arguments on both sides considered. That has now been done, and I am of opinion without any doubt that the rule should be discharged. The facts of the case lie in a very narrow compass. It appears that three gentlemen were appointed to act as commissioners. They went down to Beverley, and held several meetings at which witnesses were examined, and various proceedings took place. All these meetings it is admitted were perfectly regular, but about the last week in September the commissioners thought it expedient to put off further meetings for a longer interval than a week, viz., till October. Accordingly they communicated with the Secretary of State, and received permission from him to adjourn from the 27th Sept. to the 19th Oct. His answer was received probably on the 23rd Sept., and on the date of such receipt the commissioners all agreed to such adjournment, and it was publicly announced that such adjournment would take place in the Town Hall at a meeting that took place on the 25th. This meeting was duly held by all three commissioners, and the inquiry was then postponed till the 27th. On the 27th a meeting was held, at which, however, only two commissioners were present, and then those two commissioners expressly postponed the inquiry till the 19th Oct. It is insisted that, only two commissioners being present the meeting was invalid; and that, supposing even that the act of a majority of the commissioners would be valid, it is necessary that the whole body should be present at a meeting; but on that point, as it does not necessarily arise as it seems to me, I express no opinion; not so much because I feel any doubt on the point, as because I think the safest course in such a case is that there should be no judicial expression of opinion on a point that is not directly involved in the decision at which the court has arrived. Putting aside, therefore, this question, and assuming that the meeting being of two only, and so at that meeting the discretion of three not being exercised, the meeting was invalid, and that consequently all the proceedings, including the adjournment, were void, and must be treated as never having taken place at all, the question arises whether any adjournment was necessary according to the provisions of the Act. It is contended that proceedings under these commissions are analogous to, or in the nature of, judicial proceedings, and that consequently at any meeting of the commissioners an adjournment from time to time is necessary, as in the case of a meeting of magistrates at quarter sessions. Now, in my opinion, this commission does not constitute a court at all—it is a mere commission authorising certain persons to prosecute an inquiry, and incidentally to the exercise of such authority in one instance, and it would appear in only one instance, to exercise powers of a judicial character; that is to say, on a witness appearing and being guilty of a contempt, they have power to punish such contempt as any one of the courts in Westminster Hall would have power. That power is, however, only incidental to the main object of the commission, and does not, in my opinion, constitute the commissioners a court, or create any of the analogies of a court of justice. My brother Cleasby has referred to Lord Coke's writings with reference to the functions of commissioners, but the commissioners there referred to are such as exercise functions in their nature judicial. We are, therefore, not called upon, I think, to consider the analogy of a court of justice or the doctrines laid down by Lord Coke, which have been referred to, for it appears to me that the powers of these commissioners depend entirely upon the terms of the Act of Parliament under which they are appointed. The question, therefore, is, whether the commissioners, in prosecuting their inquiry, must be taken to be authorised to hold only one single meeting as long as it is necessary the inquiry should be continued, or several successive independent meetings, not to be holden by adjournment from the original meeting, but from time to time, as the prosecution of the inquiry may require. Now, by the 6th section we find that the commissioners shall, by all such lawful means as to them appear best, with a view to the discovery of the truth, inquire into the manner in which the election has been conducted, and whether any corrupt practices have been committed at such election. By the 4th section it is provided that the commissioners appointed under this Act, to make inquiry as aforesaid, shall, upon their appointment, or within a reasonable time afterwards, go to such county, division of a county, city, borough, university, or place, and shall, from time to time, hold meetings for the purposes of such inquiry within the same or within ten miles thereof. Now here we find by these sections general powers given, which, if not restrained in any way in any other part of the Act, certainly enables the commissioners to prosecute their inquiry by holding meeting *after* meeting, as in the exercise of their discretion they may think best for the purposes of such inquiry; and if the 4th section stopped here it would be perfectly clear that the commissioners could hold fresh independent meetings without adjournment from one to the other. The section, however, proceeds as follows: "And shall have power to adjourn such meetings from time to time from any one place to any other place within such county, &c., as to them may seem expedient; and such commissioners shall give notice of their appointment, and of the time and place of holding their first meeting, by publishing the same in some newspaper in general circulation in such county," &c. Now it is contended, in support of the rule, that the provision for giving notice of the first meeting shows that this is to be the only meeting except those by adjournment, which are all to operate merely in continuance of this original meeting. The use of the expression "first" seems to me to be somewhat against this contention, but I do not rely very much on that. When we look to the nature of the commissioners' functions, we shall find the strongest reasons against giving the words of the section the meaning contended for in support of the rule, and in favour of the meaning's being that successive meetings may be held. Why, for instance, after one or more meetings have been held for the purposes of the inquiry—of which due notice has been given, and all that remains to be done afterwards is for the commissioners to meet to consider the evidence and agree as to their report, a meeting at which no portion of the public are called upon or entitled to

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attend—should it be necessary that any adjournment should take place from the last public meeting? Again; the Act says, that if the commissioners find corrupt practices to have been committed, they may make the like inquiries concerning previous elections; having concluded their inquiry as to the last election, they may wish to consider whether they will come to the conclusion that corrupt practices have been committed, and accordingly, whether they will inquire into previous elections or not. Why, in this case, should an adjournment be necessary when it is uncertain whether any further meetings are to be held or not, and nothing can be settled as to the time or place of such meetings, if any be held? It seems by far the more reasonable construction that these meetings may be separate independent meetings. In some cases, and as to some meetings, circumstances may require express adjournment, but in other cases it may be wholly unnecessary and even inappropriate. With reference to the words relating to adjournment, it is to be observed that they do not say that the commissioners "shall adjourn," but that they "shall have power to adjourn from time to time and from any one place to any other place within such county." As I said before, if the section stopped before those words it would clearly give power to hold fresh independent meetings, and why should these words be considered as restricting the previous part of the section. Their natural meaning is not that the commissioners are bound to adjourn, but that they may do so if they think fit. A witness might be describing some transaction in which knowledge of the position of particular localities might be essential to understanding his evidence, and the commissioners might desire to look at the spot for themselves; and, having done so, to return and proceed with the meeting. If a particular witness were unwell, they might think it expedient to adjourn to his residence and take his evidence. At most this is but a power contained in the Act, and cannot be construed as intended to restrict powers given in the previous part of the section. It is said that adjournment is always necessary, for how else are people to know when the next meeting will be held. The answer is, in the same way as any one else who is not present at the meeting. A witness who has not been required to give his evidence before must have a fresh notice. Notice may be given, under the general powers of the Act, by advertisement or otherwise. It is said that the meaning of the Act must be taken from the analogy of courts, or other commissions, where an adjournment is absolutely necessary; and the Legislature, in using this word "adjourn," must be taken to have meant to use it in the strict technical sense derived from such analogy; but if that construction were put on the statute the greatest mischief and inconvenience might arise. If from illness or any accident a meeting appointed cannot be held, the whole proceedings will be at an end. The argument *ab inconvenienti*, it is urged, might be equally well applied to the case of quarter sessions, and yet the Legislature has clearly rendered an adjournment necessary in their case. But it is clear that in the case of a commission like this the mischief and inconvenience are so much more likely to occur that the two cases are not really analogous; and we ought not, unless compelled by the strongest and clearest words, to hold the same rule to have been intended to apply to both. But now we come to the words at the end of the section, and it is said that these show an adjournment to be necessary. They are these: "Provided always that such commissioners shall not adjourn the inquiry for any period exceeding one week without the consent and approbation of one of her Majesty's Principal Secretaries of State." The whole question with reference to this proviso turns on the word "adjourn;" if it implies that no meeting can be held other than the original meeting except by adjournment, and that no such adjournment shall be beyond a week without the permission of the Secretary of State, then, of course, no meeeting can be good unless there have been a regular adjournment from the previous one; but it seems to me, looking to the whole of the Act, that this proviso means nothing more than that they shall not protract the inquiry by holding meetings at greater intervals than a week without the permission of the Secretary of State; and if they find it necessary to hold a meeting at a greater interval, they must apply for that permission. The word "adjourn" in this place merely means "postpone" in my opinion, and all that is required is permission to postpone the inquiry beyond a week. That permission the commissioners clearly got, and public notice was given on the 25th Sept. that the inquiry would be postponed until the 19th Oct. The other clauses of the Act seem to me, like those which I have read, uniformly to point to the conclusion that the powers conferred on the commissioners are not in their nature judicial, and that it was not intended to encumber them in an inquiry of this sort with the forms of judicial procedure; very general and extensive powers are given to them for the purpose of eliciting the truth; they are to use all such lawful means as to them may seem best. The words of the 4th section certainly bear the construction that they may from time to time, as they deem it expedient for the purposes of the inquiry, hold separate and independent meetings; and it seems to me, from the very nature of the inquiry that they were to hold, absolutely necessary that they should have such power. Under these circumstances I am of opinion that the rule should be discharged.

CHANNELL, B.—I am also quite satisfied that the rule should be discharged. These commissioners were acting under 15 & 16 Vict., c. 57, and I quite agree with the argument that their authority depends wholly upon the terms of that Act. If they were not exercising that authority when they made those committals, the applicants are entitled to be discharged out of custody. Admitting, then, that they were merely the creatures of the statute, the question arises whether by the statute they were bound to adjourn their meeting from time to time in order to keep the whole proceedings alive; and they have been compared to a court to which an adjournment is necessary. Now it is true that by the statute they are entitled to exercise some powers which a court of law may exercise, and in a similar way, but that does not, in my opinion, constitute them a court. If the 4th section stopped at the words "ten miles thereof," I should have thought the case clear beyond all reasonable doubt, and that these were commissioners acting with express powers to hold meetings from time to time. But a difficulty has been suggested, arising from the subsequent part of the section, which says that they shall have power to adjourn. The question is what construction is to be put upon the word "adjourn" here, and in the proviso at the end of the section?—whether it is to be construed as involving the necessity for an adjournment in the strict legal sense of the term, or merely as used in a more popular sense, and referring to postponement. Now it is worthy of observation that the adjournment is contemplated in two points of view: first, with regard to time; and secondly, with regard to place. With respect to the latter, the commissioners are empowered to adjourn to any place within the limits of their authority without any sanction; but, with respect to time, they cannot adjourn, so that more than a week shall elapse in

the prosecution of the inquiry, unless they obtain the approval of the Secretary of State. The concluding words of the 4th section, which make the approval of the Secretary of State necessary are only restrictive of the powers of adjournment previously given, but the 5th section is a positive enactment, and by that the commissioners are empowered with such consent and approbation as aforesaid to hold meetings in the cities of London and Westminster, and to adjourn the same from time to time, as they may deem fit. I cannot, on looking at these provisions as a whole, come to the conclusion that the provisions relating to adjournment were intended to restrict the previous words which give power to hold meetings from time to time. It seems to have been supposed that the effect of the decision of the Queen's Bench is to make the words relating to adjournment mere surplusage; but I do not think that any of the expressions used by the judges there could have been meant to be taken in this sense. It may be, and that was probably all that was intended, that it was not necessary for the purpose of continuing to hold meetings, to exercise the power of adjournment given by the middle part of the 4th section, yet that power may be, as in the cases suggested by the Lord Chief Baron, eminently useful. I do not think, therefore, that those words are surplusage, but I cannot come to the conclusion that they are intended to be restrictive. If the true construction of the Act be such as I have mentioned, then all its requirements were complied with in this case. The postponement of the further prosecution of the inquiry till October was approved of by the Secretary of State, the commissioners all agreed upon such adjournment, and public notice was given that it would be so adjourned or postponed until the 19th Oct. What occurred on the 27th Sept. may be treated as a nullity, and there was therefore a valid postponement made at a meeting at which all three commissioners were present. It was argued, with relation to the postponement till the 19th Oct., that, an adjournment being necessary, there was virtually no consent to such adjournment as took place, because the approval of the Secretary of State must be taken with reference to the application on the 18th, which was not for an adjournment from the 25th, but from the 27th, and that there was no specific consent by reason of the informal meeting, the consent presupposing a valid adjournment on the 27th. On that point I decline to offer any opinion, for in my view it is unnecessary to decide it, if I am right as to the construction of the statute, and no adjournment was necessary to keep the powers of the commissioners alive.

PIGOTT, B.—I am of the same opinion. The question is whether the commissioners, when they made this committal, were acting within their powers. These powers are prescribed by the Act under which they were appointed. We must give this Act a reasonable construction, looking to the subject-matter with which it deals; and I think in so doing it will be found there is no real ambiguity in it, and that the provisions of the 4th section are all very easily reconcilable. It provides that the commissioners shall go down to the place where the inquiry is to be, and may hold meetings from time to time for the purposes of such inquiry. If the section had stopped there, there would have been no room for contention as to its meaning; but it goes on, and adds a power of adjournment from time to time of such "meetings." I confess I cannot imagine words more unapt to lay down the necessity of an adjournment from day to day. The words purport to give a "power" not to restrict previous powers. Such a power is by no means superfluous. Cases may easily be imagined in which the necessity for its exercise would arise. The summons to a witness would require attendance at the time and place specified. If a witness summoned were not examined, it is quite clear if the power of adjournment were not exercised, he must be summoned over again. Then, thirdly, comes the proviso which sets a limit to the power of adjourning. This seems to me to make no difference; it does not imply that the meeting must be kept alive by adjournment, or else that the powers of the commissioners will come to an end. The word adjourn may be used in a strict technical sense as with reference to the court of quarter sessions; but it may also be used in a more popular sense, as meaning merely postponement. The provision is merely that the inquiry shall not be postponed beyond the certain limit, without the consent of the Secretary of State. It is clear that the commissioners did not postpone the inquiry beyond the week without the consent of the Secretary of State. They agreed to postpone the meeting from the 25th to the 27th; so far they required no permission. For the postponement till the 19th Oct., upon which they all agreed, and of which notice was given, they had the requisite approval. The question is whether the consent and all the subsequent proceedings became void because no valid meeting was held on the 27th. I cannot come to such a conclusion; reading the word "adjourn" as meaning "postponement," with reference to this point, for such postponement they had permission. If we come to the conclusion that no formal adjournment was necessary, it seems to me to follow that all that was requisite to give the commissioners jurisdiction existed in this case.

CLEASBY, B.—I am of the same opinion. The question is whether the meeting of the 21st Oct. was a valid meeting of the commissioners under the Act. It is argued that it was not, because their powers had come to an end for want of a previous adjournment. It is alleged in answer, first, that no such adjournment was necessary; and, secondly, that if it were, there was a valid adjournment Now a commission under this Act does not appoint a commissioner to any office by virtue of which he exercises any particular authority or character apart from the provisions of the Act. We have therefore to look to the Act alone to determine the powers of the commissioners and their limits. Now if I were satisfied that a regular adjournment were necessary it would not be necessary to decide the first point, but I confess I cannot see my way to deciding that this was a regular adjournment by all three of the commissioners. All that was stated at the meeting of the 25th Sept. was a mere expression of intention to adjourn after a meeting on the 27th. I do not think that amounted to an adjournment. The intention might have existed, but it might be altered; it might be that on the 27th circumstances might arise to induce the commissioners to come to the conclusion that the adjournment had better be to the 28th. Neither can I think that the act of the two commissioners on the 27th could constitute a valid adjournment. If an adjournment be necessary to keep the commission alive, it is clear it is no matter of mere form or small importance. But these points become immaterial for the conclusion at which I have arrived, looking to the words of the 4th and 5th sections of the Act, and the subject-matter, and the fact that the commissioners have to report as well as to hear evidence, is that it not essential that there should be an adjournment in order to keep the commission alive. The words of the 4th section give the power to meet from time to time, and then give power to adjourn from time to time and place to place. Without these words, I should

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think the commissioners would probably have the power, as necessary to their functions, of meeting and adjourning; but the Legislature has thought fit to put this matter beyond doubt by giving the express power. The effect of an adjournment, as distinguished from a fresh, independent meeting is of importance, for, by adjournment, all the meetings so adjourned are continued as one meeting; everything done at a meeting remains in force over all the days during which such meeting lasts. Then the Act proceeds to impose a limitation. The effect is that without the authority of the Secretary of State there cannot be an interval of more than a week between the meetings held in the course of the inquiry. Giving these provisions the most careful consideration that I can, I come to the conclusion that an adjournment was not necessary, and that this meeting was so far perfectly good and valid. But a third question has been suggested. It is said that assuming an adjournment was not necessary, yet if a fresh meeting was held at a greater interval than a week it would not be valid unless held with the consent and approbation of the Secretary of State; and it is further argued that no consent or approbation was given to the adjournment that took place till October. I do not think there is anything in this contention when the substantial effect of what took place is looked at. It is quite clear that if they had separated without adjournment on the 25th, and had then within the week applied for and obtained the permission of the Secretary of State to meet again at a greater interval than a week, such a mode of proceeding would have been valid if our view of the law be correct. It is suggested that here the consent having been to a specified mode of proceeding, namely, to an adjournment after a meeting to be held on the 27th Sept., and that meeting never having been held, the subsequent meeting of 19th Oct. was without authority. I do not think we are driven to that conclusion. Bearing it in mind that no adjournment was necessary, it seems to me that the substance of the authority given was to postpone the inquiry until the 19th Oct. It seems to me therefore that all the requisites necessary to give the commission jurisdiction existed. No adjournment was necessary; the meeting that was held afterwards, at a greater interval than a week, was held with the consent and approbation of the Secretary of State. Under these circumstances the rule must be discharged.

Rule discharged.

Attorneys: *F. W. Blake*, for *Bainton*, Beverley; *Solicitor to the Treasury.*

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, Nov. 13.

(Before Kelly, C. B., Martin, B., Blackburn, Lush, and Brett, JJ.)

Reg. v. William Martin.

Coining—Felony—Having possession of counterfeit coin after previous conviction—Course of proof at trial—24 & 25 Vict. c. 99, ss. 12 and 37.

On the trial of an indictment for felonious possession of counterfeit coin, with intent to utter the same, after a previous conviction, the course of proceeding at the trial is prescribed by sect. 37, viz., first to try that part of the offence which relates to the possession, and then, if the prisoner be found guilty, to try the prisoner for the previous conviction.

Case reserved for the opinion of this court by William Forsyth, Esq., Q. C., sitting as a commissioner at the Leeds Summer Assizes.

William Martin was tried before me on the charge of being unlawfully in possession of counterfeit coin, he having been before convicted of unlawfully uttering counterfeit coin.

The following is a copy of the indictment:

Yorkshire, West Riding Division, to wit. The jurors for our Lady the Queen, upon their oath present that William Martin, on the 10th April 1869, unlawfully had in his custody and possession fifteen pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for fifteen pieces of the Queen's current silver coin called crowns; five pieces of false and counterfeit coin resembling and apparently intended to resemble and pass for five pieces of the Queen's current silver coins called florins: and five pieces of false and counterfeit coin resembling and apparently intended to resemble and pass for five pieces of the Queen's current silver coin called shillings, knowing the said several pieces of false and counterfeit coin to be false and counterfeit, and with intent unlawfully, fraudulently, and deceitfully to utter and put off the same, against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence hereinbefore mentioned, to wit, at a special session and delivery of the gaol of our Lady the Queen, holden at Lincoln, in and for the county of Lincoln, on Friday the 11th Dec., in the twenty-first year of Her present Majesty's reign, the said William Martin, in the name of Martin Kelley, was, in due form of law, convicted on a certain indictment against him for that he on the 14th Nov. in the twenty first year of the reign aforesaid, at the parish of Gainsborough, in the county of Lincoln, did unlawfully utter and put off to Mary Pycock one counterfeit half-crown, knowing the same to be false and counterfeit, against the form of the statute in such case then made and provided. And that the said William Martin, in the name of Martin Kelley, was thereupon ordered to be imprisoned in the house of correction and kept to hard labour for the term of two years. And so the jurors aforesaid, upon their oath aforesaid, do say that the said William Martin on the day and year first aforesaid, feloniously and unlawfully had in his custody and possession the said several pieces of false and counterfeit coin, knowing the same to be false and counterfeit, and with intent unlawfully, fraudulently, and deceitfully to utter and put off the same in manner and form aforesaid, and against the form of the statute in such case made and provided.

Second count:

And the jurors aforesaid upon their oath aforesaid do further present that the said William Martin afterwards, to wit, on the 10th April 1869, feloniously and unlawfully had in his custody and possession fifteen pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for fifteen pieces of the Queen's current silver coin, called crowns, and five pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for five pieces of the Queen's current silver coin, called florins, and five pieces of false and counterfeit coin, resembling and apparently intended to resemble and pass for five pieces of the Queen's current silver coin, called shillings, knowing the said several pieces of false and counterfeit coin to be false and counterfeit, and with intent unlawfully, fraudulently, and deceitfully to utter and put off the same against the form of the statute, in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore, and before the committing of the offence in this count mentioned, to wit, at a special session and delivery of the gaol of our lady the Queen, holden at Lincoln, in and for the county of Lincoln, on Friday, the 11th Dec., in the twenty-first year of Her present Majesty's reign, the said William Martin, in the name of Martin Kelley, was in due form of law convicted on a certain indictment against him, for that he on the 14th Nov., in the twenty-first year of the reign aforesaid, at the parish of Gainsborough, in the county of Lincoln, did unlawfully utter and put off to Mary Pycock one counterfeit half crown, knowing the same to be false and counterfeit against the form of the statute, in such case then made and provided. And that the said William Martin, in the name of Martin Kelley, was thereupon ordered to be imprisoned in the House of Correction and kept to hard labour for the term of two years.

At the outset of the case Mr. Forbes, the counsel for the prosecution, called a witness, and proposed to give in evidence a certificate to prove the previous conviction of the prisoner. Mr. Middleton, the counsel for the prisoner, objected, and I, having regard to the 37th section of the Act 24 & 25 Vict. c. 99, refused to receive the evidence at that stage of the case.

Evidence was then given to show that the

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prisoner was guilty of the subsequent offence charged, but I refused to allow evidence to be given of the previous conviction until the jury should give their verdict upon the subsequent charge.

At the close of the case for the prosecution, the counsel for the prisoner contended that there was no case of felony to go to the jury, for that the offence of being in possession of counterfeit coin, was, by the 12th section of the above statute, made felony only when there had been a previous conviction of an offence relating to the coin, and no such previous conviction had been proved.

I allowed the case to go to the jury upon the question whether the prisoner was guilty or not of the subsequent offence.

The jury found a verdict of guilty.

The prisoner was then asked whether he had been previously convicted as charged in the indictment, and he admitted that he had been so convicted.

Feeling doubtful whether I had done right, first in refusing to admit the certificate when it was tendered in evidence, and, secondly, in leaving to the jury the question of the prisoner's guilt as to the subsequent offence before the previous conviction had been proved, I deferred passing sentence, and the prisoner remains in custody.

I desire to have the opinion of the Court for the Consideration of Crown Cases Reserved whether I was right in rejecting the certificate when it was tendered in evidence, and in submitting to the jury the question whether the prisoner was guilty of the subsequent offence before the previous conviction had been proved against him.

William Forsyth.

Forbes for the prosecution.—The question was reserved in order to ascertain what is the proper mode of proceeding upon the trial of cases of this kind. The indictment is under the 12th section of 24 & 25 Vict. c. 99, which enacts that "Whosoever having been convicted of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former Act relating to the coin, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall be guilty of felony." By the 11th section, the having three or more pieces of counterfeit gold or silver coin in possession, with intent to utter or put off the same, is made a misdemeanor. Upon the trial of indictments of this kind different modes of proceeding have prevailed. The 37th section, however, seems to apply. That enacts that "Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only of the indictment. . . . And the proceedings upon *any* indictment for committing any offence after a previous conviction shall be as follows (that is to say), the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty the jury shall be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty he shall then, and not before, be asked whether he had been previously convicted, and if he answer that he had been so previously convicted, the court may proceed to sentence him; but if he deny that he had been so previously convicted the jury shall then be charged to inquire concerning such previous conviction. [Blackburn, J.—Mr. Justice Crompton pointed out the difficulty on this section. The charge in the indictment is for felony, which cannot be unless the prisoner has been previously convicted; but he said the technical difficulty must give way to the common sense of the words, and the first thing to be tried was, was the prisoner guilty of misdemeanor? And then if he was, had he been previously convicted.] Willes, J., at the Warwick Assizes in 1851, Lush, J., at the Leeds Assizes in 1867, and Mellor, J., had ruled that it was necessary to prove the previous conviction first, and then the other part of the offence. [Martin, B.—To make the offence a felony, I should have thought it right to prove the previous conviction first, but sect. 37 directs how the proceeding is to be.] Sects. 20 and 21 were then referred to.

No counsel appeared to argue for the prisoner.

Kelly, C. B.—Section 37 prescribes the course of proceeding on the trial of such indictments as this, and that was the course adopted in the present case. The conviction will, therefore, be affirmed.

Lush, J.—When I directed a different course at the Leeds Assizes my attention was not called to sect. 37, but I afterwards discovered it, and that prescribes the course of proceeding.

The rest of the Court concurred.

Conviction affirmed.

NISI PRIUS.

COURT OF QUEEN'S BENCH.

Tuesday, Dec. 7.

(Before Mellor, J. and a Common Jury.)

Girardot v. Fitzpatrick (a).

Action for goods sold—Evidence of appropriation.

Plaintiff, an artist, made the following agreement with defendant, a picture dealer, "I agree to finish three pictures for Mr. Fitzpatrick (the defendant) which are now submitted to him, in my best manner for 60l. cash and a clock." The pictures were not then completed, but afterwards defendant expressed approval of them, and said he would send for them next day:

Held, in an action for the 60l., that these circumstances constituted sufficient appropriation of the pictures by defendant to support common counts for goods bargained and sold, and sold and delivered.

Action upon common counts for work done and materials provided by the plaintiff for the defendant at his request, for goods bargained and sold, and sold and delivered by the plaintiff to the defendant; also upon accounts stated.

Plea, never indebted.

Particulars of plaintiff's claim:

To finishing three pictures as per agreement of 3rd May 1869			60 0 0
To painting picture of head, 10 by 8 ...	£12 0 0		
Cr. by dog kennel	£8 0 0		
By Cash	0 10 0		
		8 10 0	
			3 10 0
			£63 10 0

The agreement referred to was as follows:

3rd May, 1869.

I agree to finish three pictures for Mr. Fitzpatrick which are now submitted to him. Subject—"A Lady Artist." Sizes (here follow the inches of length and breadth)—in my best manner, for 60l. cash and a clock.

E. G. Girardot.
H. Fitzpatrick.

Prentice, Q. C. and *Day* appeared for plaintiff.

J. O. Griffits for defendant.

(a) Reported by M. W. McKellar, Esq., Barrister-at-Law.

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Plaintiff was an artist, defendant a picture dealer; there had been many transactions between them, and the claim for 3*l.* 10*s.* related to a previous affair not material here.

When the agreement was entered into, the pictures bargained for were neither of them finished; the plaintiff took possession of the clock just afterwards.

On the 2nd June plaintiff wrote to defendant saying the pictures were finished, and asking for the money. The defendant called at the plaintiff's studio, and a conversation took place, about which the evidence was conflicting. Both parties admitted that defendant agreed to buy another picture of plaintiff for 20*l.* Plaintiff said that defendant expressed approval of the three pictures which were the subject of this action, and agreed to send for them the following morning; he also said that he sold the fourth picture for 20*l.* upon condition that the defendant should pay the whole 80*l.* he owed the plaintiff the next day when he sent for the pictures. The defendant, however, said that he made no such condition as to his purchase for 20*l.*, and that he called the plaintiff's attention to some objections which he made concerning the colour of some drapery and the naturalness of some flowers in the other three pictures; and never entertained an intention of taking the pictures until these matters to which he objected were altered.

Next day defendant sent his son to plaintiff with 10*l.*, and a request to have the 20*l.* picture; this plaintiff refused, and he returned the 10*l.* Afterwards nothing further, except recrimination, took place between the parties.

Griffits submitted that upon this action for goods bargained and sold, and sold and delivered, there must be a nonsuit as to the subject of the agreement of the 3rd May. There was no evidence of appropriation; the proper form of action would have been for not accepting; and the claim could only be for damages. The defendant might have answered such an action by payment into court, or by objection to the manner in which the pictures were painted. He cited *Lee* v. *Griffin*, 1 B. & S. 272, in which it was held that a contract to make a set of artificial teeth was a contract to supply goods, and not for work, and that the relative value of the work to that of the materials was no criterion as to the nature of the contract.

Day, for the plaintiff, contended that the property passed to the defendant when he called at the plaintiff's studio, expressed approval of the pictures, and said he would send for them next day.

MELLOR, J.—I shall hold that upon the plaintiff's story, if it be true, the property then passed to the defendant, and this action will lie; and, if I thought it necessary, I should certainly amend the declaration.

Day declined to have the record amended.

In summing up to the jury, the learned JUDGE asked them if they believed the plaintiff's version of the conversation between himself and the defendant in the studio. If they did not believe it, but accepted the defendant's evidence, which he reminded them the defendant did not give with very great confidence,—if, he said, they believed that the defendant on the last occasion of his seeing the pictures expressed dissatisfaction, and did not promise to pay for them the next day, then perhaps Mr. Griffits had some foundation for his objection, and the verdict should be for the defendant as to 60*l.* of the claim.

The jury found a verdict for the whole amount claimed by the plaintiff, and the learned judge stayed the *postea*, and granted leave to the defendant to move to enter a nonsuit as to 60*l.* upon the ground of the insufficiency of the evidence to establish legal appropriation of these specific pictures, but upon the following conditions—viz., that the amount of the verdict should be paid into court in a week, that the plaintiff should keep the pictures till the whole matter had been settled, and that both parties should be bound by the decision of the Court of Queen's Bench, the court being at liberty to amend the form of action upon any terms.

Attorneys for plaintiff, *Harper*, *Broad*, and *Manby*.

Attorneys for defendant, *Hurford* and *Taylor*.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Nov. 23.

(Before LORD PENZANCE, J. O.)

MILLER v. MILLER.

Restitution of conjugal rights—Husband successful—Wife condemned in costs—20 & 21 Vict. c. 85, s. 51.

A wife in her answer to a petition for restitution of conjugal rights, made charges against her husband of odious and disgusting conduct, which her counsel withdrew at the trial. She was proved to have a separate income of 700l. a year. The husband obtained a decree, and the court, under the 51st section of the Divorce Act, condemned the wife in the costs of the suit.

This was a suit by the husband for the restitution of conjugal rights. The parties were married in June 1856, the husband being then practising as a surgeon at Barton, in Staffordshire, and the wife having a separate income of her own to the amount of 700*l.* a year. In 1864, the wife induced her husband to give up his practice, and to come up to London, urging that her income was large enough for their maintenance. Accordingly they came to London, and cohabited at Tavistock-terrace, Notting-hill. In Nov. 1866, the wife, without just cause, withdrew herself from cohabitation, and has ever since refused to return to her husband's house. In March 1868, the husband filed a petition for the restitution of conjugal rights. The wife in her answer denied generally that she had withdrawn herself from the cohabitation, and went on to charge her husband with cruelty, and alleging that her health had suffered very considerably "from the violent filthy conduct towards her" of her husband. In the fourth and fifth paragraphs she gave particulars alleging that at two specified dates in Aug. 1865, and in Nov. 1866, "The said Benjamin Miller insisted with violence, notwithstanding the remonstrances of the respondent, in the exercise of his marital rights at a period when it was not proper or decent to have conjugal intercourse, that is to say, when the respondent was in a state of menstruation," and "that on three several occasions he handled the petitioner in a most filthy manner, thereby causing her much pain and misery of mind and body." In further paragraphs the respondent charged her husband with personal violence. The petitioner denied these charges, and issue being joined, the case was tried in July 1869, before Lord Penzance, J.O., and a special jury. At the trial the counsel for the respondent admitted that he had no evidence to support her charges, and all the issues having been found for the petitioner, the court pronounced a decree of restitution of conjugal rights, and reserved the question of costs.

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Dr. *Spinks*, on behalf of the petitioner, now moved that the respondent be condemned in the costs of the suit. He read affidavits setting out that the respondent continued to reside abroad, keeping her place of residence concealed, in order to evade the service of the decree, and that although her movements were well known to the family of the respondent, her trustees, and solicitor, they refused to disclose it. In his affidavit the petitioner stated that he had been put to great expense to meet the charges placed on the record, and that though he had recently gone into practice as a consulting surgeon, his earnings at present were very slender and precarious, and wholly insufficient to bear the costs of the needless and expensive litigation entailed upon him by his wife. He also stated that his wife had a separate income of 700*l.* a year. He submitted that the 51st section, which says that "the court on the hearing of any suit, proceeding, or petition under this Act, and the House of Lords, on the hearing of any appeal under this Act, may make such order as to costs as to such court or House respectively may seem just," was sufficiently general in its terms to give the court power to make the order prayed. Whatever might have been the privilege of the wife in the old ecclesiastical courts, the Act gave the unlimited power to condemn either party in costs, and it had frequently exercised it: (See *Glennie* v. *Glennie and Bowles*, 3 S. & T. 109; 7 L. T. Rep. N. S. 696; *Carstairs* v. *Carstairs*, 3 S. & T. 528; 10 L. T. Rep. N. S. 696; *Wells* v. *Wells and Hudson*, 3 S. & T. 542; 10 L. T. Rep. N. S. 696; *Robinson* v. *Robinson and Lane*, 1 S. & T. 362.) Where there was a fund to pay, the court had power to act on the merits of the case, see *Melford* v. *Melford*, 37 L. J. 77, where the House of Lords had condemned the wife in the costs of a vexatious appeal, and *Morgan* v. *Morgan and Porter*, L. Rep. 1 P. & M., 544, where the court had ordered to be deducted from the wife's costs the expense of meeting certain charges against her husband, made by her against her husband. On the merits he urged that this was peculiarly a case in which the court should exercise that power.

Dr. *Tristram* on the same side.—In the Ecclesiastical Courts the wife was a privilege suitor because she was presumed to have no property of her own. But here the wife had considerable property, and the reason ceasing the rule ought also to cease. He cited

Wilson v. *Wilson*, 1 Consist. 204;
Davis v. *Davis*, 2 Consist. 203;
D'Aguilar v. *D'Aguilar*, 1 Hag. 788.

Dr. *Deane* contra, admitted that the section gave the power, but submitted that there was no case in which it had exercised it adversely to the wife. *Morgan* v. *Morgan and Porter* was merely a case of deducting a certain sum of money from that which had to be paid by the husband as costs, and in *Garston* v. *Garston*, an unreported case, where there was a petition for nullity on the ground of impotence, and the wife had abandoned her defence on coming into court, a similar application to condemn in costs was made, and the court refused to create a precedent.

Dr. *Spinks*, in reply.—In *Garston* v. *Garston*, all the husband's property came from the wife.

Lord PENZANCE, J. O. — I have no particular recollection of what took place in the case of *Garston* v. *Garston*; but, having the circumstances called to my mind, I do not recognise in any of these circumstances mentioned, any ground for condemning the wife in costs. Each case must stand on its own merits so far as the discretion of the court is to be exercised. The legal questions are whether the court has the power; and secondly, will the court ever exercise that power in proper cases? It cannot be doubted that the court has the power, because the section (51) says very distinctly the court may order either party to pay the costs. The question therefore is, will the court ever exercise that power? I see no reason why it should not be exercised. I see no reason why, if a wife has separate property of her own she should be entitled to put her husband to all manner of expense by instituting a frivolous suit against him, which fails altogether, and then be allowed to retire from the court free of costs, and escape altogether every portion of the burden. The only reason why a wife stands in a different position in this court from suitors generally is, that the law presumes that she has no property of her own. So matters were in the old days of the ecclesiastical courts, but under the auspices of the court of equity she has achieved the power of holding considerable private property. To the extent, therefore, to which she has private property the reason of the rule fails, and there is no reason why the wife should not litigate to that extent on the same footing as other suitors. Of course the court in the exercise of its discretion will bear in mind certain principles to one of which the court referred in *Carstairs* v. *Carstairs*. And that is, that the House of Lords before it would allow a husband to be divorced from his wife always insisted that some provision should be made for the maintenance of the wife, and would make no order which would end in the absorption of her means of subsistence. The court has to look not merely to the fact of the wife having separate property, but to the amount of that property, before it makes an order upon her. In this case the wife is stated to have a separate income of 700*l.* a year, and as the costs of the suit cannot be heavy, I have no hesitation in making an order on her to pay them.

Solicitor for petitioner, *R. Miller*.

Solicitor for respondent, *A. Jones*.

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister-at-Law.

Tuesday, Nov. 23.

THE HICKMAN.

Salvage—Form of tender—"Costs (if any) due by law"—Practice.

For the future, where a tender is made in this court, it must state that it is a tender for salvage reward, together with an offer to pay costs, or it shall specify the ground upon which costs are not tendered, and refer the question to the court.

This was a case for salvage, in which the court pronounced the tender, or rather two tenders taken together, to be sufficient. They amounted to 282*l.* Two questions were reserved for the further consideration of the court: 1. Whether the sum awarded, being under 300*l.*, the court, having regard to the sects. 3 and 9 of 31 & 32 Vict. c. 71 (The County Courts Admiralty Jurisdiction Act), ought to certify for costs. 2. Whether, although the suit had been properly instituted in this court, the plaintiffs ought to have their costs, inasmuch as the court had pronounced for the sufficiency of the tender.

The form of the tenders was as follows:

Take notice, that we have this day paid to the account of the registrar at the Bank of England the sum of £ which we tender together with such costs, if any, as may be due by law.

Deane, Q. C. and *Gibson* appeared for the plaintiffs.

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Butt, Q. C. and *Clarkson* for the defendants.

Sir R. PHILLIMORE.—With regard to the first question reserved for consideration, I have considered all the circumstances, and especially though not solely, the small difference between the sum awarded and that which limits the jurisdiction of the County Court, and I am of opinion that I ought to certify for costs. As to the second question cases were cited to me with respect to the Chancery and Common Law Courts on questions of tender; but I cannot consider them as furnishing precedents for the practice of this court. Various cases on the subject of tender decided in this court were also referred to in the course of the argument. They will all be found collected in Chap. 5 of Williams and Bruce's Admiralty Practice, which also contains in the notes some valuable remarks upon the principles of tender in this court. The first decision of any importance is that of Lord Stowell in the case of the *Margaretta* (decided in 1801), 4 Rob. 146. The rule which Lord Stowell intended to lay down in that case, was that the parties ought to know "what is proposed to them for their reward and what for costs;" and that, inasmuch as verbal offers had led to misunderstanding and uncertainty, a more regular and legal form should be adopted for the future. Since that time the matter was several times discussed before my predecessor in this chair. But upon the whole I am of opinion that the practice on this point has been somewhat wavering and uncertain; and I agree with the observations made at the bar that it is expedient to take this opportunity to lay down a fixed rule on the subject. With respect to the present case, I am of opinion that it was competent to the defendant to tender the reward for salvage and reserve the question of costs; and such was the intention of the tender, and I think it would have been competent to the plaintiff to have accepted the tender, so far as it related to the reward, and to have reserved the question of costs for the consideration of the court. I shall give the plaintiff his costs up to the time when the second tender was made; but having regard to the uncertainty as to the practice, and to the correspondence between the solicitors of the parties, which has been put in evidence, I shall make no order as to costs subsequent to the tenders, but leave both parties to pay their own costs. For the future I must direct that, when a tender is made, it shall either state that it is a tender for salvage reward together with an offer to pay costs; or it shall specify the ground upon which costs are not tendered, and refer the question of costs to the consideration of the court.

Proctor for the plaintiffs, *H. C. Coote*.

Proctors for the plaintiffs, *Deacon, Son*, and *Rogers*.

UNITED STATES COURT OF MICHIGAN.

September, 1869.

ANTONY *v.* THE ETNA INSURANCE COMPANY (*a*).

Marine insurance—Perils of the sea—"Other misfortunes"—Risks of lighterage—Inherent defect.

The plaintiff insured with the defendants a shipload of cattle, the adventure to begin from the loading and continue until the cattle should arrive and be safely landed at the port of destination. The risks covered by the policy were "perils of the lakes, seas, rivers, canals, railroads, fires, jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment, or damage of the said property or any part thereof;" and also "the usual risk of lighterage at Ontonagon." The propeller on which the cattle were shipped arrived off Ontonagon, but was prevented by a bar in the harbour from landing them. The animals were taken from the propeller on board a lighter, where they were fastened with a five-eighth inch iron chain. During the passage the animals were frightened, the chain broke, and a number of them fell into the sea and were drowned:

Held that this was a loss covered by the policy; that, if not a "peril of the sea," which the court was inclined to think that it was, it came within the term "all other perils and misfortunes."

Semble, that where animals are drowned in the sea, that is a loss by "perils of the sea."

Held, further, that in the absence of explanation by the insurer, it was to be presumed that the fright of the animals was caused by something connected with navigation; and also that the insurer must be presumed to know the usual mode and appliances of lighterage at the place, and to have had in contemplation such an accident as happened, when taking the risk.

This was a motion for a new trial, the verdict having been given for the defendants, the insurers. Judgment was delivered by

WITHEY, J.—On the trial of this cause at a former term, the court rendered a verdict for defendant, on the ground that the loss sustained by plaintiff was not covered by the policy of insurance. A motion for a new trial is urged on the ground that such ruling was erroneous. It affords me great satisfaction that my brother Wilkins, who presided at the trial, has been able to sit with me and hear the arguments on this motion, and that he entirely concurs with the conclusions which I shall express. On the 1st May 1865 an open season policy was issued by defendant to plaintiff, insuring the plaintiff's property from ports and places to ports and places, including the voyage in which was this risk. The adventure was to begin from the loading, and continue until the property should "arrive and be safely landed at the port of destination." The risks covered by the policy are "perils of the lakes, seas, rivers, canals, railroads, fires, jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment, or damage of the said property, or any part thereof;" also, "the usual risk of lighterage at Ontonagon." Under this insurance the plaintiff shipped on board the propeller *Pewabic* from Bayfield to Ontonagon, on Lake Superior, forty or more beef cattle. The vessel arrived off the latter port in July 1865, but was prevented by a bar in the harbour from landing. The animals were taken from the propeller on to a lighter to be landed, and were fastened on the lighter in this way: A chain of five-eighth inch iron—called an anchor chain—ran fore and aft through the middle of the lighter, fastened at the ends to timber heads eight or ten feet from each end of the lighter. To this chain the cattle were tied by ropes, heads in on opposite sides of the chain. When the lighter had proceeded from a quarter to a third of the distance in, the cattle, from some cause not explained, became frightened, breaking the chain into three pieces, and twenty-seven of the cattle, tied to one of these pieces, went over into the lake and were drowned by the weight of the chain carrying their heads under water. The lighter was tugged in and out, and was in good condition. The cattle were fastened on the lighter in the customary way of lightering at that place. Such was the case made by the plaintiff at the trial, and the question pre-

(*a*) Adapted from the *Chicago Legal News* by F. O. CRUMP, Esq., Barrister-at-Law. The novelty of the facts in this case, and of some of the principles of law laid down, has been taken to justify the introduction of this report to English readers in an English dress. See *Lane* v. *Nixon*, L. Rep. 1 C. P. 412, as to warranty of seaworthiness of lighters.

sented, which we are called upon to decide, is whether the loss was occasioned by a "peril of the lakes," or other "peril and misfortune" within the meaning and intent of the policy. The general doctrine is, that the insurer undertakes, in a marine risk, only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed. Every loss which arises from tempests, or by rocks, winds, or waves, strictly and naturally comes under the idea of a loss occasioned by perils of the sea. But if this be the extent of the phrase "perils of the sea," we should be obliged to conclude that it covered only accidents of an extraordinary nature, and produced only by natural causes peculiar to that element. Such, however, is clearly not the rule for construing the phrase "perils of the sea," in reference to marine insurance. Mr. Parsons, in his work on Marine Insurance, vol. 1, p. 544, says: "The phrase covers all loss or damage which arises from the extraordinary action of the wind and sea, and from inevitable accidents directly connected with navigation, excepting those provided for in other parts of the policy, as captures and the like." Mr. Justice Story, in the case of the schooner *Reeside*, 2 Sumner, 567, remarks. "that the phrase 'danger of the seas,' whether understood in its most limited sense, as importing only loss by natural accidents peculiar to that element; or, whether understood in its more comprehensive sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arising from irresistible force, or some overwhelming power, which cannot be guarded against by ordinary exertions of human skill and prudence." The Supreme Court of the United States, in *Garrison* v. *Memphis Insurance Company*, 19 How. 312, seems to give the more extended sense to the term, "perils of the sea," as suggested by Story, J. That court says these words "have been extended to comprehend losses arising from some irresistible force or overwhelming power, which no ordinary skill could anticipate or evade." It has often been said, and correctly, that what are ordinary and what are extraordinary perils, is a question of much difficulty. The difficulty has been illustrated by many cases. Thus, in *Magnus* v. *Buttemer*, 9 Eng. L. & E. 461; 11 C. B. 876, a vessel moored in a tide harbour, and took ground when the tide fell. In consequence of this she was hogged and strained all over. It was held that the underwriters were not liable, In *Potter* v. *Suffolk Insurance Company*, 2 Sum., 197, the circumstances were very similar to the last case, and Mr. Justice Story held, "that unless there was inherent weakness in the vessel, such damage could only be occasioned by an unusual and extraordinary accident in grounding upon the ebbing of the tide, which would be a peril of the sea." In *Hunter* v. *Potts*, 4 Camp. 203, Lord Ellenborough held, a leak occasioned by rats was not a peril of the sea, not being a loss of an extraordinary nature. But in *Garrigues* v. *Cox*, 1 Binn., 592, a leak occasioned by rats was held to be a peril within the policy. And Mr. Parsons, in his Marine Insurance, vol. 1, 546, note, after citing a number of cases, concludes his review by saying: "On the authority of recent cases in this country, we should consider the insurers liable in such a case, even if the rats remained on board through the negligence of the master, on the ground that the damage by water was the proximate cause of the loss." We might refer to many other cases on the subject, but we think they will not tend very much to elucidate the question involved in the case at bar, inasmuch as every case depends so much on its own particular facts and circumstances. My own views are strongly in the direction of holding this case to be a loss within the term "perils of the sea," in accordance with the more comprehensive sense of those words and their more reasonable signification—in brief, because the cattle were drowned, which is peculiar to the element on which they were being transported; because they were drowned by an accident that could not have been guarded against by ordinary exertions or prudence, considering the fact that it was the usual mode of lightering at that place, which fact must be presumed to have been known to the insurer; because, too, it could not reasonably have been foreseen that there was inherent weakness in the chain; and because, in the absence of explanation by the insurer, it is to be presumed the fright of the animals was caused by something connected with navigation, whether from the exhaust of steam, the working of machinery of the tug, the ringing of a bell, or otherwise. It was a peril of navigation, which could not well have been foreseen or guarded against by the carrier. But we are not compelled to rest our decision on the ground strictly of a loss by a "peril of the sea," and the court does not wish to be understood as so deciding. I have simply indicated the tendency of my own mind after an examination of the question, because that particular point was much dwelt upon by the arguments of the learned counsel. We are entirely clear, after a careful examination of the the authorities, that the loss was a risk within the general terms of the policy, "all other perils and misfortunes," and the specific provision, "the usual risk of lighterage at Ontonagon." While it is laid down by the authorities, that these general words, "all other perils," cover only perils of the like kind to those specifically enumerated, we think they are material and operative words, and are not in the policy to have no effect assigned to them in its construction. Hillyard on Marine Insurance, p. 348, says, these words have the effect of providing for any doubts which might arise as to causes which come nearly, but not precisely, under the specific causes of loss. In *Cullen* v. *Butler*, 5 M. & S., 465, Lord Ellenborough says: "They are entitled to be considered as material and operative words, and to have due effect assigned to them in the construction of the instruments; and which will be done by allowing them to comprehend and cover other causes of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." The animals did not die from diseases or any inherent defect in them, but from an accident on water, in course of the voyage, which was something peculiar to that element. Had the accident of breaking the fastening occurred in a land transportation, no such result could have taken place. The cattle were drowned by their heads being drawn under water by the weight of the piece of chain to which they were tied. It was five-eighths inch iron, and had the chain been perfect would undoubtedly have resisted any strain the whole number of the animals on board could have produced, and yet the accident was fortuitous. It was the custom to use this chain for fastening cattle lightered from vessels, it was believed to be sufficiently strong, and as we have already remarked, it could not have been foreseen, in all reasonable probability, that there was inherent weakness in this anchor chain. The insurer must be presumed to have known the usual mode and appliances of lighterage at the place, and to have had it in contemplation when taking the risk. If now we regard it doubtful whether the loss was strictly within the indemnity against "perils of the sea," still we think it should be regarded as caused by perils of *his kind*, and therefore covered by the general words of the policy. No case has been found where the facts were like those in the one at bar; but on principle,

Deveaux v. *J. Anson*, 7 Scott, 507, is regarded as sustaining the conclusions to which we have arrived. In that case, the effect of the general words of the policy, "all other perils and misfortunes," were very fully considered, and the cases which had been decided referred to. The declaration averred that the "ship was broken, damaged and destroyed, and rendered wholly incapable of pursuing the said voyage, by certain perils which the said assurers, by said policy, did take upon themselves, to wit: by the accidental breaking and giving way of the tackle and supports whereby the said ship was supported, in being moved from a certain dock; in consequence of which breaking and giving way, the said ship struck violently against the sand and was bilged, broken, destroyed, damaged and rendered incapable of pursuing the said voyage." The defendants traversed the allegation "that the ship was broken, damaged and destroyed, and rendered incapable of pursuing the voyage, by *any perils which the said assurers, by said policy, did take upon themselves.*" Lord Chief Justice Tindal said, "the point remaining to be considered is whether the loss was occasioned by any of the perils insured against by the policy. It is to be observed that the words in the policy are very large; the policy not only enumerates 'perils of the sea,' but all other perils, losses and misfortunes that had or should come to the hurt, detriment or damage of the subject matter of the insurance." After referring to several cases, the learned judge says, the "loss occasioned by the endeavour to get the vessel afloat from the dry dock in which she had just been repaired, was a loss within the policy." Here the supports broke and caused the damage, like the case at bar. Again, the other clause in the contract, "the usual risk of lighterage at Ontonagon," was clearly not necessary to indemnify the assured against "perils of the sea," nor perils of the like kind, for the risk begins with loading the freight and continues *until safely landed.* Assuming, then, what is claimed by defendant, the accident which happened not to be a loss by "perils by the sea," nor "other perils and misfortunes," we should, in order to give due effect to the clause, "usual risk of lighterage," in view of the other stipulations of the policy being held not to cover the loss, say that it is covered by the risk of lighterage. In the view we have taken of "all other perils and misfortunes," there is no occasion to inquire into the effect of the lighterage clause, but if we were to hold differently in reference to the other specific and general clauses of the policy, it would be difficult to see how the lighterage clause could be regarded as operative words in the contract, unless held to cover their loss. For the reasons given, the motion must prevail, and a new trial be awarded.

Irish Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

BELFAST ELECTION PETITION.

Saturday, 30th Jan. 1869.

(Before FITZGERALD, B.)

Subscription to Orange halls—Bribery—Paying expenses of candidate—Application of money subscribed Corrupt intention—Double candidature.

The respondent subscribed to an Orange hall with a view to express the bent of his opinions:

Held, that this was a legitimate method of giving expression to the opinions of the candidate with the view of influencing votes.

The friends of the respondent early in the canvass held out an assurance to J., a proposed colleague, that a public subscription instituted for the purpose of paying his expenses would be contributed to by them:

Held, that such a subscription was not illegal, but that it behoved the candidate so assisted to see that the money subscribed was legitimately expended.

It was suggested that a guarantee should be given under which a settlement might take place after the election. This was objected to, and money desired. Eventually this was paid, although the acting agent of the respondent warned the persons making the payment of the danger which would follow:

Held, that supposing the real intention accompanying this payment was to secure the return of J., there would be strong ground for holding that it was a corrupt practice so far as concerned the return of J. But

Held further, that however corrupt the practice might have been as regarded J., if the object of the payment was to create a community of opinion on the part of the voters of J. in favour of the respondent, and thus secure assistance in his election, that was not a proceeding which would avoid the respondent's return.

There is no power given by the Corrupt Practices Acts to deal with practices which have effects similar to those covered by the statutes; and offences not defined by such statutes, although having the same pernicious results as those which are defined, are not cognizable by the court.

This was a petition against the return of Mr. M'Clure. All material facts and arguments are stated in the judgment.

FITZGERALD, B.—I have considered this case, with certainly great hesitation upon one part of it, but I have come to my determination. There are points in the case upon which I shall touch very lightly indeed. [Having done this, his Lordship proceeded]:—The next case is one of a class to which I confess I have been unable from the beginning of this case to give any weight at all, that is the subscription to the Orange Hall. I really confess, having listened with the greatest attention to the arguments on both sides, that I cannot see what effect it has at all in the shape of bribery. I am not here to try whether it was consistent upon the part of Mr. M'Clure to give support to an Orange Hall. I am not here to try whether it was done in perfect sincerity; that is a question with which I have nothing to do; but of this I am sure, that the profession by a candidate of holding certain opinions is a legitimate mode of influencing votes. If it were not, they would have no means in millions of cases of influencing votes at all; and if (for I am not going to try whether it was consistently or sincerely done) Mr. M'Clure thought that it would be for his benefit with reference to the election, and for procuring votes, to inform Orangemen and others that he did entertain opinions in favour of institutions of this kind, I see nothing illegitimate in that. The case appears to me identically the same as if he had written a pamphlet in support of, or sustaining such institutions as Orange Halls, and had paid the printer for publishing it. I am not upon the question whether it was consistent upon the part of Mr. M'Clure to do it, or whether it was not. If by subscriptions of that kind he thought proper to indicate that his opinions were favourable to institutions of this kind, I have no right to try his consistency or sincerity, but it was perfectly legitimate for him to put forward his opinions as a means of procuring votes. I now come to the part of the case upon which difficulty really exists, and I quite agree both with Mr. Falkiner and Mr. Kisbey that I am so to endeavour to construe this Act as to repress the mischief which the Act was intended (and, I

presume, sincerely) to guard against. I am bound to do that, and for that purpose I am, so far as such common sense and such knowledge of the world as I possess, enable me to do so, to strip of every colour, of every dress, of every shape, any act which is brought before me, so as to discover what the true and real nature of the act is; and if, having so done, if, having stripped it of its colouring, taken off its dress or varnish, or whatever may be about it, I find that in its true nature the act is one of the corrupt practices defined by the statute, I am bound, notwithstanding what shape, notwithstanding what colour, notwithstanding any dress it may have, to give effect to the Act of Parliament. But I have not the power under the act of Parliament to change the nature of the act itself because the act proved may be clearly shown to me by most reasonable evidence to be fraught or attended with all the pernicious consequences which the Act was intended to guard against. I have no power, notwithstanding, to repress the act, unless the act be in its nature one of the corrupt practices specified, and I cannot make it so by reason of its being attended by circumstances which the Act of Parliament was intended to guard against. It appears to me that it is an application of real subtlety, when one endeavours, by reason of the mischief which follows, to alter the nature of the act itself for the purpose of repressing the mischief. That is what I cannot do. Well now, the transaction, so far as it is necessary for me to state it, is one about which, until we come to the motives of it, there is in reality little or no controversy. It appears that early in the canvassing for Mr. M'Clure, Mr. Duffin, and certain other gentlemen who were his friends and supporters, did hold out an assurance to the friends of Mr. Johnston that a public subscription, instituted for the purpose of defraying the expenses of his election, would be contributed to by them, to the extent of at least 300*l.*, according to Mr. Duffin's evidence. Mr. Johnston, as it appears he stated to one of the witnesses in this case, Mr. Dysert (and it seems to be agreed by other witnesses that it was so publicly stated), had not the money or the means, or did not think he had the money or the means, or did not wish to apply such money or means as he had to the expenses of his election, and he declined altogether to stand at his own expense; but, as he told Mr. Dysert, he was perfectly willing to be of service to his friends and supporters provided they returned him. Now, so far as I can judge, I have no reason for believing that a subscription instituted for that purpose, that is to pay the expenses of a candidate, and relieve him from any expenses in the matter, is in any way an illegal or unconstitutional proceeding. It would behove the candidate to look well that the money of which he availed himself of his own knowledge, is legitimately applied, because he incurs a responsibility the moment he holds himself out as a person to be elected by those means. But that a public subscription raised for that purpose, and contributed by his friends and supporters, is itself illegal, I am not aware. Now it was perfectly competent to the supporters of Mr. M'Clure, if they thought fit to to contribute to this fund. Therefore there is nothing illegal in that, even though the fact be that they would not have contributed to the fund unless Mr. M'Clure had happened to be a candidate. I do not think it was made less legitimate by that. That being so, it appears that the subscription went on very slowly up to the election; as far as I can gather there was little more than 300*l.* collected altogether by both parties, and complaints were made that the promises given by those friends of Mr. M'Clure who had engaged to give this subscription, were not carried out. Accordingly, they proposed to do this—and I should imagine it must have been in some respect, at least, with the object of *bonâ fide* seeing that the money was rightly applied, and placed under the control of parties who would rightly administer it—they proposed to give a guarantee of responsibility for the payment of 500*l.* to the treasurer and three other members of the association, who were also members of Mr. Johnston's election committee. They proposed to give that so that the money should not be forthcoming until the time came for arranging the election expenses. That guarantee was carried by the person to whom it was given by Mr. Brett, the conducting agent of Mr. M'Clure, to Mr. Kelly, the conducting agent for Mr. Johnston, the man being, in the first instance, satisfied with it according to the evidence. Mr. Kelly objected to it. The ground of his objection, so far as I can gather, was that money would be more serviceable for the purpose; and it is very probable the difficulty may have occurred to him, without doubting the honour or credit of these gentlemen, that it was not a document that could be legally enforced on account of its form. Accordingly, he desires the men to take it back and return it, telling them, at the same time, that it would be better to have the money. But he then appears to have become apprehensive that the money might be paid into the hands of some of these parties, so as to be out of his control in the expenditure, and yet be paid with his knowledge; he was naturally, reasonably, and I think, properly, afraid that the interests of his own client Mr. Johnston, the candidate, might be affected by its being entrusted into the hands of these parties; and accordingly (and this is a part of the case that, I acknowledge, has pressed upon me throughout) he writes to Mr. Brett and waits upon Mr. Brett, also nearly contemporaneously, and warns him against making this payment. He offers himself to be responsible for the money; he would be satisfied with its being paid to Clarke, the regular treasurer of it; and Clarke and he appear to have been in communication upon it. But he positively warns him, and I think the fair inference from his evidence is that he must have been afraid that it would not be legitimately applied for the purposes of Mr. Johnston's election. In the face of that, the course adopted, upon the suggestion of the man, so far a I could see, and, so far as I understand Shannon's evidence, was, that 300*l.* of the 500*l.* should be paid in the mode in which Kelly required, and the remaining 200*l.* given to four of these active persons. Mr. Kisbey says—though it does not appear to me to be very material upon this part of the case—that they did not appear to be exactly the four named in the guarantee. Clarke was not one of the four to whom it was to be given, and instead of Clarke a man named McGladdery was one of the four to whom it was given, but his name is not in the guarantee. According to Shannon, the ambassador of these men to Brett, the 200*l.* is given by Duffin. Duffin says his difficulty was this: he was under an honourable engagement, to secure a contribution to the sum to be raised for defraying the expenses of Mr. Johnston's election. He says, there seem to be disputes among themselves what should be paid. He says, says, "I could not tell what to pay." And under those circumstances 300*l.* of it was paid as one party desired, and the remaining 200*l.* to the rest. Well, now I confess the strong inference to my mind would be that, even supposing the real intention of the gentlemen who paid this money was to secure the return of Mr. Johnston, there would be strong ground for holding that money so paid to these parties, under such warning especially, would be a corrupt practice as far as the election of Johnston was concerned. If money paid to secure the return of a party means anything, it appears to me

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that money so paid, with almost the assurance and the certainty that it will not be regularly applied, is a corrupt practice, and if it be not a corrupt practice, I find it difficult to say what the first clause and the fifth clause of the section mean. Then comes its serious bearing upon this part of the case. If I find gentlemen and men of business so acting with a species of disregard as to the mode in which the money is applied, does it not afford something in the shape of strong evidence that (interested as they were for M'Clure, and the probable inference from what they did being that this money never would have been subscribed at all unless M'Clure had been a candidate) the real object of the money so handed over was something different, and that it was intended by its influence as money to procure the support of these men for M'Clure? That is the difficulty that has pressed upon my mind throughout this case; I put it as strongly as I can, but not more strongly than it has pressed upon my own mind. On the other hand, if I could be fully satisfied that this money had been paid legitimately as a subscription to the fund, and that the real hope as to the mode in which it would affect Mr. M'Clure's election was by the impression produced upon the supporters of Johnston, and the community of feeling and desire to aid upon the part of M'Clure, it appears to me that the payment would be a legitimate one, and if the money was paid legitimately there would be no reason to complain of it. Supposing I were satisfied that however corrupt the practice was as regards Mr. Johnson's election, the only effect it could produce upon Mr. M'Clure's election, would be an identical one, and that that was the effect contemplated, can I make it a corrupt practice as to the election of Mr. M'Clure? It does not appear to me that the Act has said so. The true way to try it is, supposing that state of facts to be clear, that is, that it was so clearly a corrupt practice to secure the election of Johnston that an indictment could be maintained against these parties for corrupt practice in order to procure the return of Johnston, and it further appeared that these parties entertained a hope or expectation that the effect produced upon the minds of the supporters of Johnston would be a community of opinion and aid from them in favour of the election of Mr. M'Clure, and that they would give their votes just in the same way as they would if the money had been directly so applied; can I say that an indictment could be sustained against them in the alternative in order to procure the election of Mr. M'Clure? If I cannot, then I say it comes to this, that it is a case not provided for by the Act of Parliament, though open to mischief, but I have no power to change the nature of the act itself, because it would have been followed by the same mischief, and to make it an act of the same nature as that which would be corrupt under the Act of Parliament. The real difficulty that has been upon my mind is whether I must not regard this as a mere colourable proceeding, considering the mode in which it was done by men of business, by men well acquainted, several of them, with electioneering practices and contrivances of various kinds—whether I am not to treat this as a colourable act really done to influence the election, as distinct from the contrivance of which I have spoken, and which might operate in favour of the election of M'Clure. I acknowledge that there appear to me to be strong grounds for treating it in that way, and that has pressed heavily upon my mind throughout. But in order to do that I must act against the sworn testimony of men of respectability and character. I need hardly say that I pay very little or no regard to a gentleman who gets upon the able and says, with indignation, "I never committed an act of bribery in my life," because I do not know what is the meaning of it, unless I know that the gentleman puts the same meaning upon the word "bribery" as I do. Trace this throughout, up to the moment at which the separation took place into two sums, and I am unable to see anything that can be treated as a corrupt practice to secure the election of Mr. M'Clure. Well, then, am I to distrust these gentlemen as to the instructions given, however loose they were, that this was not intended to impose any obligation whatever upon the parties to whom it was given; that it was to be for the election of Johnston; that it was given in regard to the original promise, and so forth; and the positive oath of these men that they did it for no other purpose? It is a strong thing for me to do that. If I were to act merely upon the probabilities of the case alone, I acknowledge my conclusion would have been different, although even then there are circumstances insisted upon by Mr. Andrews as to the original innocence of this transaction, and the peculiar circumstances under which the alteration took place. I cannot decide, in the face of that sworn testimony, whatever doubt I have; and I am obliged to put it under the same class of cases as the money given by Mr. Dysert. With reference to the case of treating, I really shall not dwell upon that. It seems to me that the purpose mentioned in the Act of Parliament has not been proved in either of the cases which have been spoken to in evidence, and they appear to me to have been merely introduced for the purpose of filling up the case. Therefore I have come to the conclusion to declare Mr. M'Clure duly elected, and, of course, I must say that he is not cognisant that any corrupt practice was resorted to at this election. And the costs must follow in the ordinary course.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Tuesday, Nov. 16.

(Before the LORD CHANCELLOR (Hatherley).

RUSHBROOK v. LAWRENCE.

Mortgage — Equity of redemption — Release—Agreement in fieri—Abandonment of agreement.

Mortgagees brought an action of ejectment in July, 1853, *against the mortgagor, who was in possession of the mortgaged property. The action was compromised upon these terms: That the mortgagor should give up possession to the mortgagees on the* 29th *of September then next, and should release to them (if required) all his right, claim, and interest in the mortgaged property, the release to be prepared at the expense of the mortgagees; the mortgagees agreeing, in consideration of the mortgagor engaging to give such possession and execute such release, to forego all claim in respect of costs of the action; but in case default should be made by the mortgagor in giving up such possession, or in the execution of such release (if required), the mortgagees should be entitled to the costs.*

A release was never required, and the mortgagor continued in possession until 1865, *when the mortgagees sold the property under the trust for sale contained in the mortgage deed, and realised more than sufficient to pay their principal, interest, and costs:*

Held (affirming the decision of the Master of the Rolls), that the compromise was an agreement in fieri, which had been abandoned by all parties, and could not now

be carried out, and that the mortgagor was entitled to the surplus proceeds of sale, after paying to the mortgagees their principal, interest, and costs.

This was an appeal by the defendant from a decision of the Master of the Rolls. The suit was by the heir-at-law of a mortgagor against a mortgagee to recover the surplus of the proceeds of sale of the mortgaged property, after payment of the mortgagees' principal, interest, and costs. The defendant resisted the suit on the ground that the plaintiff had released his equity of redemption. The proceedings in the court below are fully reported 21 L. T. Rep. N. S. 192.

Sir R. Baggallay, Q.C., and *G. N. Colt* for the appellant.

Southgate, Q.C., and *Rigby* for the plaintiff.

The following cases were cited:
Knight v. *Majoribanks*, 2 Mac. & G. 10;
Vernon v. *Bethell*, 2 Eden. 110;
Ford v. *Olden*, 15 L. T. Rep. N. S. 558; L. Rep. 3 Eq. 461;
Watson v. *Marston*, 4 De G. M. & G. 230.

The LORD CHANCELLOR (Hatherley).—It appears to me, I confess, that the view of the Master of the Rolls in this case must be supported—the view that he took as to the whole thing being considered as a matter abandoned and put by; it being, in truth, intended only for a particular purpose. That appears to me to be perfectly clear upon the face of the bill itself. But taking the Master of the Rolls' view first, it would stand thus: Suppose, for instance, there had been an arrangement that this gentleman should concur in giving up all his right in the equity of redemption, that was a matter done at a time when from the bill of costs it appears that a sale was contemplated. "As soon as ever possession should be taken." In the course of October, 1853, there is that entry about the sale being about to take place. The sale did not take place, and the consequence of it was that the object for which the possession was sought not having been required to be carried into effect, the sale was eventually postponed for fourteen years. No party to the arrangement took the slightest notice of that. They did not even ask for possession; they allowed this man, I will not say to remain in possession, because there is some question as to how he got in. At all events, one Cave was afterwards intrusted with the possession. That is clear upon the whole from Cave's evidence, and the documents produced, and clear also from the result of the evidence, and from the conduct of the mortgagees' own solicitor, who, in taking possession from Cave, paid to Cave all that he had expended for rates and taxes during the time he was in possession, on behalf of Mr. Rushbrook and his mortgagees, as they are called. Then, the whole property is treated as a property without the slightest reference to any release or intention to release the equity of redemption; it is treated as a mortgaged property, and sold by the present defendant as a mortgagee under trust for sale; and, taking advantage of that position, he stipulates in his conditions of sale that he shall not enter into any other covenants than the common covenants against incumbrances. Therefore, we have a single bill by the representatives of a mortgagor who conveys the fee simple in trust for sale, subject to a prior mortgage which was vested in Ingle's representatives; a bill by the representative of the heir of the mortgagor, to have the benefit of the surplus produced by the sale, now in the hands of his trustees. That person treats himself as such trustee from the year 1853 down to the time of sale in 1867; he has made that sale as mortgagee, and has never, apparently, divested himself in any way of that character. So that if the agreement does mean what the defendant says it means, then clearly it is an agreement which, as the Master of the Rolls says, has been abandoned by everybody upon every side. It seems to me the true intent of the parties themselves, so far as the instrument is concerned, is quite consistent with that intention. The plaintiff states it in this way in his bill: "The plaintiff believed and understood that the said document was intended only to give to the mortgagees the means of obtaining possession of the mortgaged premises, so as to enable them effectually to exercise the powers of sale contained in their mortgages, and that in consideration of his giving up possession when required, he was to be relieved from the costs of the said action." That is borne out by every fact in the case. They were then about to sell in that very year as appears from the bill of costs, and it was an object to them to get possession and to get an undertaking from the person then in possession—who seems to have been all but a pauper—if he joined in the conveyance. There is nothing said about surplus moneys or anything of that kind, because nobody thought there would be any; but it was of consequence to them to get him to concur in handing over the property to a purchaser; and at that time the effect might have been the same as if he agreed to release the equity of redemption. That is to say, there was nothing worth releasing. But that is only what the circumstances might be, it was not any part of the terms of the agreement. We have to construe the terms of the agreement by the facts of the case, and if we look at them I think it is quite plain what was the intent; that it was not the intent to convey by way of conveyance any possible benefit arising from the equity of redemption; because the action is brought by the first and second mortgagees—those two parties are concurring. If there was any intent to convey the beneficial interest in any property, the agreement would have been thus worded: "I will convey to you something apart from the release; I will convey to you for your benefit the surplus, if any." But there is not a word of that kind said. The words of the agreement, supposing the whole to be fully proved, would stand thus: that he engaged to give up possession, and he agreed to release the plaintiff from his right to claim any interest, if any there were, in the hereditaments and premises, the release to be prepared at the expense of the plaintiff. The judge's order is very much to the same effect, except that he leaves out the words "to release to the plaintiff all his right to claim any interest in the hereditaments and premises." But then, contemporaneously with that, we have the fact that a sale was contemplated, and that a sale was made to two parties standing in two different positions with reference to the property—one was first and the other second mortgagee—and as to which there could be no intention to hand over the equity of redemption in consideration to these two parties. And we have at that very time the letter to Mrs Chevell of the 19th July 1853, in which the solicitor tells her of the arrangement that has been made, and calls it a very good one. He is to give up possession on the 29th Sept., and to join in releasing any claim on the heir-at-law; that is, to execute a conveyance. Such is the plain meaning of the agreement, and therefore there is not a pretence for giving up the equity of redemption. If I were to hold any other construction, then there would arise a very serious difficulty; because, if you are to give up the equity of redemption, how does it agree with this part of the case? Here you have this young man of twenty-two, a pauper, who appears to have employed Mr Ind as his solicitor, who

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brought an action afterwards upon his bill of costs, there being nothing to protect the young man. There is nothing I can trace beyond this, that he does that which anyone would say was a very foolish thing, that is he goes personally to the solicitor on the other side to make an arrangement. I would not blame Mr Ind for saying "I do not object to your doing it," and I do not say there was any harm in joining in the conveyance, because his joining in the conveyance would not deprive him of the produce of the sale, if there happened to be a surplus; if there were no surplus, which was then the most probable thing, it would not harm him either; and so far, I think it would be very reasonable. Mr Ind expressly says he never told him anything about the equity of redemption. Then comes the question—how could you enforce against this young man of twenty-two, who entered into this agreement, in which nothing at all is said about the equity of redemption; how could you enforce against him this agreement, that he is to give up the property, however valuable it may turn out, in order that these two persons should do that which appears to me to be contrary to all the meaning and intent of the agreement? I do not think there is anything in what may be said about there being no redemption, but that it is a trust for sale. It is what one may call an equity of redemption—one perfectly understands what it means. It means his interest in the surplus of the property, whatever that may be, whenever the sale takes place. It appears to me that what he says is entirely consistent with the documents, so far as they are executed, and so far as they have any meaning at all. It was simply an agreement that he should join in the conveyance. It never had the slightest bearing upon his giving up any interest in the surplus moneys, if any there should be—a thing not thought of by anybody at the time; and then it seems to me further, that nobody thought it worth while to act upon it, no step whatever having been taken for fourteen years; and, although the solicitor claimed it as an excuse that he knew nothing about it personally, his client says in her letter she knew all about it; and there is no doubt, if they had known all about it, they would have felt the impossibility of their treating this as a relinquishment of right beyond the right that he should be compellable to execute the conveyance without further trouble; but not a conveyance by which he intended to part with his interest in the surplus, if any existed. I think, therefore, the decree of the Master of the Rolls must be upheld on every possible ground, and I can only dismiss this appeal with costs.

Solicitors for the plaintiff, *Anderson* and *Stanford*, for *Whyley* and *Piper*, Bedford.

Solicitors for the defendant, *Kingsford* and *Dorman*, Essex-street, Strand.

ROLLS COURT.

Reported by HENRY PRAT, Esq., Barrister-at-Law.

Saturday, Nov. 6.

Re MERCHANTS' COMPANY; HERITAGE'S CASE.

Company — Winding-up — Contributor—Non-execution of transfer by transferee.

A. applied for and had allotted to him 100 shares in a company. Before the allotment A.'s brokers, by his instructions, sold the shares to other brokers, who gave the name of B., as the purchaser, without B.'s authority. A. duly executed a transfer of the shares to B., but B. never executed it. The transfer was, however, registered by the company, and B.'s name was entered on the register. His name was subsequently removed by order of the court, on the ground that he had never accepted the shares, and, the company being ordered to be wound-up, A.'s name was placed on the list of contributories:

Held, that, no valid transfer of the shares having been made from A., he had been properly placed on the list of contributories; and an application to remove his name was, consequently, refused with costs.

Adjourned summons.

This was an application by Mr. Heritage to have his name removed from the list of contributories to to the above company in respect of 100 shares.

On the 5th Oct. 1865 Mr. Heritage applied for 200 shares in the company, which was then in the course of formation, and on the 14th of the same month 100 shares were allotted to him. On the 9th Oct., in contemplation of the allotment, he instructed his brokers to sell the 100 shares, which they did at a premium; and on the first settling day the purchasing brokers paid for the shares, and gave the name of one Hankey as the purchaser. Mr. Heritage duly executed a transfer to Hankey, and returned it to the brokers, who left it at the office of the company for registration, without Hankey having executed it, as required by the articles of association. Notwithstanding this omission, the transfer was registered by the company, and Hankey's name was entered on the register of shareholders.

In Aug. 1866, Hankey, alleging that his name had been used in the transaction without his authority, moved the court to rectify the register of shareholders by omitting his name, which was accordingly done on the ground that he had never accepted the shares. The company was ordered to be wound up in Nov. 1866, and soon afterwards Heritage's name was placed on the list of contributories in respect of the 100 shares. He accordingly took out the present summons to have his name removed from the list.

Jessel, Q.C. and *Everitt* appeared in support of the application.

Sir *Richard Baggallay*, Q.C. and *Lindley* for the official liquidator.

Lord ROMILLY.—When a person once take shares he remains a shareholder until his shares are forfeited or duly transferred. There has been no forfeiture in this case, and no valid transfer has been effected, as the deed was not executed by Mr. Hankey, who, in fact, gave no authority for the use of his name. Mr. Hankey's name has been removed from the register of shareholders by an order of this court, and I must assume that order to have been correctly made, as no steps have been taken to discharge it. The effect of the order was that the shares immediately reverted to Mr. Heritage. If I were to grant the present application, the effect would be simply to cancel the shares. The court has already, in effect, decided that there has been no valid transfer from Mr. Heritage, and he was, therefore, properly placed on the list of contributories. I cannot remove his name, and the summons must, therefore, be dismissed with costs.

Solicitors for Mr. Heritage, *Evans* and *Co.*

Solicitor for the official liquidator, *J. Rand Bailey*.

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Monday, Nov. 8.

TONGE *v.* WARD.

Trade-mark—Imitation—Injunction—Damages—Costs.

W.'s manager, without the personal knowledge of W., affixed tickets with T.'s name printed thereon to certain goods of inferior quality to T.'s, and made by another manufacturer. On T.'s complaining of this, W. offered to give an undertaking that he would not use such tickets again, and to pay a certain sum, but declined to make a public admission that he had used the tickets in order to defraud T.:

Held, that, notwithstanding W.'s offer, T. was entitled to an injunction with costs, and also to an inquiry as to damages at his own risk:

Nunn *v.* D'Albuquerque, 34 *Beav.* 595, *distinguished.*

This was a suit by Messrs. Richard Tonge and Co., cloth manufacturers, of Manchester, against Messrs. Ward, Armitage, and Co., who carry on the business of commission agents at the same place, to restrain them from affixing to cloth sold by them, tickets with a name similar in sound to the plaintiffs' name. The bill also prayed for an account, and an inquiry as to damages.

The plaintiffs were manufacturers of certain mixed fabrics of worsted and cotton, known as "Tonge's" chintz poplins, and other similar names, and they were in the habit of affixing to the fabrics manufactured by them, ornamental tickets embossed with the word "Tonge's" in addition to the name of the fabric; under this name or trade-mark the plaintiffs' cloth had acquired a considerable reputation in America.

Early in 1868 a Mr. Brown, of the firm of White, Brown, and Co., of Boston, customers of the plaintiffs, gave the defendants an order for a large number of pieces of a fabric very similar to the plaintiffs' chintz poplins, but admitted by the defendants' answer to be of an inferior quality; Mr. Brown directed Mr. Stewart, the defendants' manager, to whom he gave the order, to affix to the pieces tickets with the words "Tung's chintz poplins," which Mr. Stewart accordingly did, but without the personal knowledge of the defendants. The tickets so affixed did not bear much resemblance to the ornamental tickets used by the plaintiffs, except in the word "Tung's," which is quite similar in sound to the word "Tonge's." About 5200 pieces of fabric with these tickets affixed were sent out to America, and there was evidence to show that in addition to the immediate loss of custom, the plaintiff's reputation as cloth manufacturers had been injured in America by the inferior quality of the fabric to which the defendants had affixed these tickets.

In May 1868 the plaintiffs heard of the transaction, and immediately wrote to the defendants, complaining of their conduct. In reply the defendants admitted what had occurred, but stated that their manager had acted without their knowledge, and that they would give an undertaking not to repeat the offence, and that they would pay 50*l.* to the Royal Infirmary at Manchester. The plaintiffs then required the defendants to make the payment to the infirmary through the plaintiffs as an acknowledgment of the fraud. The defendants, however, refused to make any public acknowledgment of the fraud, and the present suit was accordingly instituted.

Sir *Richard Baggallay*, Q. C., *Jessel*, Q. C., and *E. Thurston Holland*, for the plaintiffs, submitted that they were entitled to an injunction with costs. They cited

Millington v. *Fox*, 3 My. & Cr. 338;
Sykes v. *Sykes*, 3 B. & C. 541;
Chappell v. *Davidson*, 2 K. & J. 123.

They also asked for an inquiry as to damages.

Swanston, Q. C. and *Hume Williams*, for the defendants, submitted that the defendants having offered to give the undertaking required, and to pay what was required by the plaintiffs, the bill should not have been filed, and that the decree ought to be made without costs. The plaintiff's trade-mark had been infringed without the personal knowledge of the defendants, and the plaintiffs had sustained no real damage; if the plaintiffs insisted on an inquiry as to damages they were strictly entitled to it, but they submitted that it ought to be made at the risk of the plaintiffs. They cited

Nunn v. *D'Albuquerque*, 34 Beav. 595.

LORD ROMILLY.—I cannot assent to the proposition that the defendants are not legally and morally liable. It is a very different thing to infringe a patent without knowing that a patent has been taken out, and to sell goods with the name of another person upon them. In this case the defendants sell with the name of "Tung's" upon the goods. If they did not know what their servant had done, they were bound to know. It does not lie in their mouth to say that they did not know. There were two thousand parcels of goods sent out with the name of "Tung's" upon them. For what purpose did they put the name of "Tung's" upon a certain quantity of cloth which was sent to an agent of a Boston house? Would anybody suppose—particularly among persons who are manufacturers of cloths—that there was any particular cloth called by that name? The defendants do not even pretend that there was such a thing; but it is the name of a manufacturer of cloth of a certain description. They were bound to know what their servant did. It is quite true that they could not be compelled to do that which was required, namely, to pay a sum of money to the infirmary or the like. But this they might have done—the moment the bill was filed they might have said, "we will give you a decree as you ask it." It was not at all necessary for that purpose to bring it to a hearing. They might have said, "take a decree in the terms you ask, and we will pay your costs." It is impossible for them to say that they are not liable to pay the costs. This case is quite distinct from the case of *Millington* v. *Fox* (*sup.*) It is quite distinct from the case of *Nunn* v. *D'Albuquerque* (*sup.*), where the defendant said: "I was not at all aware of the patent; the moment I heard of the patent, I gave up the whole of the goods which I had manufactured; I will undertake not to do it any more; I will pay the costs, and I will also pay you the profits which I have made." If after such an offer on the part of the defendant, a plaintiff brings on the suit to a hearing, it is a case of oppression, for what more could he get? He was offered everything which he could possibly get by the suit. That is not so in this case; it is very far from it. Accordingly, I must make a decree as asked for with costs, up to and including the hearing; but I strongly advise the plaintiffs not to ask for an inquiry as to damages.

Jessel, Q. C.—There were 5200 pieces of cloth. It is loss and damage to us.

LORD ROMILLY.—That may be so, but the burden of proof lies upon you, and you will have to pay the costs of the inquiry if you do not prove any damage. There is this circumstance, that it is admitted that the cloth was of an inferior quality, and the damage may be damage to your reputation, besides the quantity of cloth which has been sold. I am of opinion that the plaintiffs are entitled to the

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decree which they ask in this case. It is impossible for a man to say that he does not know what his agent does. Mr. Stewart was the defendant's agent. Of course this sort of thing is never done personally by the parties in any case; it is always done by some servant or agent. They are bound to know what their agents do, and if they do not know, they are responsible exactly as if they did did know.

Solicitors for the plaintiffs, *Fawcett, Horne*, and *Hunter*, for *Blain* and *Chorlton*, Manchester.

Solicitors for the defendants, *Reed, Phelps*, and *Sidgwick*, for *Sale, Shipman, Seddon*, and *Sale*, Manchester.

Thursday, Nov. 11.

Re NEW ZEALAND BANKING CORPORATION; *Ex parte* HANKEY.

Company—Winding-up—Compromise of claims against directors—Motion to stay actions by dissentient contributories—Jurisdiction—Companies Act 1862, *ss.* 87, 160.

A compromise had been effected of certain claims by the contributories against the late directors of a company in the course of liquidation; the compromise had been assented to by forty-nine out of fifty-one contributories, and had been sanctioned by an order of the court.

On a motion to stay actions commenced against the late directors by the two dissentient contributories pending an inquiry (which was also moved for) into the conduct of the directors:

Held, that the court had no jurisdiction to stay the actions.

This was a motion on behalf of Mr. James Alers Hankey, formerly a director of the above company, for an order that certain actions lately commenced in the Court of Common Pleas by Messrs. Turner and Middlemast, two contributories of the company, against the late directors, might be stayed, pending an inquiry into the conduct of the late directors of the company, in order to ascertain whether such directors had wilfully and fraudulently applied to their own use any moneys of the company, or made any false statements respecting its affairs, or been guilty of any breach of trust in relation to the company, regard being had to a compromise which had been lately effected between the directors and contributories of the company. The motion was also for such an inquiry into the conduct of the late directors.

Disputes had arisen between the former directors and the contributories of this company, and eventually a compromise had been agreed upon, to which forty-nine out of fifty-one contributories had assented. The compromise had been sanctioned by an order of the court dated the 30th July 1869.

The two dissentient contributories were the plaintiffs in the actions, which it was sought to stay.

Jessel, Q. C. and *H. M. Jackson*, in support of the motion, submitted that the court had jurisdiction, under the 87th and 160th sections of the Companies Act 1862, to stay the action. They cited

Re Commercial Bank Corporation of India and the East, 20 L. T. Rep. N. S. 839; L. Rep. 8, Eq. 241.

Sir *Richard Baggallay*, Q. C., for the assenting contributories, supported the motion.

Roxburgh, Q. C. and *G. W. Lawrence*, for the dissentient contributories, contended that the sections in question gave the court no jurisdiction to stay actions against the directors of a company as individuals, but only against the company.

Wickens appeared for the official liquidator.

The sections of the Companies Act 1862, above referred to are in the following words:

Sect. 87:

When an order has been made for winding-up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as the court may impose.

Sect. 160:

The liquidators may, with the sanction of the court, where the company is being wound-up by the court, or subject to the supervision of the court, and with the sanction of an extraordinary resolution of the company where the company is being wound-up altogether voluntarily, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding-up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharge in respect of all or any such calls, debts, or liabilities.

Lord ROMILLY.—I have no jurisdiction to stay the actions, and must therefore refuse the motion. There will be no costs, except that the official liquidator must have his costs out of the estate.

Solicitor for the applicant, *J. R. Adams*.

Solicitors for the other parties, *Kimber* and *Ellis*; *Lawrance, Plews*, and *Boyer*; *Mackenzie, Trinder*, and *Co.*

Saturday, Nov. 20.

Re GLEBE LANDS OF GREAT YELDHAM.

Lands Clauses Consolidation Act—Purchase-money paid into court—Insolvent railway company—Petition for payment of costs.

A railway company took part of the glebe lands of a parish and paid into court the purchase-money, which was ordered to be invested in Consols, and the dividends to be paid to the rector of the parish during his life; and the company were ordered to pay the costs of the rector. The company became insolvent before they had paid all the costs.

On a petition by the rector:

Ordered, that part of the Consols be sold and applied in payment of the unpaid costs.

This was a petition by the rector of Great Yeldham, praying that part of a sum of 300*l.* 15*s.* 9*d.* Consols, which represented the purchase-money of certain glebe lands in his parish, taken by the Colne Valley and Halstead Railway Company and paid into court under the Lands Clauses Consolidation Act, might be sold and the amount applied in payment of certain costs remaining due to his solicitors.

By an order made on the petition of the rector, and dated the 27th Nov. 1867, the purchase-money had been ordered to be invested in Consols and the dividends to be paid to the rector during his life, and the railway company were ordered to pay the costs of the rector, which were afterwards taxed at 143*l.* 9*s.* 7*d.* Of this sum only 105*l.* 5*s.* 9*d.* had been paid by the company, leaving a balance of 38*l.* 3*s.* 10*d.* still due. The purchase-money was invested in accordance with the order, and produced 300*l.* 15*s.* 9*d.* Consols.

The petition stated that the railway company was now insolvent, and prayed that a sufficient part of the Consols might be sold to produce the balance

still due for costs, and that the proceeds might be paid to the petitioner's solicitors.

Rowcliffe appeared in support of the petition.

Lord ROMILLY.—I think I may make the order as prayed for.

Solicitors: *Gregory, Rowcliffes,* and *Rawle.*

Thursday, Nov. 25.

Re WILKINSON'S SETTLED ESTATES.

Practice—Death of petitioner—Amendment—Leases and Sales of Settled Estates Act (19 & 20 *Vict.* c. 120).

Where a petitioner, a tenant for life of settled property, had died after the petition was served, but before it could be heard, leave was given to amend the petition by substituting the successor to the settled property, an infant tenant in tail, for the original petitioner.

A petition had been presented under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120) by the tenant for life of a settled estate, and considerable expense had been incurred in advertisements and in serving the petition on respondents resident out of the jurisdiction. Before the petition could be heard the tenant for life died, and an infant became entitled to the property as tenant in tail.

C. Browne applied for leave to amend the petition by substituting the infant for the original petitioner, and setting out the death of the tenant for life. He cited

Robinson v. *Harrison*, 1 Dr. 307;
Maude v. *Maude*, 5 De G. & Sm. 418.

Lord ROMILLY gave leave to amend the petition as asked.

Solicitors, *Parke* and *Pollock.*

Nov. 20 and Dec. 4.

Re JONES (a Solicitor).

Solicitor and client—Taxation of costs on order obtained by client—Costs of uncertificated solicitor—6 & 7 Vict. c. 73, s. 26.

The 26th section of the Solicitors' Act (6 & 7 Vict. c. 73, s. 26), which provides that no uncertificated solicitor shall be capable of maintaining any action or suit for the recovery of any fee, &c. for business done by him whilst uncertificated, does not destroy the debt, but merely takes away the remedy.

Consequently, where a solicitor had, without any fault of his own, been without a certificate for six months, and the taxing master, on an order of course taken out by the client, had disallowed all the items in a bill of costs in respect of business done during the time that the solicitor was without a certificate;

Held, on a summons by the solicitor to review the taxation, that the taxing master was wrong in disallowing these items, and the matter was referred back to the taxing master accordingly.

Adjourned summons.

This was an application on the part of Mr. Richard Bevan Jones, a solicitor, that it might be referred back to the taxing master to review his taxation of a certain bill of costs in respect of certain items which had been disallowed.

A client of Mr. Jones has obtained the common order to tax his bill in respect of the costs of a certain suit in which Mr. Jones has acted as his solicitor. The client on his petition for the order had made the usual submission, to pay what should appear to be due in respect of the bill.

During six months (Dec. 1866 to June 1867) of the time over which the business done by Mr. Jones extended, his certificate, by pure accident and through no fault of his own, but through a mistake of his London agents, had not been renewed, and the taxing master, according to his invariable practice, disallowed all the charges for business done during the six months in which Mr. Jones had been without a certificate, on the ground that they were irrecoverable under the 26th section of the Solicitors' Act (6 & 7 Vict. c. 73), by which it is enacted that no person who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit, or any proceedings, in any of the courts, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid whilst he shall have been without such certificate as last aforesaid.

The client did not deny that the business had been done for which the disallowed charges were made, but relied upon the above-mentioned section of the Solicitors' Act in support of the taxing master's decision.

Jessel. Q. C. and *Bevir,* in support of the summons, submitted that, although the Act rendered a solicitor incapable of maintaining any action or suit for the recovery of his fees for business done whilst he was without a certificate, it did not destroy the debt; the provision in the Act was analogous to those in the Statutes of Limitation, which had been frequently held not to destroy the debt, but only to bar the remedy. They cited

Courtenay v. *Williams*, 3 Hare, 539;
Spears v. *Hartley*, 2 Esp. 81;
Higgins v. *Scott*, 2 B. & Ad. 413.

Begg, in support of the taxing master's decision, contended that this summons was a suit for the recovery of his fees by an uncertificated solicitor within the meaning of the Act, and that the taxing master's decision must, therefore, be upheld. He cited

Sparling v. *Brereton*, 14 L. T. Rep. N. S. 166; L. Rep. 2 Eq. 64;
Re Angell, 6 Dowl. & Low. 144;
Fullalove v. *Parker*, 6 L. T. Rep. N. S. 353; 8 Jur. N. S. 1078;
Punter v. *Lord Grantley*, 3 M. & G. 295.

He also urged that, on grounds of public policy, the decision of the taxing master should be upheld.

Jessel, Q. C. replied.

Dec. 4.—Lord ROMILLY.—This is a summons asking me to direct the taxing master to review his certificate in consequence of these circumstances. [His Lordship stated the facts of the case, and continued]: The client took out the order of course. It was not a proceeding by the solicitor, but it was a proceeding taken by the client, who thereupon undertook to pay everything that should be found due. As I have stated, the taxing master has disallowed all these items; and unquestionably, in doing that, the taxing master has only followed the invariable practice. The question seems never to have undergone any judicial decision, and I have, therefore, looked into the case very carefully. Now it is to be observed that the clause of the Act (6 & 7 Vict. c 73, s. 26) is a penal enactment, and, therefore, it is to be construed strictly. Does it destroy the debt? It says that no solicitor or attorney shall maintain any action or suit at law or

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in equity for the recovery of any fee or reward in respect of any business done during the time that he has been uncertificated. Am I to go beyond that and say that it puts an end to the debt? If so, I must consider, in the next place, whether this is a proceeding at law or in equity which is maintained or prosecuted by the solicitor for the recovery of his fees. The distinction between putting an end to a debt and putting an end to the remedy is very well marked, and is familiar to everybody. It is well known in the case of the Statute of Limitations, which does not destroy the debt, but only puts an end to the remedy. This is a matter of very great importance, which, as far as I can make out, has never met with any judicial decision; and I have come to the conclusion that it does not destroy the debt, but that the debt is still a subsisting debt, though the solicitor cannot take any step to recover it. That this is so I think there are authorities to show. In the first place this clause has been construed very strictly in various respects. It has been decided that it does not apply to conveyancing business, for it merely says, prosecuting any proceeding at law or in equity, and, therefore, it does not affect conveyancing business. I was referred to several cases by Mr Begg, who has taken a good deal of pains with the matter, and was kind enough to give me all the authorities which appear to exist on the subject, it being very important that the court should come to a mature decision; but the only case which appears to me to be very material upon the point is the case of *Fullalove* v. *Parker* (*sup.*). In the judgments pronounced by the learned judges in that case there are observations which materially fortify the view I take of this case. The case there was of this description. It seems to have been, as far as I can make out, an order for the recovery of costs in a suit in the Secondary's Court in the City of London; the defendant was ordered to pay the plaintiff's costs of the suit; they went to tax the plaintiff's costs; the plaintiff's attorney had not taken out a proper certificate, but the taxing master taxed the costs before the attorney on the other side had discovered the fact; and accordingly the taxing master, all parties being ignorant that the attorney was not properly certificated, allowed the costs. Upon that the defendant appealed to the Court of Common Bench for the purpose of getting the costs disallowed, and the court held that he could not get them disallowed then because, not having taken the objection before the master, it was too late—showing clearly that in their estimation the debt was not destroyed. But, in addition to that, there is an observation made by both the learned judges who disposed of the case, which I think it material to read. Mr Justice Willes says (6 L. T. Rep. N. S. 353): "If the attorney is really uncertificated, he is not entitled to recover any costs, nor is the plaintiff entitled to recover such costs from the defendant except in this case only—if the plaintiff has made advances to the attorney, he cannot recover them back as a *conditio indebiti*, as for money paid under a mistake; the attorney, though uncertificated, is entitled to retain the money so advanced, and the plaintiff would have a right to recover this from the defendant." Mr Justice Byles says (8 Jur. N. S. 1078): "I am of the same opinion. The case cited by my Brother Willes" (*Punter* v. *Lord Grantley*, 3 M. & G. 295) "shows that this matter was for the master, not for the court. In the circumstances stated, the court could not interfere without taking a leap in the dark. Moreover, part of the money may have been paid by the plaintiff to his attorney in the interval; in which case it cannot be recovered back." Both these judgments show clearly that the judges did not consider that the debt was extinguished, but only that the remedy was taken away. Then I have to consider whether this is a proceeding at law or in equity by the solicitor for the recovery of his fees. I am of opinion that it is not. I do not say what the effect would be if the solicitor himself had obtained a taxing order, and had taken the initiative in the matter; but he has taken no step. It is a step taken by the client, who obtains the usual order of course to tax the bill, undertaking to pay all that is found due. I am of opinion that this part of the bill was due at the time, and that the clause in the Act of Parliament, like all the other penal clauses, must be construed strictly, and must be considered to have the effect of taking away the remedy and not of destroying the debt. I am of opinion, therefore, that the taxing master was wrong in disallowing these items, though he has followed the invariable practice, which has never before been submitted to the consideration of the court. I am of opinion that I must decide the case according to the proper construction of the Act of Parliament, and that the Act does not take away the right of the solicitor either to set-off the debt or to apply to it money which has already been paid. The result is that this case must go back to the taxing master to tax those items which have been disallowed. Of course there will be no costs. I beg it to be understood that I do not express any opinion what the effect might be if the solicitor had taken the initiative, but this is a proceeding by the client, and the client undertakes to pay all that is due; and as I am of opinion that, under the statute, this amount is due, he is bound to pay it.

Solicitors for Mr. Jones, *G. L. P. Eyre* and *Co.*

Solicitor for the client, *C. M. Stretton* for *T. B. Snead*, Llanelly.

Tuesday, Dec. 7.

Re NORTHERN ASSAM TEA COMPANY.

Winding-up—Practice—Official liquidator—Appointment by court.

In a winding-up, where the party having the carriage of the winding-up order proposes a fit and proper person to be liquidator, the court will appoint him where there is no material difference in point of merit between the persons proposed.

Re The General Provident Assurance Company, 19 *L. T. Rep. N. S.* 45, *followed.*

This was an adjourned summons to determine who should be official liquidator of the above company, which was ordered to be wound-up some months ago upon the petition of a creditor. The winding-up had since been managed by a provisional liquidator.

Two gentlemen were proposed for the office: the first, Mr. Samuel Barrow, was supported by creditors to the amount of 5724*l.*, amongst whom was the creditor on whose petition the company had been ordered to be wound-up, by the holders of 640 paid-up, and 750 partly paid-up shares, and by the Universal Life Insurance Company, who held debentures for 15,000*l.* as security for a loan of 6000*l.*

Mr. James B. Gibbons, the other gentleman proposed, was supported by creditors to the amount of 20,000*l.* by the holders of 3369 shares, and by a Mr. Jenkins, who claimed 30,700*l.* as the purchase-money of estates sold by him to the company; and also by the London and County Bank.

Mr. Gibbons had acted as provisional liquidator.

Swanston, Q. C. and *Napier Higgins*, for the petitioner and other creditors, submitted that the person proposed by the party having the carriage of the winding-up order should be appointed. They cited

Re The General Provident Assurance Company, 19 L. T. Rep. N. S. 45.

Jessel, Q. C., for the Universal Life Insurance Company, also supported the appointment of Barrow.

Roxburgh, Q. C. and *Graham Hastings*, for the shareholders and others supporting Gibbons, contended that he ought to be appointed, as he was supported by the majority of the shareholders, and had acted as provisional liquidator.

W. W. Karslake, *Fitzroy Kelly*, and *Lindley*, for other parties, also supported the appointment of Gibbons.

Lord ROMILLY.—I will follow the rule laid down by Malins, V. C. in *Re The General Provident Assurance Company* (*sup.*), that where the party having the carriage of the winding-up order proposes a fit and proper person, he shall be the person appointed liquidator if there is no material difference in point of merit between the persons proposed. Mr. Barrow must, therefore, be appointed.

Solicitors for the petitioner, *Mercer* and *Mercer*.

Solicitors for the other parties: *Deane* and *Chubb*; *Young* and *Co.*; *Swann* and *Co.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

July 8, 15, *and* 22.

COOK *v.* HATHWAY.

Practice—Revivor by assignees of bankrupt plaintiff—Costs—Stay of proceedings.

Where a plaintiff becomes bankrupt or dies, and his assignees or representatives carry on the suit, they can only do so upon payment of all costs, which he had been ordered and was liable to pay.

This was a motion in the cause in which there had been the usual order of revivor that all further proceedings might be stayed until certain costs ordered to be paid by the original plaintiff were paid. It appeared that, the bill having been filed previously to the month of Dec. 1868, the then plaintiff presented a petition in the cause, which came on to be heard, and upon which an order was made, dismissing it with costs. Matters remained *in statu quo* until the month of May following, when the plaintiff was adjudicated a bankrupt, and the costs ordered to be paid in December remaining still unpaid, the cause was revived in the ordinary way by his assignee, who claimed a right to adopt the suit, and proceed in it, without first paying those costs, and the question was whether he could do so.

Glasse, Q. C. and *Charles Hall*, for the defendant, in support of the motion. This case must be looked at as if the plaintiff had not become bankrupt, and no order for revivor had been made; that is the true test. Had that been the case, no further proceedings would have been allowed to be taken by him until he had first paid the costs of the petition dismissed in Dec. 1868. His assignee stands in exactly the same position as the bankrupt, and can have no better rights; and he must therefore pay these costs, or all further proceedings must be stayed:

Bellchamber v. *Giani*, 3 Madd. 550;
Oldfield v. *Cobbett*, 12 Beav. 91;
Whitcomb v. *Minchin*, 5 Madd. 91;
Poole v. *Franks*, 1 Moll. 78; see also
Morgan and Davey on Costs, 86.

The assignee of a bankrupt is in the same position as an ordinary party reviving a suit as representing the former plaintiff, and that was well settled many years ago:

Troward v. *Bingham*, 4 Sim. 483;
Altree v. *Hordern*, 5 Beav. 623;
Long v. *Storie*, 13 Jur. 1091.

A party reviving a suit cannot take advantage of his position as plaintiff without entirely representing the original party. In such entire representation is involved the liability to pay costs if any suit exists; and it is not necessary to refer to the remedy for nonpayment. The same rule holds good at law in the action: 15 & 16 Vict. c. 76, s. 162. (The Common Law Procedure Act).

Karslake, Q. C., and *Mander* contended, first, that no case existed in which such a motion as this had been made and succeeded; if a defendant to a suit could get such an order, there would be numerous precedents, and there were none. It was entirely a question resting on the fact of the party being in contempt for nonpayment of the costs. *Bellchamber* v. *Giani* (*sup.*), and *Oldfield* v. *Cobbett* (*sup.*) showed that. The mere fact of bankruptcy was sufficient to purge the contempt if there was any, and hence the only thing upon which such a motion as this rested, was done away by the bankruptcy, and the assignee began *de novo*. In the case of a plaintiff becoming bankrupt, the defendants have two courses; they can either have the bill dismissed without costs, if the cause has not come to a hearing; or, if it has, they can move to stay proceedings, putting it upon the assignees to revive, and fixing a time within which they must do so.

Sharp v. *Hallett*, 2 Sim. & St. 496;
Whitmore v. *Oxborrow*, 1 Coll. C. C. 91.

No doubt at law, under the 15 & 16 Vict. c. 76, s. 162, the assignees of a plaintiff in an action, who becomes bankrupt, are required to give security for costs; but that finds no parallel in equity. The assignees may continue the suit, and would, of course incur the same future liability for their own acts as any other plaintiff: (*Foxwell* v. *Greatorex*, 3 Beav. 345.) The authorities cited in support of the motion were not in point. They were either cases where the assignees did not stand alone, or where they filed a new bill, leaving the defendant in the difficulty of being unable to revive for costs only. The defendants here, if these proceedings were stayed, would have a double remedy, which would not be allowed, for they already have the means of recovering their costs in the bankruptcy, against the bankrupt's estate.

The VICE-CHANCELLOR.—This motion has been argued at very considerable length, and as a matter of practice is of some importance, but I entertain no doubt upon it whatever. [The Vice-Chancellor referred to the facts.] The estate of the bankrupt being liable to these costs, it is not, nor indeed can it be, disputed that in case the assignees of a bankrupt plaintiff do not adopt and carry on a suit first instituted by him, the only remedy the defendants have to recover any costs to which he may at the date of his bankruptcy be liable, is by proving the bankruptcy against his estate in respect of such costs as a debt and receiving a dividend. The question, however, in the present case is this: Can the assignee revive a suit and go on with it, not having first paid any costs which his bankrupt was at the date of his bankruptcy liable to pay? I am of opinion that he cannot; I think that is perfectly clear. Let us look, first, at the principle upon which this proceeds; what is the duty of assignees in a case like the present; they find a suit instituted by the party whom they represent, and they have to consider whether they will prosecute it or not. In considering this, they have to consider, not only whether it is worth while to go on at the risk of further costs, but

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whether it is worth while to take the liability of paying those which the bankrupt was ordered to pay. If the conclusion is that it is not worth while, the suit should be put a stop to, and upon every principle of justice the defendants ought not to be further harassed with the proceedings. This motion, therefore, on principle appears to me to be right. Then the principle being such as I have stated, how does the matter stand on authority? I own I was somewhat surprised to hear Mr. Karslake assert that there was no authority in point; for it appears to me that there are not only many cases directly in point, but that the principle was recognised many years ago; indeed the cases are not new ones by any means. *Poole* v. *Franks* (*sup.*) was a case where a plaintiff having become bankrupt his assignees continued the suit by supplemental bill (that is, in fact, the same as this case), in which the suit is carried on by revivor, amounting to the present practice. Sir Anthony Hart, a most experienced judge in such matters (who was the Lord Chancellor of Ireland), treated the matter in this way. He referred to the fact that the assignees now adopted part only of the case made by the bill, the bankrupt suing both as executor and residuary legatee, and observed that it behoved them not to touch the original record, but to file a new bill. But they elected to come in by supplemental bill, and thereby adopted all the liabilities of the original plaintiff, and that is shown by the very form, which was in the usual terms, of a supplemental bill; namely, to have the benefit of the original suit. This was an adoption of the suit. (The Vice-Chancellor read passages from the judgment.) And Sir Anthony Hart decided that they had adopted the suit and were bound to pay the whole costs as the condition of going on with it. The assignees of a bankrupt and the representative of a plaintiff who revives, are precisely in the same position. In *Horlock* v. *Priestley*, 8 Sim. 621, the executors of a plaintiff revived the suit, and the question was whether they could be allowed to prosecute it without first paying the costs, which their testator was liable to pay, Sir Launcelot Shadwell considered that the executor having revived, stood in the testator's shoes, and must pay the costs. In *Lyon* v. *McKenna*, 2 Moll. 460, Sir William McMahon took the same view. (The Vice-Chancellor referred to that case.) In that case there was a rule to revive, which the plaintiffs did, but neglected to proceed with the suit, and their bill was dismissed with costs; and it was held that by reviving they were subject to all the costs. *Whitcomb* v. *Minchin* (*sup.*) was not exactly the same—indeed, it was the converse case, the assignees of the bankrupt being defendants, and made parties by supplement, and Sir John Leach concluded that if they improperly resisted the plaintiff's demand they might be liable for all the costs. But further, in *Long* v. *Storie* (*sup.*), a new bill was filed for the same purpose in substance, and Shadwell, V. C. was of opinion that the proceedings ought to be stayed, it being, as he expressed it, "grossly unjust that parties should go on with a second suit until they had paid the costs of the first." That was the same, in fact, as the present case. In *Altree* v. *Horden* (*sup.*), also, a new bill was filed, and Lord Langdale stayed the proceedings in the second suit until the costs in the first suit were paid. *Troward* v. *Bingham* (*sup.*) is to the same effect, and Shadwell, V. C. refers to something he had before recognised, namely, that an adoption of a suit by an executor involves the liability to costs. *Foxwell* v. *Greatorex* (*sup.*) was to the same effect, that being a case of specific performance. The principle, therefore, settled by the authorities is this: where a person fills a representative character, whether it be as the assignee of a bankrupt, the executor of a testator, or the administrator of an original plaintiff, if there be costs due by such plaintiff or the person who is represented, the proceedings cannot go on unless those costs are first paid. There is no authority contrary to this. As to the case of revivor within a limited time, that is for the protection of a defendant, and the option of reviving is given; and if the option is exercised, I am clearly of opinion that it could only be on the terms of paying all the costs to which the bankrupt was liable at the date of the order to revive. A great deal of time has been occupied upon an argument not sustainable, and on a case perfectly concluded by authority forty years ago. Upon principle and authority, therefore, I must accede to this motion. I ought, perhaps, before I part with the case, to refer to an argument which was much pressed, that the practice of staying proceedings by a party until payment of costs was founded solely on contempt. Having carefully considered the authorities, I find no case depending on contempt; they all go on the injustice of allowing a party to go on without paying costs ordered to be paid. The assignee must pay the costs of this motion, which he has resisted and failed in his resistance.

Solicitors for the plaintiff, *Halse, Trustram, and Co.*

Solicitors for the defendants, *Gregory, Rowcliffe, and Co.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET, and R. T. BOULT, Esqrs., Barristers-at-Law.

Nov. 22 and 24.

Re FAMILY ENDOWMENT SOCIETY.

Companies Act 1862—*Winding-up—Transfer of business—Novatio debiti.*

The F. E. Life Assurance Society (unregistered) agreed, in 1861, *to transfer its business and assets to the A. company, who undertook its liabilities. Resolutions in accordance with the deed of settlement of the society were passed at two general meetings in* 1861, *approving the arrangement and dissolving the society, which thereupon discontinued business:*

Held, that the society had not ceased to exist before the Companies Act 1862, *and that the Court had jurisdiction to wind it up under that Act.*

The petitioner (who held two annuities from the society) had notice of the agreement for transfer, and afterwards received his annuities from the A. company, and gave them receipts:

Held, that he had not thereby ceased to be a creditor of the society.

This was a petition for the winding-up under the Companies Act 1862 of an assurance society called the Family Endowment Society, presented by General Pott, the holder of two annuities granted by the society.

The society was formed in the year 1835. It was never registered under the Companies Act 1862. The nominal capital of the society was 500,000*l.*, divided into 5000 shares of 100*l.* each. It was regulated by the provisions of a deed of settlement, and by an Act of Parliament (6 & 7 Will 4, c. xxi.). The Act provided (s. 10) for the enrolment in Chancery of memorials of the names of all new directors, chairmen, and secretaries of the society, and provided (sect. 11) that the persons whose names were last so memorialised, should, until the memorialising of their successors, continue liable to all proceedings as if they had not ceased to be such directors,

chairmen, or secretaries. The Act enabled the society to sue and be sued in the name of the directors, or chairman, or secretary.

The petition stated that by a contract dated the 12th March 1849, subscribed by three directors of the society, and duly binding on the society pursuant to its deed of settlement, it was declared that in consideration of the monthly payments to be made as therein mentioned by General Pott to the society until and including the 26th Jan. 1861 (which were all duly made) the funds of the society should be made liable, according to the provisions of the deed of settlement to the payment to Gen. Pott or his assigns of an annuity of 1000 East India Company's rupees, with a bonus, such annuity to commence on the 26th Aug. 1861, if General Pott should be then in India, or on the 26th Feb. 1862 if he should be then in Europe, and to continue thenceforth payable during his life by equal half-yearly payments, on the 26th Aug. and 26th Feb., in every year, provided that the subscribed capital of 500,000*l.*, and other the stocks, funds, securities, and property of the society remaining at the time of any claim or demand made unapplied and undisposed of in pursuance of the provisions and authorities contained in its deed of settlement, should alone be liable to answer and make good all claims and demands upon the society.

The petition also stated a similar contract entered into between the society and General Pott on the 11th June 1850.

The 32nd and 122nd clauses of the deed of settlement were as follows.

Clause 32:

That two extraordinary general meetings, specially called for the purpose, shall by a majority of three-fourths of the votes of the proprietors present and entitled, and not declining to vote at such meeting, or at any ballot which may be taken in consequence of its having been demanded at any such meeting, have full power to pass a resolution to dissolve the society.

Clause 122:

That, whenever two successive extraordinary general meetings shall, upon the recommendation of the board of directors, have come to a resolution to dissolve the society, the board of directors shall cease to grant or renew any contracts of endowments or assurances on behalf of the society, and shall proceed in such manner as they shall think fair and reasonable to meet the existing engagements of the society; and shall cause so much of the funds or property of the society as shall not then consist of money, and as shall not be required to meet the existing engagements of the society, and shall cause so much of the funds or property of the society as shall not then consist of money, and as shall not be required to meet the existing engagements of the society, to be forthwith sold or otherwise converted into money in such manner and upon such terms as the board shall think proper, and after such sale or conversion shall cause so much of the funds or property of the society as shall not be required to meet the existing engagements thereof, to be paid and distributed to and amongst the several persons then being proprietors or holders of shares in the society rateably and *pari passu* according to the number of shares held by them respectively. And the directors shall have full, unlimited, and uncontrollable power and discretion to direct and adopt any mode which they shall think proper for realising, dividing, distributing, and finally disposing of the surplus funds and property of the society, and for that purpose to retain and set apart to such amount as they shall think proper, any moneys to form an indemnity fund to meet the engagements and liabilities of the society, and to deal with such fund; and in the meantime until it shall be required for satisfaction of the purposes for which it shall have been set apart in such manner as they shall think proper, and in the event of there being a surplus of such fund after satisfying all the engagements and liabilities of the society, the board of directors shall, as soon as conveniently may be after such surplus shall be ascertained, convert the same into money and distribute and divide the proceeds among the several persons being proprietors or holders of shares in the society at the time of the dissolution thereof, and their respective executors, administrators, and assigns; and the further to enable the board of directors to carry into effect a dissolution of the society and to wind-up the affairs thereof, it shall be lawful for them to adopt any plan which in their judgment shall be deemed expedient for paying to the proprietors or holders of shares in the society, or placing at their risk their several proportions of the surplus funds of the society, and the persons who shall be directors at the time of passing the resolution for dissolving the society, shall continue in such office until the affairs of the society shall be wound-up, and shall and may fill up, if they think proper so to do, any vacancies which may occur among themselves during such period, and the persons so elected to fill such vacancies shall have, exercise, and enjoy all the powers and authorities hereby conferred upon directors of the society as fully and effectually to all intents and purposes as though they had been elected by the proprietors at an annual general meeting, under the provisions in that behalf hereinbefore contained, provided nevertheless, that in case the funds or property of the society, at the time of such dissolution, be insufficient to pay the existing claims and demands upon the society, in respect of the assurances effected by the society, then, and in that case, the board of directors shall, under the powers hereinbefore contained, from time to time as they shall think proper, or find it necessary, call upon the proprietors of the society for the payment of such further instalments on their shares in the capital of the society as shall be sufficient to make up the deficiency in such funds or property for payment of the existing claims and demands upon the society, and shall distribute the amount of such further instalments together with such fund or property as aforesaid, amongst the several claimants in respect of the assurances effected by the society in full satisfaction of their respective claims and demands, rateably and in proportion to the amount of their respective claims and demands upon the society, and when, and so soon as such payment and distribution shall be completely made and effected, the society shall be dissolved, and every clause, article, matter, and thing herein contained, except this present provision, shall thenceforth cease, determine, and be void.

By articles of agreement made on the 5th Feb. 1861, between three of the directors of the society of the one part, and three directors of the Albert and Medical Life Assurance Company of the other part, it was agreed that subject to the approval of two extraordinary general meetings of the shareholders of the society, the business of the society, and all its money, property, credits, securities, and effects should be transferred as from the 1st Jan. 1861, to the company, which should repay to all the shareholders of the society the sum of 4*l.* per share, being the entire amount then paid upon the shares of the society, with interest at 5*l.* per cent. per annum from the 1st Jan. 1861. It was also agreed that all the debts, engagements, liabilities, and risks of the society, and all claims and demands against the society should be wholly paid, performed, undertaken, and met by the company, and the company should at all times save harmless and keep indemnified the society and the trustees and directors and shareholders thereof from and against the same, and from and against all actions, suits, and proceedings in respect thereof, and all acts and charges in connection therewith. It was also provided that the holders of all such policies of assurance as would be entitled to participate in the profits of the society (and who should accept in exchange policies of the company, or otherwise concur in accepting the engagements of the company) should be entitled to participate in the profits of the company, and empowered the company to use the names or name of the society, or any of its directors, or trustees, in the proceedings which might be required for realising the assets of the society, and for bringing or defending any actions or suits for the purpose of the agreement.

At two extraordinary general meetings of the society, held on the 21st Feb. and 14th March 1861, resolutions dissolving the society and adopting the agreement, were duly passed and confirmed.

Circulars were shortly afterwards issued to the policy holders and annuitants in the society, announcing the dissolution of the society and the combination of its business with that of the company, and stating that it would not be necessary in any way to disturb the existing policies and contracts of the society, but that should any policy or contract holder particularly desire it, an indorsement of the admission of the liability of the company would be put upon the policy or a new policy issued. They also stated that annuities payable under contracts

issued by the society would thenceforth be payable and paid by the company.

The petition alleged that General Pott had never received this circular, though he was aware of the amalgamation.

The Albert and Medical Life Assurance Company having changed its name to the Albert Medical and Family Endowment Life Assurance Company, and afterwards in April 1863 to the Albert Life Assurance Company, stopped payment in Aug. 1869, and was at the date of the presentation of the petition, being wound-up. The annuities secured to General Pott had been paid to him by the company up to the time of its stoppage, but the half-yearly payment which became due on the 26th Aug. 1869 was in arrear.

The petition alleged that General Pott had not in any way assented to any transfer of the liability in respect of the annuities from the capital and funds of the society to the company, or had otherwise in any way released the capital and funds of the society from such liability. It also alleged, that by the resolutions of the general meetings the company became dissolved, and had ever since continued to be dissolved within the meaning of part 8 of the Companies Act 1862, and that it had not since carried on business. It also alleged that the society had no funds or property other than its subscribed capital, and that it was unable to pay the debts due from it to him and others, otherwise than by the payment up of its subscribed capital, and that it was just and equitable that it should be wound-up.

Fry, Q.C. and *Westlake* appeared in support of the petition.

Amphlett, Q.C. and *Kekewich*, for the last memorialised directors of the company, on whom the petition had been served, supported the petition.

Sir *R. Palmer*, *J. Napier Higgins*, and the Hon. *W. Bethell*, for shareholders in the society, contended, first, that the petitioner had ceased to be a creditor of the society; secondly, that the society was not a society capable of being wound-up under the Companies Act of 1862; thirdly, that the court ought in the exercise of its judicial discretion to leave the petitioner to his remedies at law.

Kay, Q. C., *Eddis*, Q. C., *Jackson*, and *Watson* appeared for other shareholders.

Fry, Q.C. in reply.

The following cases were cited:

Rolfe v. *Flower, Salting, and Company*, L. Rep. 1 P. C. 27; 14 L. T. Rep. N. S. 144;
Re The Commercial Bank Corporation of India and the East, 18 L. T. Rep. N. S. 668;
Kearns v. *Leaf*, 10 L. T. Rep. N. S. 185; 1 H. & M. 681;
Re Era Life Assurance Society, Williams's case; Anchor case, 7 L. T. Rep. N. S. 595; 1 De G. J. & S. 29; 1 H. & M. 672;
Gregory v. *Patchett*, 33 Beav. 595;
Hart v. *Alexander*, 2 M. & W. 484.
The British Provident Life and Fire Assurance Society; Ex parte Anglo-Australian Association, 7 L. T. Rep. N. S. 234;
Evans v. *Coventry*, 5 De G. M. & G. 911;
Bishop v. *Scott*, 7 L. T. Rep. N. S. 570.
Re Smith, Knight, and Co.; Ex parte Gibson, L. Rep. 4 Ch. 662; 20 L. T. Rep. N. S. 835;
Bedford v. *Deakin*, 2 B. & Ald. 210.

As to a winding-up after dissolution:

The London and Westminster Insurance Company; Ex parte Phillips, 3 De G. & S. 3.

The VICE-CHANCELLOR.—This is a petition by the petitioner, General Pott, praying for the winding-up of a society called the Family Endowment Society. The petitioner holds two grants from the society, granting to him annuities. The annuities are in arrear to more than the sum of 50*l*. The society has ceased to carry on business. So far, therefore, the case is brought within the Act of Parliament. The answer to the petitioner's case is threefold. It is said, first, the petitioner was a creditor, but has ceased to be a creditor of the society; secondly, the society is not a society capable of being wound-up under the Act of 1862; and, thirdly, that even if both these propositions should be answered adversely to the contention of the society, the court ought, in the exercise of its judicial discretion, to allow the petitioner to take such remedies as he may have at law. The mode in which the first proposition is attempted to be made out is this: It is said, "True it is you were originally a creditor of the society, but, by an arrangement between the society and another company called the Albert Company, to which you acceded, so as to make it a tripartite arrangement, you agreed to accept, and did accept, the Albert Company, so as to discharge your original debtor, the society." This is an issue of fact which has to be made out by the society. A great many cases have been cited, and they have all of them, I think, been cited for the purpose of introducing one expression, which is found in them all, or nearly all of them, namely, that very slight evidence is sufficient to establish such a *novatio* as this. When expressions of that kind are taken out of judgments, and pressed on the court, it is very important to bear in mind the class of cases in which, and the circumstances under which, the expressions were used. They were all, I think, cases in which one *indebitatus assumpsit* was substituted for another *indebitatus assumpsit* in cases of ordinary mercantile partnership. Such a case, for instance, as this: A. B. and C., being in business, take in a partner, and a creditor of A. B. and C. continues his dealings with the new firm of A. B. C. and D. In that state of things no doubt very slight evidence would be sufficient to satisfy the court that A. B. C. and D. meant to take upon themselves, as between themselves directly, and the creditor the debts of A. B. and C.; and very slight evidence, indeed, would be required to establish that the creditor had taken the joint and several liability of A. B. C. and D. instead of the joint and several liability of A. B. and C., or such a class of cases as this, where not merely a new partner was added to the firm; but where there was a slight change in the constitution of the firm, that is to say, A. B. and C. became B. C. and D. Then possibly, or probably, evidence of a not very urgent kind would be sufficient: because one knows, according to the ordinary course of dealing, and according to the ordinary understanding of mankind, in a great number of these mercantile firms, that what the creditor looks to is not the particular individuals who, on a particular day, constitute the firm, but the firm, the establishment, the house. You trust Baring's house, Coutts's house. You trust Child's house without inquiring who the particular members were at the particular date: That is to say, men in dealing with that kind of firm or house deal with it as if it were a corporation with a continued existence, and you treat and deal with the firm as a continuing body without regard to the elements of which it is composed at any particular period. In a class of cases of that kind, no doubt very slight evidence would do. But if it is meant to be said that from that class of cases this proposition is to be deduced, that whenever a debtor assigns his business to another man, very slight evidence will be sufficient to satisfy the court that the creditor accepted the purchaser of the business as a substitute for his original

debtor, I should demur to that conclusion as being a true or just conclusion. But, however that may be in an ordinary case, it seems to me it has no application to such a case as the present. This is not a case, as it appears to me, in which slight evidence would suffice; but a case in which very cogent evidence would be required to establish this, that the man who had a grant in writing (a specialty, not, it is true, under seal, but as valid and effectual to all intents and purposes as if it had been under seal), a grant from the society charging specific property, and that grant secured to him by the provisions of an Act of Parliament, which provide him remedies and very easy modes of enforcing his claim; that a man having such a grant as that accepts in lieu of it, not a contract in writing, not an express promise of any kind, but an implied undertaking, and an implied grant for another joint stock company without any knowledge on his part, or means of knowledge, as to whether it were *ultra vires* or *intra vires*, as to whether it was a thing which, according to the institution of that society, anybody could bind the society to, and (which is not immaterial in this case) a grant, not in writing, not to be performed within a year of the date; so, therefore, not complying with the requirements of the Statute of Frauds. In this case, not only is there not that cogent evidence which I should have required, but it seems to me that, in truth, when one comes to look at it, there is no evidence whatever. What was done was simply the creditor presenting himself at the office at which he was to receive the money, receiving it, and giving receipts, which receipts when read in reference to the contracts under which the sums became payable, seem to me to amount to nothing more than this: that is—as if he had taken a bond, payable by instalments, and he had taken the bond to the office, and upon payment of the instalment, had written the receipt upon the instrument itself. He retained the instrument, he had it always with him, and always gave his receipts as for something payable under that instrument, and not as for anything payable under any new or substituted contract with the alleged new debtor. I am of opinion, therefore, that the society have failed entirely to make out their first proposition. Next they say, this society was not a society within the meaning of the Act of Parliament, because it had ceased to exist at the time when the Act of Parliament of 1862 was passed or came into operation, and that Act only applies to companies then existing, and of which it could be predicated that they had a place of business at that time. I am of opinion that the society had not ceased to exist. It could not cease to exist so as to prejudice its creditors. It did not, as it seems to me, purport to destroy its existence so as to prejudice its creditors. The very arrangement itself that was made—the provisions that were contained in the original deed of settlement of the society with reference to these arrangements, all provide that there shall be a continued existence of the society—a continued machinery for the society to collect its assets, to distribute them and to pay its debts, and (which is not immaterial, perhaps, in this case) the society was empowered by an Act of Parliament, which Act had provided the means by which the society could sue and be sued; and which means continued to exist on and after the arrangements between the society and the company. And further, on the very arrangements themselves between the society and the company, it is evident that the continued existence of the society was contemplated, for the company was to use the society's name, if necessary in collecting the assets, and the company was as a company to indemnify the society for its neglect to perform the provisions of the contract. I am of opinion, therefore, that the society did exist at the time when the Act came into operation, and that, as the society had authorised the Albert Company to receive any premiums that were payable upon its policies, and had appointed the Albert Company to pay all claims arising under its grants and contracts, the office of the Albert Company was for all intents and purposes the office or place at which the society continued to carry on its business. Therefore it seems to me that there is no difficulty whatever under the Act of Parliament. The third suggestion is that I should leave the parties to their remedies at law. I do not think that I can properly or justly do so. It would not be right with regard to the creditor, and other creditors in his position, to leave him to bring an action against the nominal defendants, the surviving directors, whose names appear on the enrolled memorandum—it would not be right, I say, to leave the creditor to bring his action against them, and then endeavour to find out the shareholders in any part of the kingdom against whom he might proceed by *sci. fa.* to enforce the judgment; nor would it be right to the nominal defendants in such a proceeding as that to allow them to be harassed without any means whatever of being protected or indemnified by the society. Under these circumstances, therefore, it appears to me that the petitioner has made out his case; that the society have failed to make out any of their defences, and the order for winding-up goes *ex debito justitiæ*.

After some discussion as to costs, the Vice-Chancellor decided that the costs of the petitioners, the costs of the directors who represented the company, and one set of costs to the other respondents (except the official liquidator of the company), should be paid out of the estate. The costs of the official liquidator of the company to be paid out of the estate of the company.

The VICE-CHANCELLOR.—I forgot to notice that one of the clauses of the arrangement between the two companies points directly to the fact of the necessity of a new policy. There is a clause which provides that any of the policy holders coming in should be entitled to share in the profits of the Albert Company if they take a new policy from the Albert Company.

Solicitors: *Clayton* and *Sons*; *Maynard* and *Co.*; *Abrahams* and *Roffey*; *Wilde* and *Co.*; *Freshfields*; *Lewis*, *Munns*, and *Co.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Wednesday, Nov. 17.

REG. (on the prosecution of the Guardians of Richmond Union) *v.* THE GUARDIANS OF THE KINGSTON UNION.

Order of removal—Removability of wife and children—Husband an Irishman absent on service—9 & 10 Vict. c. 66, s. 1—11 & 12 Vict. c. 111.

Under sect. 1 of 9 & 10 Vict. c. 66 (as amended by 11 & 12 Vict. c. 111) the status of removability or irremovability of a married woman and her children depends upon the status of the husband.

Thus where a wife and her children had resided for upwards of five years or more in the parish of R., during which time her husband (an Irishman) was absent serving Her Majesty as a soldier, it was

Held, that the wife and children had not acquired a status

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of irremovability in the parish of K., under the above statutes.

CASE.

By an order of two justices of the peace for the county of Surrey, dated the 19th Nov. 1868, Ellen Douglas and her two children, Ernest James, aged two years, and Edward, aged eight months, were ordered to be removed from the Kingston Poor Law to the Richmond Union, in the said county of Surrey, as being the union in which they were last legally settled.

The said order of removal was duly served upon the appellants, accompanied with a notice of chargeability, and a statement of the grounds of removal, including the particulars of the settlement relied upon by the respondents in support thereof.

The grounds of removal were as follows:—

1. That the said Ellen Douglas and her said two children have come to inhabit, and are now inhabiting, in the said parish of Kingston-upon-Thames, in the county of Surrey, not having resided in any part of the said Kingston Union for one year next before the application for the said order of removal, and not having gained a legal settlement in the said Kingston Union, nor having produced any certificate acknowledging them to be settled elsewhere. And that they are now actually chargeable to and receiving relief from the common fund of the said Kingston Union, such relief not being rendered necessary by sickness or accident.

2. That the said Ellen Douglas is the wife of Charles Douglas, to whom she was married on or about the 1st Nov. 1863.

3. That the said Charles Douglas, who is a soldier, and absent from his wife, is an Irishman, and has never done any act whereby to gain a settlement for himself

4. That the said Ellen Douglas is the lawful daughter of Thomas and Elizabeth Gray, formerly of and legally settled in the said parish of Richmond, in said Richmond Poor Law Union, and was born in the said parish of Richmond.

The fifth and sixth grounds of removal showed a derivative settlement in Richmond parish by renting a tenement.

The appellants duly served notice and grounds of appeal against the said order, and the first of such grounds was as follows: That the said Ellen Douglas and her children have, in fact, resided in the said Kingston Union for more than one year next before the application for the said order of removal.

The said appellants did not in their said grounds of appeal traverse or deny the said respondents' second, third, fourth, fifth, and sixth grounds of removal, or any or either of them.

At the hearing of the appeal it was proved by the pauper Ellen Douglas that she was married to the said Charles Douglas, at Twickenham, in the county of Middlesex, on the 1st Nov. 1863; that he was then a bandsman in Her Majesty's 38th Regiment, that he left the said Ellen Douglas at Twickenham on the day following the marriage to join his regiment, which was under orders for India; that immediately afterwards he accompanied his regiment to India, that he never returned to her since, and that he had not been living with her in the respondent union; that she has heard from him twice, both occasions being very shortly after the marriage; that after her husband left her she resided at various places, but that she had resided in the respondent union for the last sixteen months.

Upon this evidence the question for the decision of the court of quarter sessions was, whether the said Ellen Douglas had acquired in the respondent union a status of irremovability.

The appellants relied upon the fact that the said Ellen Douglas had resided in the respondent union for the necessary period to constitute a status of irremovability, and contended that there was no evidence to negative the presumption of her having acquired such status.

On the part of the respondents it was contended that the allegations contained in the grounds of removal to the effect that the husband of the said Ellen Douglas was a soldier, and absent from his wife, such allegations not being put in issue by the grounds of appeal, sufficiently negatived the presumption of the said Ellen Douglas having acquired the status of irremovability by showing that she was not in a position to acquire it. It was contended further that the allegation in the grounds of removal, coupled with the evidence of the said Ellen Douglas, sufficiently proved that at the time when the order of removal was made, she was a married woman, and that her husband was absent from her, and was serving Her Majesty as a soldier.

The court of quarter sessions decided that the said Ellen Douglas had acquired a status of irremovability by her residence in the respondent union, there being no evidence that during the time of her residence in the said union the said Charles Douglas was within the exceptions of the 9 & 10 Vict. c. 66, s. 1, and allowed the appeal, subject to the opinion of the court of Queen's Bench on the following question, namely:

Whether there was any evidence before the court of quarter sessions that the status of irremovability was not acquired. If the court should answer the question in the affirmative, then the order of session is to be quashed, and the order of removal confirmed with costs, including the costs of the appeal to be certified by the clerk of the peace. But if the court should answer the question in the negative, then the order of sessions is to be confirmed with costs, including the costs of the appeal to be certified by the clerk of the peace.

Field, Q. C. and *Thesiger* in support of the order of removal.—The question is, whether the wife and children of an Irishman, while absent on Her Majesty's service, acquire a status of irremovability after a year's residence. That depends upon the construction to be placed on the proviso in sect. 1 of the 9 & 10 Vict. c. 66, as amended and explained by the 11 & 12 Vict. c. 111. By sect. 1 of 9 & 10 Vict. c. 66, persons who have resided for one year (as altered by 24 & 25 Vict. c. 55, s. 1) in the parish are irremovable, the proviso excludes from the computation of the time time passed in service as a soldier, &c.; and then comes a second proviso which, as explained by 11 and 12 Vict. c. 111, is only intended to operate where the husband has acquired a status of irremovability. Thus, in *Reg.* v. *East Stonehouse*, 3 E. & B. 596, a marine who was quartered in barracks, at the parish of S., for upwards of five years, in which parish his wife and children during that period resided, were held not to be irremovable. In *Reg.* v. *Mach Hoole*, 21 L. J. 1, M. C., an Irishman, who had gained no settlement in England, resided with his family in the respondent parish for more than five years, when the husband deserted them, the wife and children afterwards becoming chargeable, were held properly removable from the respondent parish, Wightman, J. said: "If the husband himself were here he would be removable, and therefore the wife and children are removable." The judgment of Coleridge, J., in *Reg.* v. *St. Ebbe's*, 12 Q. B. 142, is to the same effect.

Edward Clarke in support of the order of sessions.—The real question is, whether, upon the evidence, the presumption is not that the husband is dead, the wife, therefore, would be a person irremovable within the meaning of the enacting part of sect. 1 of 9 & 10 Vict. c. 66.

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COCKBURN, C. J.—I am of opinion that in this case Ellen Douglas was properly removable to the appellant parish, and I come to that conclusion both upon reading sect. 1 of 9 & 10 Vict. c. 66, as amended by the subsequent Act of Parliament (11 & 12 Vict. c. 111), and also upon the authority of the cases cited in the course of the argument. The case of *Reg.* v. *East Stonehouse* is directly in point.

BLACKBURN, J.—I am of the same opinion. The question put to us by the quarter sessions is, whether there was any evidence before them that the status of irremovability was not acquired. The evidence is that the woman Ellen Douglas had married a soldier, who went the next day to join his regiment in India, and is still there. Did this absence of her husband, then, prevent Ellen Douglas from acquiring a status of irremovability? That depends upon the construction to be placed on the statutes 9 & 10 Vict. c. 66, s. 1, and the 11 & 12 Vict. c. 111. [His Lordship read the sections.] Though this proviso is very inartificially framed, I think the plain meaning of it is that the status of any member of the family shall depend on the status of the head of the family, namely, the husband. If the head of the family would be removable, then the wife and children are also; if the head of the family has acquired a status of irremovability, then I think that the wife and children cannot be removed.

MELLOR and HANNEN, JJ. concurred.

Order of sessions quashed.

Saturday, Nov. 27.

REG. v. THE JUSTICES OF THE WEST RIDING OF YORKSHIRE.

Licensing—Notice of intention to apply for certificate—When notice must be given—Adjourned general annual licensing meeting—"Before he applies"—32 & 33 Vict. c. 27, s. 7.

The notice of intention to apply for a licensing certificate under 32 & 33 Vict. c. 27, which sect. 7 of that Act requires to be given by the applicant "twenty-one days at least before he applies," may be given twenty-one days before an adjourned general annual licensing meeting, where the application for a certificate is made at such adjourned meeting, and need not be given twenty-one days before the general annual licensing meeting.

In this case *Hannay* had obtained a rule calling on the justices of the West Riding of Yorkshire to show cause why a *mandamus* should not issue to compel them to enter continuances upon the appeal of Thomas Drake, against a decision of the justices at an adjourned general licensing meeting held on the 17th Sept. 1869 for the borough of Halifax, refusing the application of the said Thos. Drake for a certificate under the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27).

The facts as they were set forth on the affidavits were as follow. The general annual licensing meeting for the borough of Halifax was held by the justices on the 20th Aug. 1869. On the 22nd July previously a person named Boocock, the occupier of a house called the Nag's Head, gave a regular notice of his intention to apply for a certificate in respect of the house occupied by him. He applied on the 20th Aug., and application was refused by the justices, on the ground that five years previously he had been guilty of some offence against the Beerhouse Act. The present applicant, Thos. Drake, a few days afterwards, became the occupier of the Nag's Head, and on the 25th Aug. 1869 gave notice of his intention to apply for a certificate in respect of that house at the adjourned general annual meeting which was to take place on the 17th Sept. 1869, by adjournment from that held on the 20th Aug. Drake served a copy of the notice twenty-one days before the 17th Sept. upon the overseers and constable, and a copy of the notice was affixed to the door of the church and of the house, in accordance with the provisions of sect. 7 of 32 & 33 Vict. c. 27. Drake applied for a certificate at the adjourned general annual licensing meeting on the 17th Sept., but the justices refused his application. He then appealed to the quarter sessions, but the quarter sessions refused to entertain his appeal on the same ground as that on which the justices had refused to grant the certificates, viz., that he should have given notice of his intention to apply twenty-one days before the general annual licensing meeting of the 20th Aug., and that a notice given twenty-one days before the adjourned general annual licensing meeting held on the 17th Sept. was insufficient.

Sect. 5 of 32 & 33 Vict. c. 27 enacts that—

Certificates under this Act shall be granted by the justices assembled at the general annual licensing meeting, held in pursuance of an Act of the session of the ninth year of the reign of King George the Fourth, c. 61, intituled "An Act to regulate the granting of Licences to Keepers of Inns, Alehouses, and Victualling Houses in England," or at some adjournment of such meeting, held in pursuance of the said last-mentioned Act; provided that certificates for licences under the said Acts of the twenty-third year of the reign of Her present Majesty, of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, and of the twenty-sixth and twenty-seventh years of Her present Majesty, may be granted by justices of the special sessions for transferring licences.

Sect. 7 enacts that—

Every person intending to apply to the justices for a certificate under the Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish, township, or place in which the house or shop in respect of which his application is to be made is situate, and to some constable or peace officer acting within such parish, township, or place, and shall in such notice set forth his name and address, and a description of the licence or licences for which he intends to apply, and of the situation of the house or shop in respect of which the application is to be made; and in the case of a house or shop not theretofore licensed for the sale by retail of beer, cider, or wine, such person shall also within the space of twenty-eight days before such application is made cause a like notice to be affixed and maintained between the hours of ten in the morning and five in the afternoon of two consecutive Sundays on the door of such house or shop, and on the principal door, or on one of the doors of the church or chapel of the parish or place in which such house or shop is situate, or, if there be no such church or chapel on some other public and conspicuous place within such parish or place. Where application is made to the justices for the grant of a certificate under this Act by way of renewal only, notice in pursuance of this section shall not be requisite.

Waddy showed cause against the rule, and contended that the notice, to be good, should have been given twenty-one days before the general annual licensing meeting of the 20th Aug. 1869. The original Act, 9 Geo. 4 c. 61, by sect. 1, requires the general annual licensing meeting to be held "in the counties of Middlesex and Surrey within the first ten days of the month of March, and in every other county on some day between the 20th Aug. and the 14th Sept., inclusive," and sect. 10 required the notice to be affixed on three several Sundays, "between the first day of January and the last day of February in the counties of Middlesex and Surrey, and elsewhere between the first day of June and the last day of July," and the notice to be served on the overseers and constable within the same period. Under that enactment the notice given by the appellant would be bad, and the present Act contains substantially the same provision. —[BLACKBURN, J.—We cannot incorporate the provisions of the Alehouse Act in the present Act.] It is submitted that the same time is intended by both

Acts. Sect. 5 of the present Act speaks of one general annual licensing meeting, which may be held on subsequent days to which it is adjourned; but all sittings are, in contemplation of law, only one day, and, therefore, twenty-one days' notice must be given before the first meeting. [LUSH, J., referred to sect. 3 of 9 Geo. 4, c. 61, which enacts "that it shall be lawful for the justices acting at the general annual licensing meeting, and they are hereby required to continue such meeting by adjournment to such day or days, and to such place or places within the division or place for which such meeting shall be holden, as such justices may deem most convenient and sufficient for enabling persons keeping inns within such division or place to apply for such licence," in which nothing is said about giving notice, and to sect. 5, which requires notices to be given of the day, hour, and place for holding every adjourned meeting.] The 3rd section of 9 Geo. 4, c. 61, gives power of adjourning "such meeting;" everything dates from the first day of meeting, and the appellant's notice was therefore, in contemplation of law, given five days after the meeting to which he applied for a licence. Further, an application had been made at the meeting held on the 20th Aug., in respect of the same house, and the justices adjudicated upon it.

Hannay in support of the rule.—The general annual licensing meeting is no doubt only one meeting, but it is held on different days, and is regarded by the Act as a meeting held on different days. Sect. 7 of 32 & 33 Vict. c. 27 only requires an applicant to give twenty-one days' notice "before he applies." If, therefore, he applies at an adjourned meeting he may give his notice twenty-one days before the date of such adjourned meeting, and it will be good. The language of the present Act is markedly different from that of 9 Geo. 4, c. 61. That the meeting, though one, is not regarded as held on one day only, is shown by sect. 5 of the present Act, which provides that certificates shall be granted by the justices at the general annual licensing meeting, held in pursuance of 9 Geo. 4, c. 61, "or at some adjournment of such meeting," the latter words being superfluous, on the supposition that all was regarded as one day. Before the present Act the appellant need not have given any notice, and the only duty cast on him by the Act is to give twenty-one days' notice "before he applies," which he has done. As to the ground on which the former occupier was refused a licence in respect of this house, it was not for anything which took place in this house, but in another house, and the disqualification was therefore a purely personal one, and not one affecting the house in respect of which the appellant applies.

BLACKBURN, J.—I think that in this case the rule should be made absolute, and that the quarter sessions should hear the appeal. The original Licensing Act (9 Geo. 4, c. 61) is incorporated with the present one (a mode of legislation which frequently operates to make persons say what they do not mean), and provides that there shall be a meeting held by the justices on some day between the 20th Aug. and the 14th Sept. Then comes the 3rd section, which is the one on the effect of which this case depends in my mind, and which enacts that "it shall be lawful for the justices acting at the general annual licensing meeting, and they are hereby required to continue such meeting by adjournment to such day or days, and to such place or places within the division or place for which such meeting shall be holden, as such justices may deem most convenient and sufficient for enabling persons keeping inns within such division or place to apply for such licence." Now I am inclined to construe that with a view to what, practically, may well happen, viz., justices sitting for a division many miles in extent. It would be very inconvenient that justices of a great county, say Northumberland, should drag the innkeeper from near Newcastle to near Berwick; and consequently the Act says that the justices shall hold adjourned meetings at such places as they "deem most convenient and sufficient for enabling persons keeping inns within such division or place to apply for such licence." This seems to me to show that it was intended not to make it necessary for innkeepers at either end of counties to come to the first meeting, and ask for licences, but to permit them to wait until the adjourned meetings were held, and the places at which they may apply, are more convenient. Construed in that way, it seems plain that the application may be made at an adjourned meeting. Then we have the new statute, 32 & 33 Vict. c. 27, which given directions as to the notice thus (sect. 7): "Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish, township, or place in which the house or shop in respect of which his application is to be made is situate, and to some constable or peace officer acting within such parish, township, or place. . . ." There I agree with Mr. Hannay, who argues that if the Legislature had meant to say "twenty-one days before the general licensing meeting is held," it would have been so expressed. But if I am right in construing the former Act it is not necessary to make the application at that meeting, but at the adjourned meeting; then, if that be so, notice must be given twenty-one days before the adjourned meeting, and it seems to me no hardship or inconvenience can arise from this construction, nor will it in any way defeat the purpose of the Act. Then it will follow that the notice of application in the present case was in time, and all we have to say is, that the quarter sessions shall hear the appeal. They may dismiss it on the merits hereafter. The other objection is, that the former applicant having been refused a certificate at the general meeting this was *res judicata*; but the complaint was personal to that applicant, and does not affect this applicant at all, and the matter must be considered no longer *res judicata*, but the quarter sessions will hear on the merits and decide as may be.

MELLOR, J.—I am of the same opinion. When I find that the 32 & 33 Vict. c. 27, in its fifth section, referring to licensing meetings to be held under the 9 Geo. 4, c. 61, says that "certificates shall be granted at those meetings, or at some adjournment" thereof, and when I consider the reasons of the adjournment, I cannot help seeing that it is not an ordinary adjournment of quarter sessions that is contemplated, which only operates on the business then before the court, but that it is intended that original applications shall be made at such adjourned meetings. Therefore, Mr. Hannay brings his client within the terms of this section; he has given twenty-one days' notice before making his application; that seems the only condition imposed by the Legislature, and I entirely agree with my brother Blackburn that there is nothing to prevent an applicant making his application at the adjourned meeting, provided the twenty-one days' notice be given previously. I think the rule should be made absolute.

LUSH, J.—I quite concur, and will only add with regard to the second point that if the magistrates' decision had turned on the unfitness of the character of the applicant or of the house, I should have

thought they could not be required to adjudicate again. But their decision was not on that ground. This is analogous to an application to transfer a licence. If the holder of a licence wishes to transfer it to A. B., the magistrates exercise a discretion as to whether they will license the holder of that house.

Attorneys for prosecution, *Bower* and *Cotton.*

Attorneys for defendants, *Edward, Layton,* and *Jaques.*

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

REGISTRATION APPEAL.

Wednesday, Nov. 17.

SMITH (app.) *v.* LANCASTER (resp.)

Tenant of chambers in the Temple—Part of chambers in occupation of under-tenants—Occupier of a house,—The Reform Act (2 *Will.* 4, *c.* 45), *s.* 27.

The appellant held as tenant an entire set of chambers consisting of three rooms not communicating together, and a vestibule into which the rooms respectively opened, in the Temple, under a demise from the benchers. The appellant occupied and used one of these rooms for the purposes of his profession, which was that of a barrister, and demised the other two rooms, unfurnished, each to another barrister respectively. By the lease or agreement between the appellant and each of these under-tenants, the appellant agreed to let the room at the rent of 30*l.*, *the rent to include attendance of clerk and laundress, rates, taxes, and coals; there were no poor rates, but the appellant paid all other rates and taxes; no one resided in any part of the chambers:*

Held, that the appellant was the occupier of a house within the meaning of the 27*th section of the Reform Act* 1832, *and was entitled to a vote for the City of London.*

At a court for the revision of voters for the City of London, before the barrister duly appointed to revise the lists of voters for the said city, Christopher Lancaster, of 28, Union-street, Little Moorfields, Cripplegate, on the list of voters for the parish of Saint Giles Without, Cripplegate, duly objected to the names comprised in the schedule hereto of the persons who are hereinafter called the said voters, being retained or inserted as the case might be on the list of persons entitled to vote for the election of members for the city of London in respect of the occupation of chambers; when the barrister decided that the said voters were not entitled to have their names retained or inserted as the case might be in such list.

The said voters having respectively given due notice of their intention to appeal from such decision, and it appearing that the validity of the objections as to the said voters being so retained as aforesaid, depended on a like state of facts, *mutatis mutandis*, and the same points of law, the barrister declared that the appeals against such decisions ought to be consolidated, and George James Philip Smith, of 55, Gloucester-place, Hyde-park, barrister-at-law, being one of the persons interested, and consenting for or on behalf of himself and all other persons in like manner interested in such appeals, to be the appellant, and to prosecute the said appeal, he named the said George James Philip Smith to be the appellant in such consolidated appeal, and the said Christopher Lancaster to be the respondent.

Whereupon the barrister stated the following case for the opinion of Her Majesty's Court of Common Pleas at Westminster:

-ge James Philip Smith, hereinafter called the appellant, was on the list of voters for the Inner Temple, in respect of his occupation of chambers, at No. 1, King's Bench Walk, in the Inner Temple.

The appellant held, as tenant, an entire set of chambers, at No. 1, King's Bench Walk aforesaid, so structurally severed from the rest of the building as to be of themselves a house, under a demise from the Benchers of the Inner Temple, the owners thereof, at a yearly rent of 70*l.* These chambers consisted of three distinct rooms, not communicating together, and a vestibule, into which the rooms respectively opened. One of these rooms was occupied by the appellant and used by him in transacting the business that came to him in the exercise of his profession as a barrister.

The appellant demised each of the other two rooms to two persons respectively.

The following is a copy of the lease or agreement for lease entered into by the appellant with one of his tenants:

1, King's Bench Walk, 15th Dec. 1867.

Mr. G. J. P. Smith agrees to let, and Mr. Lister agrees to take, the north back room of these chambers, from the 29th Oct. last, at the rent of 30*l.*, payable quarterly on the 29th Jan., the 29th April, the 29th June, and the 29th Oct. in each year, the rent to include attendance of clerk, laundress, rates, taxes, and coals; the tenancy determinable at any time by either party giving one quarter's notice.

The other agreement was, *mutatis mutandis*, similar to the above agreement.

The two tenants entered under the said agreement into the occupation and possession of the several rooms so let to them as aforesaid, and used them in transacting the business that came to them in the exercise of their profession as barristers. They had the services of the clerk and laundress who were engaged by the appellant, and were supplied with coals, according to the terms of the agreement.

There are no rates for the relief of the poor in the Inner Temple; but all other rates and taxes were paid by the appellant. No one resided in any part of the said chambers. Both of the rooms so demised as aforesaid were let unfurnished.

The appellant and each of his two tenants had a key to the outer door.

It was not the practice to lock the doors of the rooms, but it was admitted that the tenants had the right to do so at all times.

All other requisites for entitling the appellant to be retained on the list of voters in respect of the above qualification were duly proved.

The appellant claiming to be retained on the list in respect of his occupation as tenant of the entire set of chambers, it was objected that having regard to the above facts the appellant ought to be struck off the list on the ground that, by virtue of the aforesaid demises to his under-tenants, the landlord the appellant had divested himself of all right of occupation of the parts demised, and thereby the tenants had acquired an independent occupation of the parts demised to the exclusion of the appellant.

On the appellant's part it was argued that, notwithstanding the said demise he retained such an occupation of the entire set of chambers as to make him a tenant occupying a house within the meaning of the Act to amend the representation of the people in England and Wales, passed in the second year of the reign of his late Majesty King William IV.

The barrister decided that the objection was good, holding that at law, in the absence of any express reservation to the appellant of some control over or occupation of the parts demised, the sub-tenants, under or by virtue of the aforesaid agreement, acquired an independent occupation, and to the exclusion of the appellant, of their holdings; and that it could not be inferred at law, having regard to the facts hereinbefore stated, and more particularly to the fact that the appellant did not

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reside, that he retained any occupation of the parts so demised as aforesaid. And the revising barrister accordingly struck off or refused to insert on the register of voters the names of the said voters.

The question upon which the judgment of Her Majesty's Court of Common Pleas is requested is whether the occupation of the appellant of the said chambers was sufficient to entitle him to have his name retained on the register of voters for the city of London.

Prentice, Q. C. for the appellant.—In the case of *Cuthbertson* v. *Butterworth*, argued last year (L. Rep. 4 C. P. 523; 21 L. T. Rep. N. S. 140), it was decided that the tenant of one room, holding under a person in the same position as the appellant here, had no right to a vote; in this case the revising barrister has gone further, and disfranchised the immediate tenant of the society. Bovill, C. J., in his judgment last year, said: "The cases have decided that, where the subject of occupation is structurally severed from the rest of the premises, and substantially used as a separate dwelling, or as a shop, counting-house, or warehouse, the occupier may be registered." The appellant here has the constructive occupation of the whole set of chambers, which constitutes a house within the meaning of the Act of 1832. [BRETT, J.—If this be not an occupation of a house under the 27th section, why should not the appellant be a joint occupier under the 29th section?] It is sufficient for me to rely on the 27th section, and the matter of residence is of no consequence. There is a case in the Queen's Bench, in which, upon an agreement very like this, it was held that a person, although letting some rooms in a house, was the beneficial occupier of the house, so as to be liable for poor rates: (*Reg. on the prosecution of the Overseers of St. Michael, Cambridge*, v. *Henry Smith*, L. J. 30, M. C. 74.) Hill, J., in delivering the judgment of the court, said: "We think that we must look, not so much to the words as to the substance of the agreement; and taking the whole together, we think it must be construed, not as a demise of the five rooms, but as an agreement, by which the appellant, retaining possession of these rooms and keeping his servant there, bound himself to supply the other party there with fire and gas, and attendance. It is true that the exclusive enjoyment of the rooms is to be given; but that is the case where a guest in an inn, or a lodger in a house, has a separate apartment, or when a passenger in a ship has a separate cabin, in which case it is clear that the possession remains in the innkeeper, lodging-house keeper, or shipowner." So in *Wansey* v. *Perkins*, 8 Scott N. R. 978, where a landlord resided in the house, and a claimant had exclusive occupation of a floor, with a key to the outer door, Tindal, C. J. said: "In this case the landlord remains the occupier of the house." [Stopped by the court.]

F. M. White for the respondent.—I contend that the appellant has failed to make out his right to the franchise upon the facts stated in the case. The premises which he occupies exclusively are only a part of a house. Under the 27th section it is necessary to have the exclusive occupation of a whole house, whilst the necessary inference from these facts is that he has the exclusive occupation only of his own room; he may perhaps be a householder under 11 Geo. 1, c. 13, as decided by Lord Hardwicke in *Fludier* v. *Sir Thos. Lombe*, Lee's Cas. 307; but he cannot be an occupier under this section. He is in the same position as the other occupiers of the chambers. [BRETT, J.—The servants are his, and he has the management of the chambers.] In *Cook* v. *Humber*, 11 C. B., N. S., 33, Erle, C.J. lays down the principle that the subject of occupation, not the kind of occupation, is the test for forming a judgment upon such a point as this; the appellant cannot here be said to be the exclusive occupier of a whole house, for he is found to have excluded himself from the occupation of part of the house. In the case of *R.* v. *The Inhabitants of St. Nicholas, Colchester*, 2 A. & E. 599, it was held that if a person hiring a tenement underlet any part of it, he has not the actual occupation of the tenement within the terms of stat. 1 Will. 4, c. 18, s. 1 if there be any exclusive occupation given by such underletting. The fact that the tenants in this special case had a right to lock their rooms is sufficient to show that the appellant had divested himself of the occupation of those rooms.

BOVILL, C. J.—It is clear that the set of chambers rented by the appellant constituted a house structurally divided within the meaning of the 27th section of the Reform Act 1832; and it is clear that if he kept the whole set of chambers to himself, he would be the occupier within the meaning of that statute. The only question for us now is whether he ceased to be an occupier by letting two of his rooms. It was held by this court last year, in the case of *Cuthbertson* v. *Butterworth*, that neither of those tenants could be occupiers of a tenement within this 27th section. The case of *Fludier* v. *Sir Thomas Lombe*, Lee's Cases, temp. Lord Hardwicke, 307, shows that persons who are mere lodgers are not joint occupiers, nor do they prevent the landlord from being in the occupation of his house. The question arises, would the appellant be an occupier for the purposes of poor rates? Upon the authority of *Reg.* v. *Smith*, 30 L. J. 74, M. C., I am of opinion he would be. And it seems to me that he is also an occupier for the purpose of the franchise. The fact of letting out a portion of a house has never been considered to deprive a person who has the management of the sole occupation; and there is no pretence here that the other persons using these chambers were joint occupiers. The case of *Reg.* v. *St. Nicholas, Colchester*, was cited by Mr. White. That case was decided upon the authority of previous decisions, but the reasons for the conclusions were based upon the peculiar language of a particular Act of Parliament, and the circumstances of the actual occupation in that case. Although the court arrived at a decision adverse to the claim of occupation, they referred with approbation to the contention concerning an occupier under different circumstances; that case is, I think, no authority in favour of the respondent's argument here. Consistently with all the decisions, the appellant was the occupier of these premises within the meaning of the 27th section of the Act of 1832, and is entitled to the franchise.

WILLES, J.—I am of the same opinion. If it were necessary to find special reasons for our judgment, it might be said to be obvious from the business of all the people concerned in this case that, upon an agreement of this kind, the appellant can use the premises as he thinks proper; this document in its practical effect would resemble a licence rather than a lease, so that in popular estimation, as well as in law, the two tenants could not interfere with the sole occupation of the appellant. But the special circumstances are not necessary as a ground for this judgment, because I am of opinion that the letting out a portion of a house does not prevent the occupier of the rest of the house from having a vote, provided that he reserves the mastership of the house and the control of the outer door. The appellant has been found to have retained the general control of his chambers, and I cannot share in the doubts of the revising barrister.

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KEATING and BRETT, JJ. concurred.

Judgment for appellant.

Attorneys for appellant, *Harper, Broad,* and *Manby.*

Attorneys for respondent, *Travers Smith* and *De Gex.*

Tuesday, Nov. 30.

REG. *v.* THE GUARDIANS OF THE BIGGLESWADE UNION.

*Poor rate—Appeal—Next quarter sessions—Prohibition—*17 *Geo.* 2, *c.* 38, *s.* 4—27 & 28 *Vict.*, *c.* 39, *s.* 1.

A poor rate was made for the parish of A. in the county of B., and published on May 30. *On the* 11*th of June L. gave notice of objection to the union assessment committee. The committee at its next meeting on the* 30*th of June refused to grant him relief. The Midsummer Quarter Sessions for the county of B. were held on the same day. L. appealed to the Michaelmas Sessions, and the justices allowed the appeal to be entered.*

Held, on a motion for a writ of prohibition against L. and the justices of B. to stay all further proceedings in connection with the appeal, that L. could not be said to have failed to obtain relief from the union assessment committee until June 30, *when the committee heard his case, and refused to allow his objections.*

Held also, that L. would not have been right in giving notice of appeal to the sessions until he had so failed before the union assessment committee.

Held also, that as L. was, under the circumstances, prevented by the provisions of the Union Assessment Committee Act Amendment Act 1864 (27 *&* 28 *Vict.* c. 39) *from appealing to the Midsummer Sessions, it was not too late for him to appeal to the Michaelmas Sessions.*

A poor rate made for the parish of Arlsey, in the county of Bedford, was published on Sunday, May 30, 1869.

On June 11 next, one Lawes gave notice of objection to the union assessment committee. The committee did not hold a meeting from the 30th May until June 30. At this meeting Lawes's case was gone into, but he failed to obtain any relief.

The Midsummer Quarter Sessions for the county of Bedfordshire were also held on the 30th June.

Lawes lived about twenty-five miles from the place where the sessions were held.

At the succeeding Michaelmas Quarter Sessions, Lawes appealed against the rate. It was objected, on behalf of the union assessment committee, that the appellant ought to have appealed to the Midsummer Sessions, these being the next sessions after the publication of the rate; and that, as he had not done so, the sessions ought not to entertain the appeal. The court, however, decided that it was not too late for Lawes to appeal, and accordingly the appeal was then entered and respited.

A rule was granted, on the motion of the respondents, calling on the appellant and the justices of Bedfordshire to show cause why a writ of prohibition should not issue to stay all further proceedings in the matter of the appeal. Against this rule

A. Wills showed cause.—The appellant only took twelve or thirteen days to consider whether he should object to the rate or not. That was a reasonable time. The court of quarter sessions has held it to be reasonable. If he had given notice to the assessment committee earlier, the result would have been the same, and the committee would not have heard his objections any sooner. The Act 12 & 13 Vict., cap. 45, s. 1, requires that fourteen days' clear notice shall be given before appealing to the sessions. It would be absurd to hold that Lawes ought to have given such notice of appeal before his application was rejected by the assessment committee. Then again, by the Union Assessment Committee Act Amendment Act 1864 (27 & 28 Vict., c. 39), s. 1, a person aggrieved is forbidden to appeal to the quarter sessions until he shall have given notice of objection to the assessment committee, and have "failed to have obtained such relief in the matter as he shall deem just." But how can he be said to have failed until he has been decided against? The words in the 17 Geo. 2, c. 38, s. 4, mean the next sessions that, under the circumstances, are reasonably practicable. The court of quarter sessions is the proper tribunal to decide which are the next sessions that are reasonably practicable. That court has taken all the circumstances of the case into consideration, and has decided that the Michaelmas Sessions were the next practicable sessions.

Graham in support of the rule. The Acts relating to the union assessment committee do not affect the time of appealing to the quarter sessions. That time is fixed by the 17 Geo. 2, c. 38, s. 4, as the next sessions. Under the old law then this appeal would have been too late. The Acts relating to the union assessment committee do not expressly extend the time for appealing to the sessions, and the time for appealing cannot be extended by implication. On the latest day for the appellant to have given notice of his intention to appeal to the sessions, he may have been said to have "failed to obtain relief" from the assessment committee, so as to entitle him to appeal to the sessions. If the committee has not met, then he has failed to obtain relief from it. He cited

R. v. *Coode*, Cald. 464; 1 Bott. 276;
R. v. *Worcestershire* (*Justices*) 5 M. & Selw. 457.

BOVILL, C. J.—It has been plausibly argued in support of this rule that the appellant was bound to lodge his appeal against this rate at the next practicable sessions, independently altogether of the provisions of the Union Assessment Acts; and it is contended that he ought to have appealed to the next sessions, even although he would have had to go there before the assessment committee had pronounced any decision on his objections. But I think that, if we were to hold this law, we should act altogether in defiance of the Union Assessment Act. That Act says that "no person shall be empowered to appeal to any sessions against a poor rate, unless he shall have given notice of objection to the union assessment committee, and shall have failed to obtain such relief as he shall deem just." It seems to me that this is an express Parliamentary enactment, and prevents a party from appealing to the sessions until he has failed to obtain relief from the union assessment committee. That failure must be, not by reason of the committee not happening to sit, but on its refusal, after hearing, to grant the relief claimed. It is idle to say that this provision was intended to prevent parties from appealing to the sessions. It is true that 17 Geo. 2, c. 38, says that a person aggrieved must appeal to the next sessions, which has been held to mean the next practicable sessions. But if a subsequent statute interposes an intermediate step before the appeal can be made, the first Act must be construed with reference to the second. It is just as though the first statute had said that a party should have a fortnight for appealing, and the second statute had said that he should have a month. The notice to the assessment committee was given on the 11th June, the rate having

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been published on May 30. The committee held its first meeting on the 30th of June, the same day as the Midsummer Sessions were held. At Michaelmas the court of quarter sessions held that, under the circumstances, the Michaelmas Sessions must be considered the next practicable sessions; and now the parties come here with dates to ask us to reverse this finding. It is difficult to ask us to say that the appellant in this case took more than a reasonable time before taking any step. We have no grounds given us for arriving at such a conclusion, even if we had power to enter into the question. On these grounds I think that this rule ought to be discharged with costs.

KEATING, J.—Mr. Graham shapes his argument in two ways. First he says that the Union Assessment Acts do not affect the time for appealing to the sessions. But it seems to me difficult to think of words that could more clearly prohibit a man from appealing to the sessions until he has been to the assessment committee. Next he says, that if the committee does not assemble in sufficient time after the publication of the rate, and notice of objection given by the person aggrieved, the person aggrieved may be said to have failed to obtain relief within the meaning of the Act. But I think that this is a very wrong construction of the Act. On these grounds I also am of opinion that this rule must be discharged with costs.

M. SMITH, J.—I am of the same opinion. The Union Assessment Committee Act of 1862 has interposed a kind of intermediate appeal, which, if it gives relief, renders it unnecessary to go to the sessions. In order to prevent parties from going to the sessions until they have failed to get relief from the assessment committee, the Act uses strong prohibitory terms. It is argued that the committee may not meet for some time. We, however, cannot assume that the committee will fail in its duty. If it does not meet within a reasonable time, means may be taken to compel the members to meet, for the Act says that, after such notice, "the committee *shall* hear," &c. It is, therefore, their duty to fix a reasonable time for meeting after receipt of the notice of objection. Mr. Graham says that the proper course for the present applicant to have taken was to give notice of appeal to the sessions, just as though the Union Assessment Committee Acts had interposed no intermediate step, and then to go to the next (*i.e.*, the Midsummer) sessions, and enter the appeal. But I think that that would have been in direct contravention of the Union Assessment Committee Act. An these grounds, I think that this rule ought to be discharged.

Rule discharged with costs.

Attorneys for the appellant, *Church* and *Sons*; for *Thurnell* and *Nash*, Royston.

Attorneys for the respondents, *Iliffs* and *Co.*; for *Hooper* and *Raynes*, Biggleswade.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Nov. 10 *and* 15.

GEORGE AND WIFE v. SKIVINGTON.

Sale to husband for use by the wife of an article compounded by the vendor—Injury to wife from use of article—Action by husband and wife in consequence—Tort to wife arising out of contract with husband—Duty of seller—Warranty—Negligence—Scienter—Pleading.

In an action by J. G. and E. his wife, the declaration alleged that the defendant was a chemist, and professed to sell a chemical compound made of ingredients known only to himself, and which he represented to be fit and proper to be used for washing the hair, and which might be so used without personal injury to the person using it, and to have been carefully, skilfully, and properly compounded by him, and that thereupon the plaintiff J. G. bought of the defendant a bottle of the said compound to be used by the plaintiff E. (the wife), for washing her hair, as the defendant then knew, and on the terms that it was fit and proper to be so used, and could be safely so used by her without personal injury, and had been skilfully, &c. compounded by the defendant. It then alleged that the defendant so unskilfully and negligently conducted himself in and about making and selling the said compound that, through the unskilfulness, negligence, and improper conduct of the defendant in that behalf, the said compound was not fit or proper to be so used, by reason whereof the plaintiff E. (the wife), was injured, and her hair destroyed by using the said compound.

Held, on demurrer, by the Court of Exchequer (Kelly, C.B., and Channell, Pigott, and Cleasby, BB.), that inasmuch as there was a duty on the part of the defendant, as the compounder and seller of the hair wash, towards the wife, for whose use he knew it was purchased by the husband, to use due and reasonable skill and care in compounding and selling it, and damage had arisen to her, not remotely, but directly, by reason of a breach of that duty on the defendant's part, the action was maintainable by the plaintiffs jointly.

Langridge *v.* Levy, 2 *M. & W.* 519; 6 *L. J., N. S.*, 137, *Ex.*; *and* Longmeid and Wife *v.* Holliday, 6 *Ex.* 761; 20 *L. J., N. S.*, 430, *Ex.*, *discussed, and the latter distinguished.*

This was an action by the plaintiffs, Joseph George and Emma his wife, against the defendant, a chemist, to recover damages in compensation for injuries received by the wife from the use of a hair wash, purchased by them of him for the expressed purpose of being used by the wife, and which proved on trial to be deleterious in its effects upon the head and hair, whereby she received injuries. By the first count of their declaration the plaintiffs charged that the defendant carried on the trade and business of a chemist, and in the course of such business professed to sell a chemical compound made of certain ingredients, *known only to the defendant*, and which he professed and represented to be fit and proper to be used for washing the hair, and which could and might be so used without personal injury to the person using the same, and to have been carefully and skilfully and properly compounded by him the defendant. And thereupon the plaintiffs, so being husband and wife, bought of the defendant, and the defendant sold to them, at and for a certain price then paid by them to the defendant, a bottle of the said compound to be used by the plaintiff Emma, then and still being the wife of the said Joseph George, for washing her hair, as the defendant then knew, and on the terms that the same then was fit and proper to be so used, and could be safely used by her by the purpose aforesaid without personal injury to her, and that it had been skilfully, carefully, and properly compounded by the defendant; yet the defendant had so unskilfully, negligently, and improperly conducted himself in and about the making and selling the said compound, that by and through the mere unskilfulness, carelessness, negligence, and wrongful and improper conduct of the defendant in that behalf, the said compound was not fit or proper to be used for washing the hair, nor could it be so used without personal injury to the person using the same, by reason of which premises, and of the mere unskilfulness, carelessness, negligence, and wrongful and improper conduct of the defendant in that behalf, the plaintiff

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Emma, then and still being the wife of the plaintiff Joseph George, who used the said compound for washing her hair, pursuant to and according to the terms upon and for which the same was so sold by the defendant, was, by so using the same, injured in health, and suffered pain and inconvenience from so using the same, and her hair was destroyed and injured, and she was and is otherwise injured.

The defendant demurred to this count of the declaration, on the ground that it failed to show any neglect of duty by the defendant in respect of the plaintiff Emma.

Joinder in demurrer by the plaintiffs.

The points for argument on the part of the defendant were—first, that the first count fails to show any breach of duty committed by the defendant in respect of the plaintiff Emma; secondly, that the count is defective for failing to show that the defendant knew of the deleterious nature of the compound; thirdly, that the contract stated in the first count of the declaration is one for a breach of duty, for which the husband alone could sue; fourthly, that a contract of sale cannot legally take place to a husband and wife jointly.

The following were the points for argument on the part of the plaintiffs—first, that a husband and wife may sue on a contract touching the person of the wife, as on a contract to carry the wife's person, or for medical treatment, and the contract declared on is of this class; secondly, the purchase of the hair wash as properly prepared for application, related to the original preparation and raised the same duty of the defendant towards the plaintiffs as if they had employed him to prepare it for such purpose.

Lord, for the defendant, in support of the demurrer to the declaration, argued that the first point was, whether or not there was any duty on the defendant, *independently of contract;* and he contended that the first count showed no duty on the part of the defendants towards the wife, independently of the contract, and that she need not have been joined. The allegation in the count was a contract of sale to the plaintiff and his wife. There was no duty here as in the case of a medical man. A common ordinary tradesman does not hold himself out to be skilful. The husband may sue alone for any injury done to his wife, but they cannot jointly sue as on a duty in the defendant unless it is shown that the defendant *knew* that the article was not what it purported to be. Independently of contract, there was here no misfeasance towards the wife. It is essential that deceit on the defendant's part should be alleged and proved, *e. g.*, that he had knowledge of the unfitness for use of the article compounded. [CLEASBY, B. refers to *Langridge* v. *Levy*, 2 M. & W. 519; 6 L. J., N. S., 137, Ex.] In that case knowledge was alleged and proved, and judgment was given for the plaintiff there on that very ground, the defendant being held liable for the injury caused to the plaintiff, the son, by the bursting of the gun, upon the express and sole ground that he knew its dangerous condition when he sold it to the plaintiff's father for the use of the plaintiff. But here there is no allegation of knowledge on the defendant's part of the injurious properties of this hairwash. How then can he be held liable for damage received by its use by a third person, a stranger to the contract? So in *Longmeid and Wife* v. *Holliday* (also in this court), 6 Ex. 761; 20 L. J., N. S., 430, Ex., it was held that a tradesman, who contracts with an individual for the sale to him of an article to be used for a particular purpose by a third person, was not, *in the absence of fraud*, liable for injury caused to such person by some defect in the construction of the article. There is no principle of law that a tradesman has a duty to a purchaser independently of contract. No doubt, as a chemist, the defendant might be liable for carelessness in putting up a prescription; but as a chemist he is not responsible for a hairwash sold over the counter in the ordinary way. [PIGOTT, B.—He professes to make this wash from "ingredients known only to himself," and represents it to be fit for use, and it turns out to be a poison, and destroys the woman's hair.] In *Langridge* v. *Levy*, in the Exchequer Chamber, 4 M. & W. 337; 7 L. J., N. S., 387, Ex., Lord Denman, C. J., delivering the judgment of that court, affirming that of the court below, does so expressly on the ground stated below by Parke, B., in this court, "that, as there is *fraud* and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." *Holliday's* case shows there is no right of action by a stranger to the contract unless that stranger show knowledge or fraud on the defendant's part. Again, there is no implied warranty that an article sold in the ordinary way is fit for the purpose for which it is sold. That was so held in a recent case n this court with respect to meat, where it was decided that there was no implied warranty of its fitness for human food: (*Emmerton* v. *Matthews*, 5 L. T. Rep. N. S. 681; 31 L. J. 139, Ex; 7 H. & N. 586.) [CHANNELL, B. refers to *Winterbottom* v. *Wright*, 10 M. & W. 109; 11 L. J., N. S., 415, Ex., in which Lord Abinger, C. B., at p. 115 of 10 M. & W., discussing the question of duty in such cases, says: "There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract.] Negligence, in these cases, must be either with regard to contract or with regard to public duty. He referred also to the judgment of Lord Cairns, L. C. in *Macfarlane* v. *Taylor*, in the House of Lords, L. Rep. 1 Scotch App. 245.

J. P. Ingham, contra, for the plaintiffs, was not called upon to support the declaration.

The court having suggested an amendment of the declaration, it was agreed by the learned counsel on both sides that it should be amended by striking out the allegation of a joint purchase of the wash by the husband and wife, and stating it to have been bought by the husband alone, for the purpose of being used by the wife. This amendment being taken as made, the learned Barons proceeded to give judgment on the demurrer as follows:

KELLY, C. B.—The declaration being amended, it now stands as a contract and purchase by the plaintiff Joseph George alone, of the article in question for the use of his wife, and I am of opinion that the plaintiffs are entitled to the judgment of the court. The facts as stated in the declaration are, that the defendant carried on the business of a chemist, and in the course of such business professed to sell a chemical compound made of ingredients known only to himself, and which he professed and represented to be fit and proper to be used as a wash for the hair, without personal injury to the person using the same, and to have been carefully, skilfully, and properly compounded by him, and it is then stated that thereupon the plaintiff, the husband, purchased this article of the defendant at a certain price, for the purpose of its being used by his, the plaintiff's, wife for washing her hair, upon the express terms that it was fit and proper to be so used, and could be safely used for that purpose without personal injury to the person

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so using it. The defendant, then, it appears, had sold this article for a particular purpose which was known to him at the time he so sold it, namely, for use as a hair wash by the plaintiff's wife. The declaration then proceeds to allege that the defendant so unskillfully, negligently, and improperly conducted himself in and about making and selling the said compound, that by reason of such unskilfulness, negligence, and improper conduct of the defendant, the said compound was not fit or proper to be used for washing the hair, nor could it be so used without producing personal injury to the person using it. And it then goes on to allege that by reason of such unskilfulness, carelessness, and improper conduct of the defendant in that behalf, the plaintiff's wife, who used the said compound for washing her hair, pursuant to the terms upon which the same was so sold by the defendant to the plaintiff, was, by using the same, injured in health, and suffered pain, and her hair was destroyed. It has been urged, and was contended, on the part of the defendant, first of all that there was here no warranty, express or implied; but it is unnecessary to enter into that question, as it does not arise in the present case, for here there was a purchase by the plaintiff from the defendant of this hair wash, and the purpose for which it was bought and to which it was going to be applied, was known to the defendant, the compounder of it, at the time he sold it. The question is, whether a tradesman who sells an article for a particular purpose, and which article he has professed to compound himself for that purpose, has not a duty imposed on him by law to be careful in the compounding and selling it. I think that every one who compounds and sells an article to be used for a particular purpose is bound, and has a duty cast upon him, to compound it with due care and ordinary skill, and in such a way and with such materials, that the use of it by the person buying it, or for whom it is bought, shall not be productive of personal injury. Here there is an allegation of the absence of such care and skill. The case of *Langridge* v. *Levy* (*ubi sup.*), which has been cited and referred to during the argument, is important as bearing upon a further question which has been raised here, namely, whether the onus, which is imposed by law upon the compounder and vendor of an article towards the person purchasing it and using it, applies also to a third person who is not the purchaser, but who happens to be the person for whom it was bought, and who uses the article, and is injured by so using it. For instance, where an article is bought by A. for the purpose of its being used by B., does the duty which is on the seller extend in such a case to B.? I am of opinion that it does. In *Langridge* v. *Levy* there was no contract between the plaintiff and defendant, but the latter knew that the father bought the gun for his son's (the plaintiff's) use; and in the present case the defendant was aware that the wash was bought by the plaintiff for his wife's use in washing her hair, and that is stated and alleged in the declaration. I think, therefore, that a duty arose on the part of the defendant here, knowing as he did at the time of the sale of the article that it was bought for the purpose of being used as a wash for the hair, to use due care and skill in compounding it, so that it should be fit for the purpose of being so used, and that it might be so used with safety; and I am of opinion that that duty extends not only to the actual purchaser of the article but also to the person for whom it was bought. There is an allegation of carelessness, negligence, and unskilfulness, and under these circumstances I am of opinion that there was a duty on the defendant which has been violated by him, and that he is, as the seller of the article, liable, since he knew the purpose for which it was expressly purchased. In the lamp case (*Longmeid and wife* v. *Holliday, ubi sup.*), there was neither breach of warranty, negligence, nor breach of duty. It is, therefore, quite a different case. My brother Channell, who has just left the court, has desired me to say that he concurs with the rest of the court in their view of the present case.

PIGOTT, B.—I am of the same opinion. The count in the declaration demurred to in this case is founded on a charge of negligence of duty on the part of the defendant, as a chemist, in compounding and selling an article for a particular purpose. Had the article been bought by the husband for his own use, and the action been brought by him alone, it cannot be doubted that it would have been maintainable. Then, if the article be purchased by the husband for his wife's use, and that was known to the defendant, I cannot see how it can be reasonably suggested that the defendant's duty is not the same. If a father takes a prescription, intended for himself, to a chemist and has it put up, and then, instead of taking the medicine himself, gives it to his young child, who is injured by taking medicine which is too strong for him, the chemist, in that case, would incur no blame or responsibility, he having been led to suppose that the medicine was for the father's use. But those circumstances would be altogether different from those of the present case. It would be a monstrous thing to say that a married woman, receiving an injury in this manner, could have no remedy for the damage done to her. I think the defendant's duty extended to the wife, and that she can recover for a direct damage done to her, joining her husband in the action for conformity's sake.

CLEASBY, B.—I am of the same opinion. I think the declaration shows a good cause of action on the part of the wife. Taking the contract by itself, no person can sue on it but a party to it. *Langridge* v. *Levy* is in point. That objection was taken there, and the answer to it was that there was fraud. There is a complete analogy between that case and the present one, putting the fraud in the former case for the negligence in the latter. The only question is, whether the facts raise a duty in the defendant to use due and reasonable care in compounding the article which he represented to be fit and proper for use, and capable of being used by the wife without injury to her. The moment that that duty arises, there is a clear case of negligence here on the defendant's part in a matter in which there was a duty, and an injury directly, and not remotely, arising from that negligence to the wife. It appears to me to be a case very similar to *Langridge* v. *Levy*.

Judgment for the plaintiff. The declaration to be amended as agreed upon.

Attorney for the plaintiffs, *J. M. Dobson*, 4, York-street, Portman-square, W.

Attorney for the defendant, *Edward M. Hore*, Lincoln's-inn-fields, W.C.

Monday, Nov. 8.

CONYBEARE *v.* FARRIES.

County Court appeal—Notice to produce—Sufficiency of —Costs of appeal.

The plaintiff brought an action in the City of London Court to recover "Twelve months' rent for the year 1866, *and ten shillings arrears of rent due previously to Jan.* 1866," *of a room let by him to the defendant, under an alleged agreement, said to be constituted by two letters, the one from plaintiff to defendant, dated* 27*th June* 1865, *the other an alleged answer thereto, dated* 29*th June* 1865. *Notice was served on the*

defendant to produce at the hearing "All letters received by you (the defendant) from the plaintiff, relating to your tenancy of a room let to you by the plaintiff, and, in particular, a letter in or about Jan. 1866, relating to deductions you were authorised to make from the rent on paying the same." At the trial, the plaintiff having produced the defendant's letter of the 29th June, the learned commissioner of the court ruled that the above notice was insufficient for the purpose of enabling the plaintiff to give secondary evidence of the contents of his letter of the 27th June, on its non-production by the defendant, and accordingly nonsuited the plaintiff:

Held, on appeal, by the Court of Exchequer (Kelly, C.B., Channell, Pigott, and Cleasby, BB.) that the ruling of the learned commissioner was wrong, and that the notice was a good and sufficient notice for the production of the letter of 27th June, and therefore the plaintiff was entitled to judgment and to a new trial:

Held, also, that, without laying down any general rule on the subject, the plaintiff was entitled to the costs of the appeal, it being a matter in the discretion of the court under the particular circumstances of each case.

Gee *v.* The Lancashire and Yorkshire Railway Company, 3 *L. T. Rep. N. S.* 328; 6 *H. & N.* 211; 30 *L. J.* 11 *Ex.*; *and* Schroder *v.* Ward, 7 *L. T. Rep. N. S.* 825; 13 *C. B., N. S.*, 410; 32 *L. J.* 150, *C. P., cited and considered.*

This was an appeal by the plaintiff below to the Court of Exchequer, from a decision of the judge of the City of London Court, Mr. Commissioner Kerr, nonsuiting the plaintiff under the following circumstances:—

The action came on for trial, at the City of London Court, on the 12th April last, and the particulars of the plaintiff's demand stated that, "the plaintiff, John Charles Conybeare, of 2, Cook's-court, Serle-street, Lincoln's-inn, claims 21*l.* 10*s.* from Mr. Thomas Farries, of Mr. Laxton's, 1, Child's-place, Temple Bar, for twelve month's rent of chambers at 5, Essex-court, Temple, for the year 1866, and for 10*s.* arrears of rent due previously to Jan. 1866, making together 21*l.* 10*s.*"

On the 17th March 1869, the plaintiff duly served upon the defendant a notice to produce in the following terms:—

Take notice, that you are required to produce to the court, on the hearing of this cause, *all* letters received by you, the defendant, from the plaintiff *relating to your tenancy of a room let to you by the plaintiff*, which are in your possession or power, and in particular a letter received by you from the plaintiff in or about Jan. 1866 (relating to certain deductions which you were authorised to make from the rent on paying the same), and which letter you produced in evidence on the 8th inst.; also all copies of letters written by you *relating to the said tenancy*; also all agreements and copies of agreements relating to the said tenancy which are in your possession or power.

When the cause came on for hearing on the 12th April 1869, the plaintiff stated that he sought to recover 21*l.* for twelve months' rent of a room let by him to the defendant under an alleged agreement, which was said to be constituted by two letters, the first being a letter dated on or about the 27th June 1865, from the plaintiff to the defendant, and the other being, as alleged, an answer thereto, dated the 29th June 1865.

The plaintiff having produced the letter of 29th June 1865 from the defendant to him, called upon the defendant to produce the alleged letter of 27th June 1865 from the plaintiff, in order, on the defendant's failing to produce the same, to give secondary evidence of the contents thereof.

The defendant's counsel objected that the said notice to produce was insufficient, and the judge, being of that opinion, refused to receive secondary evidence of the contents of the said letter. And the plaintiff thereupon elected to be nonsuited.

The question for the opinion of the Court of Exchequer is whether the judge ought to have admitted the secondary evidence or not.

The following are the plaintiff's points for argument:—1. That the notice to produce set out in the case was a sufficient notice to the defendant to produce the plaintiff's letter, dated on or about the 27th June 1865, and mentioned in the said case, and that on the nonproduction of the said letter by the defendant the plaintiff was entitled to give secondary evidence thereof. 2. That the general part of the notice whereby the defendant was required to produce *all letters* received by the defendant from the plaintiff "relating to your tenancy of a room let to you by the plaintiff" was sufficient notice to produce the particular letter, since it does not appear that the defendant had ever rented any other room from the plaintiff, except the room the rent of which is expressly claimed by the plaintiff's particulars of demand, which particulars show the defendant what room was meant. 3. That the general part of the notice requiring the defendant to produce "all agreements relating to the said tenancy" was a sufficient notice to produce the letter by which the plaintiff offered and agreed to let the premises, the rent of which was the subject-matter of the plaintiff's claim, and which letter, coupled with the defendant's reply and acceptance constituted the tenancy referred to in the notice as "Your tenancy of a room let to you by the plaintiff." 4. That the particulars of the plaintiff's demand of 21*l.* 10*s.*, set out in the case (which particulars expressly limit the demand to "twelve months' rent of chambers at 5, Essex-court, Temple, for the year 1866, and for arrears of rent due previously to Jan. 1866") coupled with the defendant's knowledge of the fact that he never rented any chambers from the plaintiff, except the said particular room at Essex-court, Temple, and that the defendant never rented any room from the plaintiff till after Midsummer 1865, sufficiently pointed out to the defendant that all the letters and agreements which he was required to produce must have been written between the summer of 1865 and the close of 1866, and that the particular letter, or other documents, constituting the original agreement of letting must have been dated about Midsummer 1865. 5. That the notice to produce, while particularising one single letter (the date of which had become known to the plaintiff from its having been produced in court by the defendant nine days before the date of the notice), distinguished such letter from the letters constituting, and from, the "agreements relating to the said original tenancy" (commenced in 1865), by pointing out the date of such letter as of 1866, and by further describing it as merely relating to "certain deductions" which the defendant was "authorised to make from the rent," arrears of which, due before the commencement of 1866, are expressly mentioned in the particulars of the plaintiff's claim.

C. S. Bowen for the appellant.—The point is whether the notice which was served on the defendant, calling on him to produce at the hearing of the action in the City of London Court "all letters, &c., relating to his tenancy," was or not a sufficient notice so far as it related to the production of a particular letter, viz., that of the 27th June 1865, mentioned in the case, so as to entitle the plaintiff, on its non-production, to give secondary evidence of its contents. It is contended on the plaintiff's part that it was a good and sufficient notice for that purpose, and that its generality was not limited by the specific mention of the letter of Jan. 1866. (He was stopped by the court, who called on)

Kemp for the respondent.—The object of giving

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a notice to produce is to set out, and bring to the attention of the party served with it, the particular documents required. This notice, like all other such documents, must be taken in connection with the claim. It is clear that it does not refer to *the creation* of the tenancy in 1865. It says, "relating to your tenancy" generally, and then it goes on to expressly particularise one letter only, and that is a letter dated Jan. 1866, relating to certain deductions the defendant was authorised to make from his rent upon paying it. The claim is for a year's rent in 1866. The effect, therefore, of the notice was such as obviously to direct the attention of any reasonable man. not to the letters at the time of the creation of the tenancy at Midsummer 1865, but to letters in 1866, relating to deductions or allowances from the rent for that year. Had the notice been entirely general in its terms, the defendant might well have been puzzled by it; but when it goes on to specify the particular letter of Jan. 1866, he might legitimately and reasonably suppose that it could have no reference to a letter of June 1865. It is submitted, therefore, that the notice is bad, and that the ruling of the learned commissioner was correct, and that this appeal must be dismissed.

KELLY, C.B.—I am clearly of opinion that this notice was a good and sufficient notice for the purpose of the production by the defendant at the trial of the letter in question, namely, that written by the plaintiff to the defendant on the 27th June 1865. The object of such a notice is to inform the party what documents he is required to produce. Here the notice is clear and precise, "You are required to produce *all letters received by you, the defendant*, from the plaintiff relating to your tenancy of a room let to you by the plaintiff, which are in your possession or power;" together also with, as it proceeds to specify, a particular letter relating to certain deductions from the rent. Looking, too, at the very recent period at which the first letter, which is the one required to be produced, was written, it would be unreasonable to suppose that the defendant could have been puzzled or mistaken with regard to the necessity for its production. I think the learned commissioner of the court below was wrong, and that our judgment should be in favour of the appellant; and that he is entitled to a new trial.

CHANNELL, B.—I am entirely of the same opinion.

PIGOTT, B.—I also am of the same opinion. Of what use would it be to give a defendant notice to produce *all* letters and documents in his possession relating to a particular matter, if it were requisite also to go into details and to give the dates and particulars of all of them.

CLEASBY, B. concurred.

Bowen then, for the appellant, applied for the costs of the appeal, on the authority of the case in the Common Pleas of *Shroder* v. *Ward*, 7 L. T. Rep. N. S. 825; 13 C. B., N. S., 410; 32 L. J. 150, C. P. No doubt in a prior case in the Exchequer of *Gee and others* v. *The Lancashire and Yorkshire Railway Company*, 3 L. T. Rep. N. S. 328; 6 H. & N. 211; 30 L. J. 11, Ex., this court held that, where, on an appeal from a County Court or the City of London Court, a new trial is ordered on the ground of misdirection, the court would not give costs to the successful appellant; but the Court of Common Pleas, in the subsequent case first above mentioned, after having taken time to consider the point, and having had the decision of this court in *Gee* v. *The Lancashire and Yorkshire Railway Company* brought to their notice, laid down and acted on a directly contrary rule, and held that an appellant from a decision of the County Court who succeeded in his appeal, was in all cases, except under substantially exceptional circumstances, entitled to the costs of the appeal, even though a new trial might have been obtained on the ground of misdirection: (See the judgment of the court, delivered by Willes, J., at p. 414 of 13 C. B., N. S.) It was most desirable that the practice of all the courts in this matter should be the same.

Kemp, for the respondent *contra* (being called on), must leave the matter in the hands of the court. At the same time, he contended that there was nothing to take the present case out of the ordinary rule of practice which had prevailed in this court. But, at any rate, a new trial having been directed, the justice of the case would be fairly met by ordering that the costs of this appeal should abide the event of such new trial.

KELLY, C. B.—I think the appellant should have his costs of this appeal. In expressing that opinion I do not at all mean to lay down any general rule on the subject. I do not either adopt to its full extent the decision of the Court of Common Pleas, in the case which Mr. Bowen has cited of *Shroder* v. *Ward*, nor do I mean for a moment to say anything against it. I think it is a matter which depends upon the discretion of the court under the particular circumstances of each case.

CHANNELL, PIGOTT, and CLEASBY, BB., concurred.

Judgment for the appellant, a new trial directed, with costs of the appeal.

Attorney for the appellant, *H. F. Pain*, York-chambers, York-buildings, Adelphi, W.C.

Attorney for the defendant, *Jones*, 5, New-inn, Strand, W.C.

EXCHEQUER CHAMBER.

Reported by T. W. SAUNDERS, and M. W. MCKELLAR, Esqrs., Barristers-at-Law.

ERRORS FROM THE COMMON PLEAS.

Tuesday, Nov. 30.

(Before KELLY, C. B., CHANNELL, B., MELLOR, J., PIGOTT and CLEASBY, BB.)

TEBB v. HODGE AND ANOTHER.

Agreement for a lease and a mortgage—Money advanced on the security of premises and fixtures—Equitable mortgagee.

The plaintiff entered into an agreement with one Barrows to grant him a lease of premises at a certain rent for twenty years upon certain conditions; Barrows agreeing to pay 1000l. on the granting of the lease, and to fit up the premises to plaintiff's satisfaction within a certain time. Upon payment of the consideration money, the premises being fitted up as aforesaid, the plaintiff undertook to grant the said lease with covenants mentioned. And it was further provided that the plaintiff should lend Barrows upon the security "of the said premises so fitted up," 1000l. for two years. Barrows entered into possession and duly put up the fixtures, but at his desire no lease was granted, and no money was paid; Barrows became bankrupt, and under an order of the Bankruptcy Court his assignee, one of the defendants, severed and removed the fittings:

Held, affirming the decision of the Court of Common Pleas, in an action to recover the fittings, that there was an equitable contract between the plaintiff and

Barrows by which the premises, together with the fixtures, had become plaintiff's security for the 1000l. advanced by him; that the plaintiff was in the position of an equitable mortgagee; and that the defendant, the assignee, had no right to the fixtures.

This was an appeal under the provisions of the Common Law Procedure Act 1854, against the decision of the Court of Common Pleas in discharging a rule of that court obtained by the defendants to show cause why a verdict should not be entered for them upon points reserved at the trial.

The declaration in the action was as follows:

1st count: For that the defendants broke and entered the plaintiff's house called the Gray's-inn Restaurant, No. 19, High Holborn, in the county of Middlesex, and broke to pieces, damaged and destroyed the same, and severed, removed, and carried away the fixtures of the plaintiff therein, that is to say, tavern and luncheon bar fittings, &c., and converted the same to the defendants' own use, and wrongfully deprived the plaintiff of the use and possession thereof.

2nd count.—And for that the defendants converted to their own use and wrongfully deprived the plaintiff of the use and possession of his goods (to wit), goods of the same description as the articles in the first count mentioned.

3rd count.—And for that heretofore (to wit) on the 18th Dec. 1867, the plaintiff being lawfully possessed of the premises in the agreement hereinafter mentioned, an agreement was made and entered into between the plaintiff and Joseph Grimes Barrows as follows, that is to say:

Agreement made the 18th Dec. 1867 between Robert Palmer Tebb, of 139, Cheapside, gentleman, of the one part, and Joseph Grimes Barrows, of 20, Park-place West, Liverpool-road, in the county of Middlesex, wine and spirit merchant, of the other part, whereby the said Robert Palmer Tebb agrees to grant, and the said Joseph Grimes Barrows to take, a repairing lease of the Gray's-inn Restaurant, No. 19, High Holborn, comprising the ground-floor, basement, with the kitchen and scullery under Gray's-inn chambers, the pantry or larder in the yard, the coal cellar adjoining, water closets in the area, and the joint use, with other tenants, of the adjoining premises for the time being, of the said Robert Palmer Tebb, his executors, administrators, or assigns, of the back area and yard, at the clear net rent of 370l. per annum: also the small office on the ground floor in Gray'inn-chambers (previously occupied by Mr. Holloway), and the two rooms or offices on the third floor over the Gray's-inn Restaurant, at the clear net rent of 80l. per annum, for the term of twenty years from the 24th June 1866, less the last fourteen days thereof, upon the following conditions: The said Joseph Grimes Barrows agrees to pay the said Robert Palmer Tebb, his executors, administrators, or assigns, the sum of 1000l. on the granting of the above lease of the above-described premises, being the consideration for the same, also to fit up the said premises forthwith in a substantial and appropriate manner as a first-class luncheon bar and restaurant, such fittings to be of the value of 500l. at least, and to be completed to the satisfaction of the said Robert Palmer Tebb, his executors, administrators, or assigns, on or before the 11th Feb. next, and in this respect time shall be of the essence of the contract. And upon payment of the said consideration-money, the said premises being fitted up as aforesaid, the said Robert Palmer Tebb, his executors, administrators, or assigns will grant the said lease, such lease and counterpart to be prepared by the solicitor of the said Robert Palmer Tebb, at the expense of the said Joseph Grimes Barrows, and to contain similar covenants to those in the original lease, under which the said Robert Palmer Tebb holds the said premises, and also a covenant for the lessee not to underlet or assign the said premises, or any part thereof, without the consent, in writing, of the said Robert Palmer Tebb, his executors, administrators, or assigns, first had and obtained. And further, that the said Joseph Grimes Barrows shall not do, or suffer to be done, anything that shall be, or grow to be, an annoyance to the adjoining tenants, nor anything that shall endanger or entail the withdrawal of the licence of the said premises by the magistrates. (The agreement also contained provisions as to payment of rent, insurance, rates, and taxes.) And the said Robert Palmer Tebb agrees to lend or obtain for the said Joseph Grimes Barrows, upon security of the said premises so fitted out and licensed, the sum of 1000l. for the term of two years from Christmas 1867, at 5 per cent. per annum interest; the said Joseph Grimes Barrows to have the option of repaying the said mortgage and interest at any earlier period, by giving six months' notice, or on payment of three months' additional interest in lieu of notice. And it is also provided that if the lessee shall assign or underlet the said premises before the expiration of the said two years, it is agreed that the said mortgage of 1000l., with interest thereon, shall be paid off and discharged. And it is hereby mutually agreed by and between the said parties that if the said Joseph Grimes Barrows shall fail to carry out all or any of the stipulations and conditions herein contained, or should the rent remain unpaid beyond fifteen days from any quarter day, or should the said premises not be fitted up in the manner and within the time hereinbefore stated, or should the same become vacant or otherwise discontinued, or not be conducted in the ordinary way as a respectable restaurant and luncheon bar, then, in each or any of such cases it shall be lawful for the said Robert Palmer Tebb to enter and take possession of the premises without the necessity of any formal process at law, in as full and complete a manner as if this agreement had never been entered into. As witness the hands of the said parties the day and year first hereinbefore written.

And the plaintiff then delivered possession of the said premises in the said agreement mentioned to the said Joseph Grimes Barrows, under and by virtue of the said agreement; and he entered into the said premises, and became and was possessed thereof under and by virtue of the said agreement as tenant thereof to the plaintiff, the reversionary estate and interest therein, subject to the said tenancy then belonging to the plaintiff; and the said Joseph Grimes Barrows, under and by virtue of the said agreement, and in performance thereof on his part, fitted up the said premises in a substantial and appropriate manner as a first-class luncheon bar and restaurant, with divers appropriate and substantial fittings of great value (to wit) of the value of 1000l.; and afterwards, and whilst the said Joseph Grimes Barrows was so possessed of the said premises, and during his tenancy, and whilst plaintiff was so entitled to the reversion of and in the said premises, fixtures, and fittings, subject to the said tenancy of the said Joseph Grimes Barrows, under the said agreement, the defendants wrongfully severed and removed the said fixtures, and carried away and converted the same to their own use, and in so doing broke to pieces, damaged, and destroyed divers parts of the said house and premises, whereby plaintiff was greatly injured, prejudiced, and aggrieved in his said reversionary estate and interest in the said premises, fixtures, and fittings; and the said fixtures and fittings became and were wholly lost to him; and the said house and premises were much lessened in value to the plaintiff, and the plaintiff was and is otherwise injured.

And the plaintiff claims 1000l.

The following were the pleas: 1. Not guilty. 2, 3, and 4. Traverses of the plaintiff's property in the house and fixtures and goods. 5. And for a further plea as to so much of the third count as complains of the defendant's severing, removing, carrying away, and converting the said fixtures and fittings, the defendants say that the plaintiff had no such interest in the said fixtures and fittings as alleged. 6. And, for a further plea, the defendants say that before any of the said times when, &c., the said Joseph Grimes Barrows became and was duly adjudged bankrupt under and by virtue of the statute in such case made; and at the time he so became bankrupt he had, by the consent and permission of the plaintiff, the true owner thereof, in his possession, order, and disposition divers goods and chattels (to wit) the alleged fixtures in the first count mentioned, and the goods in the second count mentioned, and the alleged fixtures and fittings in the 3rd count mentioned, whereof he was reputed owner, and whereof he had taken upon himself the sale, alteration, and disposition as owner. And the Court of Bankruptcy, duly authorised in that behalf, then duly ordered the same to be sold and disposed of for the benefit of the creditors of the said bankrupt under the said bankruptcy; and thereupon the defendant, David Hodge, then being

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the assignee of the estate and effects of the said Joseph Grimes Barrows under the said bankruptcy, the defendant Frederick Cutten, as his servant and by his command, sold and disposed of the said goods and chattels for the benefit of the said creditors, under the said bankruptcy, under and in pursuance of the said order, and in so doing necessarily and unavoidably did what is complained of, doing no more than necessary and lawful in that behalf, which are the supposed trespasses and grievances in the declaration mentioned.

The plaintiff joined issue on the defendant's pleas.

The following is a statement of the case.

The plaintiff is an auctioneer or estate agent, at 139, Cheapside; the defendant Hodge is a gas chandelier manufacturer, carrying on an extensive business at 100 and 101, Hatton-garden, Middlesex, and is the assignee of one Joseph Grimes Barrows, a bankrupt. The defendant Cutten is an auctioneer, at 81, Basinghall-street, in the City of London.

On the 18th Dec., 1867, the agreement set forth in the third count of the declaration was made and entered into between the plaintiff, of the one part, and Joseph Grimes Barrows, of 20, Park-place West, Liverpool-road, in the county of Middlesex, wine and spirit merchant, of the other part.

The said Joseph Grimes Barrows took immediate possession of the premises at 19, High Holborn, in the said agreement mentioned, and known as the Gray's Inn Restaurant.

At the time the said Joseph Grimes Barrows took possession of the said premises, the same had been recently rebuilt by the plaintiff, and the said Joseph Grimes Barrows immediately proceeded to fit the same up with fixtures—including those which are the subject of this action—as a restaurant, in pursuance of the terms contained in the said agreement.

The lease in the said agreement mentioned was not executed, nor was the consideration of 1000*l.* in part paid for the same, nor was a sum of 1000*l.*, or any sum, in fact, advanced by the plaintiff to the said Joseph Grimes Barrows; but, after the said Joseph Grimes Barrows had fitted up the said premises, the plaintiff at his request inspected the same, and expressed his satisfaction, and told Barrows that he was ready to grant him the lease whenever required, and the plaintiff asked Barrows to take up the lease. Barrows replied, that he did not wish to take it up just then, as he could deposit the agreement as a security. At the request of Barrows the plaintiff wrote him a letter.

Afterwards Barrows applied to the plaintiff for liberty to assign the agreement by way of mortgage; but the plaintiff refused his consent till the lease had been taken up. The plaintiff consented to the agreement being deposited as a security, subject to his claim of 1000*l.* Barrows never paid any rent.

On the 15th April 1868, the said Joseph Grimes Barrows was adjudicated a bankrupt upon a creditor's petition.

On the 5th May 1868, the defendant Hodge was appointed creditor's assignee of the estate and effects of the said bankrupt, of which he immediately proceeded to take possession.

The only estate given up by the bankrupt to his assignee, was the goods, fixtures, fittings, stock in trade and effects, on the premises at 19, High Holborn, and an application was made to the Court of Bankruptcy for an order under section 125 of the Bankrupt Law Consolidation Act 1849.

This order was granted, and was in the words and figures following:

IN THE LONDON COURT OF BANKRUPTCY.

In the matter of Joseph Grimes Barrows, of High Holborn, in the county of Middlesex, licensed victualler, bankrupt.

Before Mr. Commissioner GOULBURN.

Whereas the above-named Joseph Grimes Barrows was adjudged bankrupt by this court upon a petition duly filed, and whereas David Hodge is the assignee duly appointed and chosen of the estate and effects of the said bankrupt. Now upon the application of John Evans, solicitor of the said assignee, and upon reading the affidavit of the said John Evans, sworn on the 18th May 1868, and the proceedings herein, the court doth find that at the time when the same Joseph Grimes Barrows became bankrupt, he had, by consent and permission of Robert Palmer Tebb, who claims to be the true owner thereof, in the possession, order, and disposition of him the said Joseph Grimes Barrows, the goods, chattels, fixtures, fittings, and effects mentioned in the catalogue marked A, and being in, upon, or about the premises 19 and 20, High Holborn, in the county of Middlesex, known as the Gray's Inn Restaurant, of which goods, chattels, fixtures, fittings, and effects the said Joseph Grimes Barrows was the reputed owner. And the court doth order that the same be sold and disposed of by the said assignee, for the benefit of the creditors of the said Joseph Grimes Barrows.

W. HAZLITT, Acting Commissioner.

The defendant Cutten examined the said goods, fixtures, fittings, and effects at Nos. 19 and 20, High Holborn aforesaid, and caused a catalogue of the same to be prepared, and advertised them to be sold by auction on the 20th May 1868.

Immediately upon the sale being advertised the plaintiff caused to be served upon the defendants a notice to the effect that he claimed the lots numbered 1 to 21 inclusive, and lots 128, 129, and 131 in the said catalogue, and cautioning the defendants not to sell the same.

The defendants nevertheless sold the whole of the lots.

The order of the Court of Bankruptcy authorising the defendant Hodge to sell was read at the sale, in the presence of the plaintiff.

The plaintiff himself bought all the fixtures, viz., lots 1 to 21, and the same were never severed. The other fixtures and fittings were sold by defendants, to be severed, and were purchased by different purchasers, and severed by such purchasers from the premises.

The defendant Hodge paid rent of the said premises up to March 1868. He afterwards renounced the agreement for a lease, pursuant to sect. 131 of the 24 & 25 Vict. c. 134, and delivered up the key of the premises to the plaintiff.

The plaintiff then brought this action to recover the value of the fixtures claimed by him, and also damages for the trespass to the premises, and for alleged injuries to his reversion.

This action was tried at Westminster Hall on the 28th Nov. 1868, before Mr. Justice Montague Smith and a common jury, when after the evidence had been gone into it was agreed that the verdict should be entered for the plaintiff on the first and second counts, damages 150*l.*, being the money realised at the said sale for the fixtures sold by the defendants and also for the plaintiff on the third count, damages 10*l.*, being the agreed amount of damage done to the premises by the removal of the fixtures, with leave for the defendants to move to have the verdict entered for them, the court to draw conclusions of fact.

The court was accordingly moved by Mr. Montague Chambers in Hilary Term 1869, and a rule *nisi* granted upon certain grounds therein set forth, and of which the following is a copy:

IN THE COMMON PLEAS.

Hilary Term, in the 32nd year of the reign of Queen Victoria.

TEBB against HODGE AND ANOTHER.

Friday, 15th Jan.

Upon reading the record of the Nisi Prius trial between the said parties, it is ordered that the plaintiff, upon notice of this rule, to be given to him or his attorney, shall shew cause to this court on Thursday next why the verdict found for him on the trial of this cause at the sittings after last term, holden at Westminster Hall, in and for the county of Middlesex, should not be set aside; and instead thereof a verdict be entered for the defendants on one or all the counts of the declaration pursuant to leave reserved on the grounds:

1. That there was no evidence of plaintiff's possession of

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the premises or goods to support the first count or the second count of the declaration.

2. That plaintiff was not mortgagee either at law or in equity.

3. That the goods were in the order and disposition of the bankrupt with the consent of the true owner thereof, within the meaning of the 125th section of the Bankrupt Law Consolidation Act 1849, and that the order in bankruptcy justified the defendants in selling, and relieved them from all responsibility in the matter, the plaintiff having of his own accord subjected himself to the provisions of section 125 of the Bankrupt Law Consolidation Act 1849.

4. That there was no evidence of any injury to plaintiff's reversion by the defendants.

5. That the agreement set forth in the 3rd count of the declaration, and made between plaintiff and Barrows, if it gave the plaintiff any lien or mortgage upon the goods should have been registered under the Bills of Sale Act, in order to give it any validity as a mortgage of goods and chattels. And in the mean time, and until this court shall otherwise order, let the *postea* remain in the hands of the associate, and the entry of final judgment on the said verdict be stayed.

BY THE COURT.

On the motion of *M. Chambers*, for the defendants.

This rule was argued on the 20th April 1869, when the same was discharged.

The questions for the opinion of the court of appeal are,

Whether, under the circumstances above set forth, the plaintiff is entitled to retain the verdict for the said sums of 150*l.* and 10*l.*, or either of them, or whether as to both or either of those sums the verdict ought to be entered for defendant.

The arguments and judgments in the court below are reported in 38 L. J. 217, C. P.

Bush (with him *M. Chambers*, Q.C.) argued for the defendant Hodge, the assignee of Barrows. The judgment of the Court of Common Pleas was based on the ground that the plaintiff was the equitable mortgagee of the premises and fixtures. I submit that he was never an equitable mortgagee, but only a vendor, with a lien upon the premises. It is important to distinguish between the two parts of the agreement. Upon it the plaintiff was entitled to specific performance of the first part, but not of the second, which is the mortgage. The agreement was for a repairing lease, and upon the granting of the lease Barrows was to pay 1000*l.* The plaintiff might have gone to the Court of Chancery, and obtained specific performance of that part of the agreement; but the plaintiff waived that right, and no lease was granted, nor was the sum of money ever paid. In the second part of the agreement, which it is contended created the relation of equitable mortgagor and mortgagee between Barrows and the plaintiff, the fixtures formed no part of the demise. The rule of law is that the lessee may remove trade fixtures erected by him, provided it be during his term. It is only when the fixtures are left after the term has become vested in the landlord that they are the property of the landlord. *Elwes* v *Mawe*, 2 Sm. L. C. 153. This mere agreement did not create the relationship of mortgagor and mortgagee. It was held by Leach, V.C., in *Ex parte Coombe*, 4 Madd. 249, that a parol agreement to deposit a lease when granted, as security for a sum advanced, does not constitute an equitable mortgage. Here there was no actual deposit, and this could not be, as the court below has held, an equitable mortgage.

KELLY, C. B.—The plaintiff in this case, in Dec. 1867, entered into an agreement with Barrows, whose assignee in bankruptcy is the defendant Hodge, to grant Barrows a lease of premises in Holborn at a certain rent for twenty years, upon certain conditions, Barrows agreeing to pay the plaintiff the sum of 1000*l.* on the granting of the lease, and also to fit up the premises forthwith, the fittings to be of the value of 500*l.* at least, and to be completed to the satisfaction of the plaintiff by the following 11th Feb. Upon payment of the consideration money, the premises being fitted up as aforesaid, the plaintiff undertook to grant the said lease with covenants mentioned in the agreement. And it was further provided that the plaintiff should lend or obtain for Barrows, upon the security "of the said premises, so fitted up and licensed," 1000*l.* for two years; and it was provided that if Barrows should assign or underlet the premises before the expiration of two years the said mortgage of 1000*l.*, with interest thereon, should be paid off and discharged. Barrows entered into possession, and put up the fixtures to the satisfaction of the plaintiff within the time required; he was, therefore, entitled to his part of the agreement, and there was a proposal on the plaintiff's part to hand over the lease, but Barrows was not in a position to pay the 1000*l.* at once, and therefore it was arranged, according to the terms of the contract, that the payment should stand over for two years, and upon the advance by the plaintiff of the sum of 1000*l.*, "the premises so fitted up," *i.e.* together with these fixtures, were agreed to be the security for the payment of the sum advanced. Although the plaintiff was ready to complete the arrangement and furnish Barrows with a lease, Barrows preferred to keep the agreement only, as he considered the agreement was sufficient, if he wanted to deposit a security. Afterwards Barrows applied to be allowed to assign the agreement by way of mortgage; but the plaintiff refused his consent till the lease had been taken up; he consented, however, to its being deposited as a security, subject to his claim of 1000*l.*; the result therefore was, that the agreement became itself security for the 1000*l.* paid by Barrows with one hand and borrowed back with the other, and the plaintiff was entitled at any moment to enforce the mortgage of 1000*l.*; there was an equitable contract between the parties, and the premises and fixtures became the security, the plaintiff being the equitable mortgagee. Consequently no right in the fixtures belonged to Barrows nor to his assignees. The judgment of the Court of Common Pleas will be affirmed.

The other Judges concurred.

Judgment affirmed.

Attorneys for plaintiff: *Lewis* and *Sons*.

Attorneys for defendants: *Evans* and *Laing*.

ERROR FROM THE QUEEN'S BENCH.

Friday, Nov. 26.

(Before KELLY, C.B., WILLES, J., CHANNELL, B., KEATING, J., PIGOTT and CLEASBY, BB.)

SADLER (app.) v. SMITH (resp.)

Boat race—Referee—Jurisdiction—No start—Paying over the stakes.

Although the decision of an arbitrator or referee is final upon all matters within his jurisdiction, if he has the means of forming an opinion, it is not so if he has not such means.

A. and B. agreed to row a boat race, and C. was appointed by them referee. They were to start themselves. There being some difficulty in the starting, B. rowed up to the boat in which the referee was, and having made a communication to him that A. would not start fair, the referee told him to go to his station and tell A. he must start, and if he would not start that he B. was to start without him. Upon this B. rowed down the river towards A. and afterwards he rowed up the river alone to the place appointed for the termination of the race, and claimed the stakes, which the referee ordered to be paid over to him as the winner of

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the race. The referee was stationed at a place from which he could not see the start, and he was not near enough to hear whether or not the order he had given to B. was communicated to A. The jury at the trial found that the order of the referee was not communicated to A. Upon an action brought by A. to recover his stake,

Held, that the referee had under the circumstances no jurisdiction to decide the race in B.'s favour, and that A. was entitled to recover.

This was an appeal by the defendant under the provisions of the Common Law Procedure Act 1854, from a decision of the Court of Queen's Bench, discharging a rule made on the 16th April 1868, which called upon the plaintiff to show cause why the verdict for the plaintiff should not be set aside, and the verdict entered for the defendant, on the ground that the decision of the referee was, for the purpose of the action, final.

Omitting the pleadings, the following is the case stated for the purposes of the appeal.

3. The plaintiff and one H. Kelley were both watermen well known upon the river Thames, and on the 7th Oct. 1867 they entered into an agreement to row a scullers' race in the following terms:

Articles of agreement between H. Kelley, of Putney, on the one part, and Joseph Sadler, of Putney, on the other part. They hereby agree to row a right-away scullers' race from Putney to the Ship at Mortlake, the start to take place between the aqueduct and the steamboat pier, on Wednesday, the 27th Nov., for a sum of 300l. a side, the start to take place at half-past two p.m., the steamboats accompanying the race to be behind the men at starting, the cutters also accompanying the men to keep astern of the sternmost man, to row according to the recognised rules of boat-racing, the referee to be chosen at the last deposit, and whose decision shall be final, 50l. a side being now staked in the hands of the editor of the *Sportsman*. Monday, Oct. 7; the second deposit of 50l. to be made on Thursday, Oct. 17, at the *Sportsman* office; the third of 50l. a side, on Thursday, Oct. 31, at the *Sportsman* office; the fourth of 50l. a side, on Thursday, Nov. 14, at the *Sportsman* office; and the final of 100l. a side, at the Bells, Putney, on Thursday, Nov. 21, between the hours of eight and ten p.m. In the event of the referee not being agreed to, the editor of the *Sportsman* to name one; the editor of the *Sportsman* to be final stakeholder. Either party failing to comply with these conditions to forfeit all money down.

HENRY KELLEY.

Witness, R. B. Wormald. J. H. SADLER.

4. At the time when the agreement was made the defendant was and still is the editor of the *Sportsman* newspaper, and he duly received from the plaintiff, and from the said H. Kelley respectively, the sums of money mentioned in the said agreement at the times and places therein mentioned.

5. In accordance with the said agreement the plaintiff at the time and place of making the last deposit proposed Mr. Wm. Biffin, a boatbuilder, at Hammersmith, as the referee, and the said Hy. Kelley consenting to this proposition, the said Mr. Wm. Biffin was accordingly appointed to and accepted the post of referee.

6. In sculling races between professional watermen it has been the invariable custom for the competitors to start themselves, but it is to be taken for the present purpose that if either should make default in starting, and any question should in consequence arise, it would be in the power of the referee to determine such question.

7. It is usual in such races for each competitor to appoint a person who, in rowing language, is called an umpire, who attends the referee during the race, and urges on him the claims of his principal whenever he thinks that circumstances require it, but such umpires are not appointed to, and, in fact, do not discharge any judicial functions. The umpire appointed for the race by the plaintiff was James Messenger, and the umpire appointed by the said Hy. Kelley was Charles Bush.

8. It is also usual in such races for each competitor to be followed by an eight-oared cutter, to render him certain services during and before the race, and on the two days hereinafter mentioned the men were attended by their cutters in the ordinary way.

9. On the day and at the time mentioned in the said agreement, the plaintiff and the said H. Kelley appeared at the starting place, attended by the said referee and umpires in a steamer, and the two started by mutual consent, but after they had rowed part of the distance a collision or foul took place, and thereupon each umpire claimed the race for his principal on the grounds that the foul was the fault of his (the principal's) opponent.

10. The referee being unable to decide whether the plaintiff or the said Henry Kelley had committed the said foul, decided that the race should be rowed over again on the next day, namely, the 28th Nov. 1867, and that the start should take place at 3 p.m.

11. In accordance with this decision of the referee, the plaintiff and the said H. Kelley appeared on the 28th Nov. 1867, at 3 p.m., at the starting place mentioned in the agreement, to row the race, and the referee and umpires also atended in a steamer as on the previous day.

12. During the next half-hour the plaintiff and the said H. Kelley each attempted unsuccessfully to start. At the expiration of that time the plaintiff rowed from the starting place to his cutter, and put on a jersey, after which he rowed down the river some distance, and Kelly at the same time rowed up the river to the steamer, on board of which the referee was. At this time the referee, from such observations as he had been enabled to make, had formed the opinion that the plaintiff did not intend to start. The jury, however, on an issue left to them, thereupon have found that the plaintiff did intend to start.

13. When the said H. Kelley got near to the referee's steamboat he said to the referee, "We shan't start to-night." The referee replied, "What is the matter? What is the reason?" Kelley said, "He (meaning the plaintiff) will not start fair." The referee then looked for the plaintiff, and could not see him. The referee then said to Kelley, "Go to your station, and tell Sadler he must start; and if he will not start you must start without him." Messenger, the plaintiff's umpire, protested, and said to the referee, "You have no right to tell Kelley to start without telling the other man yourself." The referee said that he was the referee, and should carry out the word that he had given.

15. The referee, when he gave the order mentioned in paragraph thirteen (in the case), intended it to be communicated to the plaintiff, and that the plaintiff should have a fair opportunity afforded him of starting, if he wished to do so.

16. Upon receiving the order of the referee mentioned in the said paragraph thirteen, Kelley rowed down the river towards the plaintiff; and conflicting evidence was given at the trial as to whether Kelley made any, and, if so, what, communication to the plaintiff; and there was also conflicting evidence as to whether the plaintiff had or had not opportunity of effecting a start on even terms. The jury have, however, found on both these points in favour of the plaintiff. The referee was much too far off to hear what communication, if any, was made by Kelley to the plaintiff; he saw Kelley row within the starting limits down the river towards the plaintiff, whom he could not see at this time; he then lost sight of Kelley, and of course could not see what occurred between Kelley and the plaintiff. After the lapse of a minute or a minute and a half he saw Kelley rowing up the river, but still saw nothing of the plaintiff. Kelley then in sight of the referee, whose steamboat followed him, rowed over the whole of the course, and arrived at the Ship, at Mortlake, the place appointed for the termination of the race by the agreement.

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18. When the plaintiff found that Kelley was rowing over the course he followed, and also rowed over the course.

19. After Kelley had rowed over the course Charles Bush, his umpire, claimed the race and stakes for him; and James Messenger, the plaintiff's umpire, protested that he was not entitled to them, but he offered no evidence, and gave no reasons in support of his protest, and no opportunity was afforded him of adducing any evidence, thereupon the referee awarded the race and stakes to the said Hy. Kelley, without hearing any evidence or taking any steps to ascertain if his order had been communicated to the plaintiff, and without having any means to give him the knowledge of the fact one way or the other.

20. The plaintiff, on arriving at Mortlake, heard the decision of the referee mentioned in the last paragraph, and on the next day, and before the defendant had paid the stakes to the said H. Kelley, gave notice to the defendant not to pay the amount of the stakes to the said Henry Kelley.

21. After the receipt of this notice the defendant paid the whole of the stakes, 600*l.*, to the said H. Kelley.

22. This being the evidence at the trial, the Lord Chief Justice left the following questions to the jury:—

(1.) Did Sadler intend not to start?

(2.) Had the referee means by actual observations of forming a judgment that Sadler did not intend to start?

(3.) Was the order of the referee that if Sadler would not start, Kelley should start without him, and row over, communicated to Sadler?

(4.) Was a fair opportunity given to Sadler?

23. The jury returned the following answers to the questions so left to them.

(1.) We think that Sadler did intend to start.

(2.) The referee had not the means of forming such a judgment.

(3.) That the order of the referee was not communicated to Sadler.

(4.) That a fair opportunity of starting was not afforded to Sadler.

24. Upon this the Lord Chief Justice directed the verdict to be entered for the plaintiff for the sum of 300*l.*, and reserved leave to the defendant, subject to the finding of the jury, to move the court to enter the verdict for the defendant, on the ground that the decision of the referee was for the purposes of the action final.

25. On the 16th April 1868 the defendant, in pursuance of the leave so reserved, moved for and obtained the rule to show cause, which, upon its coming on for argument upon the 21st Jan. 1869, was discharged.

Garth, Q. C. (*Ballantine*, Serjt. and *S. Tennant* with him) for the appellant (the defendant).—The question as to who was entitled to the stakes was one entirely for the referee. The whole matter was left to him, and his decision was final, even if erroneous, at least for the purposes of this action; and as long as his decision remains unreversed, it is not competent to either party to recover back his stakes. After the decision of the referee, it cannot be taken that the order was not communicated to Sadler. The case itself finds that there was conflicting evidence as to whether or not the order was communicated to Sadler. There can be no question of fact raised after the referee has decided. [KELLY, C. B.—But it seems that the referee had no actual knowledge of the fact.] Yet it must be taken that he had ascertained that the order was communicated. [KELLY, C. B.—If he had taken the question into consideration and decided it, that would have been a different thing; but had he ever ascertained the facts?] His decision is final until reversed by some means. Suppose at the time of the running of a horse race—say the Derby—the umpire had been seized with a fit of coughing, or dust had blown into his eyes, so that, in fact, he was for the moment disabled from actually seeing the result, and he nevertheless decides, could his decision be questioned in an action to recover back the stakes? Such races could never go on if such a decision were not binding. [WILLES, J.—Suppose one of the parties had started five minutes before the time, and the referee decided in his favour, would his decision be final?] I cannot say, in such a case, as it would be a violation of the agreement between the parties. The referee has jurisdiction from the time of the actual start or the placing. [KEATING, J.—Suppose the referee had not sent to Sadler at all could he then have so decided?] I apprehend he could, for the whole question was with him to decide. [KELLY, C. B.—The question is, was there any starting at all?] The referee's jurisdiction had attached, and everything in connection with the race was for the referee's decision as soon as that was the case. [KELLY, C. B.—No doubt that would have been so if the matter had really come before the referee; but he was not aware whether or not the message had been conveyed to Sadler, and yet he decided. If he had heard the evidence, and had then decided, even erroneously, it would have been a different thing; but here he saw nothing. It is like as though he had decided upon a race the day before, or upon a race at Newcastle, which he had not seen. The question was certainly for him, but he did not hear any evidence, and he would not hear any.] But he has, in fact, decided, and if he had the power to decide his decision is binding though he may have seen nothing himself. [KELLY, C. B.—Suppose you were appointed to decide a race run yesterday, at which you were not present, and you decide at once, and refuse to hear evidence. That is just the case.] No evidence was tendered. [KELLY, C.B.—No opportunity was afforded him. Is it not quite clear that the referee decided a question upon which he had no knowledge, and upon which he received no evidence?] The question ought not to have been left to the jury, as the referee's decision was final. In *Benbow* v. *Jones*, 14 M. & W. 193, the plaintiff entered his horse for a steeplechase, one of the conditions being that no groom or professional jockey would be allowed to ride; and another that all disputes and other matters should be decided by the steward, whose decision should be final. The plaintiff intended his horse to be ridden by one Walker, but before the day of the race was informed by the steward that he considered Walker a professional jockey, and that the horse, if ridden by him, would be no horse in the race. The plaintiff insisted that Walker was qualified, and on the race day, notwithstanding a similar intimation from the steward to the plaintiff, Walker rode the horse which came in first. On the following day the steward pronounced the second horse to be the winner, and by his direction the stakes were paid to the owner of that horse. Upon this, it was held that the steward had decided the question within the meaning of the condition; that his decision was final (although it was not made after hearing both parties), and that the plaintiff could not recover the stakes from the stakeholder. Here the judge refused to hear evidence as to whether or not Walker was a professional jockey, and the court held that his decision could not be questioned. [KELLY, C. B.—There he ascertained the fact for himself, but here he saw nothing, and heard no evidence. In the case cited he saw the race, and he had the means of judging. No doubt many irregularities are tolerated for the sake of supporting a tribunal to which parties have agreed to refer their differences, but in all such cases the arbitrator

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has had means of judging. No doubt the referee is the absolute judge when he has the means of judging.] It would then come to be a question for a jury whether the referee had the means of judging, and whether his judgment was in accordance with the facts. It must be assumed that the referee knew all the circumstances necessary to give him jurisdiction. [CLEASBY, B.—He assumed it all because he believed that Sadler did not intend to start.] The question really is, whether or not the referee is to decide the question. He cited

Dines v. *Wolfe*, L. Rep. 1 Priv. Co. 280; 20 L. T. Rep. N. S. 25.

KELLY, C. B. — This case is of considerable interest, because it involves a question peculiarly applicable to a great variety of cases, especially as to how far the power of an arbitrator to decide upon questions within his jurisdiction is to be controlled by a court of law. In nothing in what I am about to say do we desire to interfere with the principle that in any question within the jurisdiction of an arbitrator, umpire, or referee, and upon which he has decided, a court of law has no right or power to interfere; and if this referee had decided upon facts within his jurisdiction, and upon materials within his knowledge, we should have held that it was not in the power of a court of law to interfere. But what are the facts? The very foundation of the jurisdiction of the referee, and which he himself had prescribed, did not in fact exist at all. There was no race because there was no start, and there was no start because the condition which the referee had prescribed had not been fulfilled, and therefore he had no jurisdiction to decide. Let us see what are the facts. Commencing at the 12th paragraph of the case it is stated, "During the next half hour the plaintiff and the said Henry Kelley each attempted unsuccessfully to start. At the expiration of that time the plaintiff rowed from the starting place to his cutter and put on a jersey, after which he rowed down the river some distance, and Kelley at the same time rowed up the river to the steamer, on board of which the referee was. At this time the referee, from such observation as he had been enabled to make, formed the opinion that the plaintiff did not intend to start. The jury, however, on the issue left to them thereupon, have found that the plaintiff did intend to start. 13th. When the said Henry Kelley got near to the referee's steamboat, he said to the referee, "We shan't start to-night." The referee replied, "What is the matter? What is the reason?" Kelley said, "He (meaning the plaintiff) will not start fair." The referee then looked for the plaintiff, and could not see him. The referee then said to Kelley "Go to your station and tell Sadler he must start, and if he will not start, you must start without him." The referee himself then prescribed the condition on which the start was to take place—"Tell Sadler he must start, and if he will not start, you must start without him." Now, if Sadler, upon being told that he must start, had not done so, and Kelley had started without him, the facts would have justified the result. But this never did take place, and hence there was no start, and Sadler in fact had no means of knowing that he was bound to start when Kelley started. There was, therefore, no start, and no race. Let us go on then and see what further the case states. "Messenger, the plaintiff's umpire, protested, and said to the referee, 'You have no right to tell Kelley to start without telling the other man yourself.' The referee said 'That he was the referee, and should carry out the word that he had given.'" The difficulty therefore must have been patent to the referee, and the statement shows clearly that this communication to Sadler was of the very essence of the start. The case then proceeds, "The referee, when he gave the order mentioned in paragraph 13, intended it to be communicated to the plaintiff, and that the plaintiff should have a fair opportunity afforded him of starting if he wished to do so." I think upon this single fact that no communication with Sadler took place. The case goes on, "Upon receiving the order of the referee mentioned in paragraph 13, Kelley rowed down the river towards the plaintiff, and conflicting evidence was given at the trial as to whether Kelley made any, and if so what, communication to the plaintiff, and there was also conflicting evidence as to whether the plaintiff had or had not opportunity of effecting a start on even terms. The jury have, however, found on both these points in favour of the plaintiff." Now, it is contended by Mr. Garth that although the jury have found this, the referee has found the contrary; and I quite agree that if upon the facts of the case the referee had had any means whatever, either by being near enough himself to see, or by having evidence of the facts adduced before him so that it could be assumed that he had informed himself of the facts, his decision would have been final. The case goes on: "The referee was much too far off to hear what communication, if any, was made by Kelley to the plaintiff; he saw Kelley row within the starting limits down the river towards the plaintiff, whom he could not see. At this time he then lost sight of Kelley, and of course could not see what occurred between Kelley and the plaintiff. After the lapse of a minute or a minute and a half he saw Kelley rowing up the river, but still saw nothing of the plaintiff. Kelley then in sight of the referee, whose steamboat followed him, rowed over the whole course and arrived at the Ship at Mortlake, the place appointed for the termination of the race by the agreement." The referee, therefore, could neither see nor hear whether this communication was made to Sadler or not, and this is really the cardinal point of the case. The case further states, "after Kelly had rowed over the course Charles Bush, his umpire, claimed the race and stakes for him, and James Messenger, the plaintiff's umpire, protested that he was not entitled to them, but he offered no evidence, and gave no reasons in support of his protest, and no opportunity was afforded him of adducing any evidence, thereupon the referee awarded the race and stakes to the said Henry Kelly without hearing any evidence, or taking any steps to ascertain if his order had been communicated to the plaintiff, and without having any means to give him the knowledge of the fact one way or the other." Now nothing is more clear than the fact of a race having taken place depending upon whether or not a certain statement had been conveyed to Sadler, and that statement, upon which his decision was given not having in fact been communicated as it should have been, the referee, nevertheless, took upon himself to declare that one party had won the race, and that the other party had lost the race, without knowing or taking means to know what were the real facts of the case. I cannot but think that the referee must have assumed that his message had been delivered, and if he so assumed a fact which had no existence his decision amounted to nothing. Then looking at the whole of this case, as there could be no race without a start, and if no race without a start there was no foundation for the referee's decision, the plaintiff is accordingly entitled to his stakes.

WILLES, J.—Departing from the rule which prevails on these occasions when the decision of the court is unanimous of not giving a separate judgment, I wish merely to say that if it had been shown that the referee was aware that his commu-

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nication had been made to Sadler, his decision would have been final.

Attorney for plaintiff, *F. Richardson.*

Attorney for defendant, *Charles Mossop*, Ironmonger-lane.

COURT OF ARCHES.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

July 28 *and* 31.

(Before the Right Hon. Sir R. J. PHILLIMORE, Dean of Arches.)

EDNEY AND LUNN *v.* SMALLBONES.

Church rates—31 & 32 Vict. c. 109, s. 3—Loan by Public Works Commissioners for repair of church—Rate to repay—5 Geo. 4, c. 36—Objections to validity of rate—Omission of re-elected churchwarden to make declaration required by 5 & 6 Will. 4 c. 62, s. 9—Non-assessment of tithe rentcharge.

Money was borrowed for the purpose of rebuilding and enlarging a parish church, from the Commissioners of Public Works, under the provisions of 5 Geo. 4, c. 36. A rate was duly assessed and levied in order to repay an instalment of the above loan.

The defendant refused payment of his assessment, and raised the following objections to the validity of the rate.

First objection, that the promoters of the suit were not at the time of making the rate, nor afterwards, lawfully churchwardens of the parish, on the ground that one of them had not made the declaration required by 5 & 6 Will 4, c. 62, s. 9:

Held, that this objection failed, since a churchwarden, who has made the declaration in a preceding year, and continues in office without renewing the declaration, though compellable to do so, may do legal acts by virtue of his office, which will be binding upon himself and the parishioners.

Second objection, that the tithe rentcharge was not rated and assessed.

Held, that, at common law, the impropriate tithes, which the title rentcharge now represents, are not rateable to ordinary church rates, and that this exemption must also hold with regard to rates made, under the provisions of 5 Geo. 4, c. 36, to repay money advanced by the Commissioners of Public Works, there being no express words in the statute, nor necessary implication arising upon its construction, to take away the common law right.

This was a suit for subtraction of church rates.

The case came before the court by letters of request from the Chancellor of the diocese of Winchester. The promoters were the churchwardens of Whitchurch, near Southampton, and the defendant was one of the parishioners.

In 1867, the church of Whitchurch being in a dilapidated condition and in want of substantial repairs, a vestry meeting was called in February of that year, in order to consider the expediency of applying to the Commissioner of Public Works, under the stat. 5 Geo. 4, c. 34, for a loan to aid the expense of repairs. The meeting passed a resolution that 4000*l.* was required, and also another resolution, with consent of the Bishop of Winchester and the incumbent of the parish, that an application should be made to the Commissioners of Public Works for an advance of 2000*l.* In March 1867 the commissioners advanced the money, to be repaid in twenty years by instalments of 100*l.*, with interest at 4 per cent. In June following a faculty was obtained to enlarge and repair the church. The Act enacted that the churchwardens might impose rates for the payment of the money. In Feb. 1868 a rate of 6*d.* in the pound was made to pay the first instalment and interest, and the majority of those assessed paid the rate. The defendant was assessed in the sum of 4*s.* 3*d.*, and having refused payment was summoned before the justices. Several objections were raised as to the validity of the assessment, and the case was then remitted to the Consistorial Court of the diocese.

The Act for the Abolition of Compulsory Church Rates (31 & 32 Vict. c. 109) by sect. 3 provides that,

In any parish where a sum of money is at the time of the passing of this Act due on the security of church rates, to be made or levied in such parish under the provisions of any Act of Parliament, or where any money in the name of church rate is ordered to be raised under any such provisions, such rates may still be made and levied, and the payment thereof enforced by powers of law, pursuant to such provisions, for the purpose of paying off the money so due, or paying the money so ordered to be raised, and the costs incidental thereto, but not otherwise, until the same shall have been liquidated; provided that the accounts of the churchwardens of such parish in reference to the receipt and expenditure of the moneys levied under such Acts shall be audited annually by the auditor of the poor law union within whose district such parish shall be situate, unless another mode of audit is provided by Act of Parliament.

Dr. *Deane*, Q.C. and Dr. *Tristram* argued for the promoters; and

Sir *Travers Twiss*, Q.C. (the Queen's Advocate) and Dr. *Swabey* for the defendant.

The cases and statutes cited are noticed sufficiently in the judgment.

July 31.—Sir R. PHILLIMORE.—This case is brought before this court by letters of request from the Consistory of Winchester. Certain questions of law are raised upon the pleadings and by the evidence taken before me, which I have now to decide. It appears that a rate has been assessed and levied upon the inhabitants and parishioners of the parish of Whitchurch, in the diocese of Winchester, in order to repay to the Commissioners of Public Works an instalment of the sum of 2000*l.*, borrowed from them under the provisions of 5 Geo. 4, c 36. The money was borrowed for the purpose of defraying a portion of the expense of "rebuilding and enlarging" the parish church, the whole expense amounting to 4000*l.* After the arguments which I have heard, I must consider the vestry meeting at which the resolution to borrow the money was passed, to have been duly summoned by proper notice, the resolution to have been duly passed, the consents of the bishop and incumbent to have been duly given, the application to the commissioners to have been duly made, a faculty to have been duly obtained, and, in point of form, the rate to have been duly made on the 7th of Feb, 1868, by the churchwardens and overseers in the manner prescribed by the statute. I must also consider that the money raised by the loan has been in part expended upon the rebuilding of the church, as well as the fact that Mr Smallbones occupied property in the parish, for which he was in point of form duly assessed, and that he has been requested, and has refused to pay his assessment. His objections to the invalidity of this rate are at present the following:—(1) That neither at the time the rate was made, nor at any subsequent period, were the promoters of this suit lawful churchwardens of the parish. I must take it to be proved that one of the churchwardens had not made the declaration prescribed by the statute before the ordinary at the time when this rate was made; but he was a re-elected churchwarden, and had been admitted in 1867 on his former election. By the 5 & 6 Will. 4, c. 62, s. 9, it is enacted, "That, in future, every person entering upon the office of churchwarden or sidesman, before beginning to discharge

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the duties thereof, shall, in lieu of such oath of office, make and subscribe, in the presence of the ordinary or other person before whom he would, but for the passing of this Act, be required to take such oath, a declaration that he will faithfully and diligently perform the duties of his office, and such ordinary or other person is hereby empowered and required to administer the same accordingly." By the 118th canon, which is in this matter unaffected by the statute, "The office of all churchwardens and sidesmen shall be reputed ever hereafter to continue until the new churchwardens that shall succeed them be sworn." I have looked at the case of *Stoughton* v. *Reynolds*, 2 Strange, 1045, and the more modern case of *Bremner* v. *Hull* 15 L. T. Rep. N. S. 353, 354; L. Rep. 1 C. P. 759, 760, and at the case of *Bray* v. *Somers*, 31 L. J. 137, M. C.,; 6 L. T. Rep. N. S. 49; and the propositions of the law to be collected from the statute, the canon, and these and other cases, are: (*a*) That every churchwarden ought to make the declaration when he is admitted to office before the ordinary; (*b*) That, if the ordinary refuse to admit him, he may be compelled by *mandamus* so to do; (*c*) That the ordinary may compel the churchwarden to make the declaration; (*d*) That the churchwarden who has made the declaration in a preceding year, and continues in office without making the declaration, though compellable to do so, may do legal acts by virtue of his office, which will be binding upon himself and upon his parishioners. I am, therefore, of opinion that the first objection fails. The objections with respect to the notice of the vestry, and with respect to] the non-assessment of the lay rector for property unconnected with the great tithes, have been abandoned upon evidence being produced that the notice was valid, and that the property in question was, by force of a legal order in council, now situate in another parish. The next, and the most important, objection is, that the tithe rentcharge, amounting, at the time when the rate was made, to a rateable value of 1189*l.*, and belonging to Mr Melville Portal, was not rated and assessed. And, if this property be rateable, unquestionably the rate is invalid, on the ground of so large an omission. It is not necessary to cite authorities upon this point. According to the common law, the impropriate tithes, which the tithe rentcharge now represents, are not rateable for the repairs of the church as these tithes are charged with the reparation of the chancel (*Nunn* v. *Varty* and *Mopsy*, 3 Curt. 362); but it is contended that that exception does not apply to the case of a rate made to repay a loan under 5 Geo. 4, c. 36. That statute, by sect. 1, provides that it shall and may be lawful for the churchwardens and overseers of the poor of any parish in England or Wales, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor in vestry assembled . . . and, with the consent of the bishop of the diocese and the incumbent of such parish, to make application to the commissioners authorised and empowered to make advances for public works under the provisions of recited Acts, for any loan or advance under the powers, authorities, provisions, and regulations of the said Acts, and this Act, of such sum . . . as shall be necessary for defraying the expense or any part of the expense of rebuilding, repairing, enlarging, or otherwise extending the accommodation "in any church or chapel of any such parish." And "from and after the grant of any such loan or advance, it shall be lawful for the churchwardens, &c., of the parish in respect of which such loan or loans shall be advanced as aforesaid . . . and they are hereby authorised and required to make such annual or half-yearly rates for the repayment of the sum so advanced, in such proportions and at such times as shall be directed and appointed by the said commissioners on that behalf, and to assign the rates so to be made as aforesaid as a security for the repayment of the sums so advanced in such manner and form as the said commissioners shall direct and appoint, and so as to secure the repayment of the sums so advanced, with interest thereon, at and after the rate of 4 per cent. per annum, by annual or half-yearly instalments, on the amount of the principal money advanced, within the period of twenty years at farthest from the advancing of any such sums respectively." And by sect. 2, it is provided that the churchwardens, &c., may "collect, demand and receive, sue for, levy and recover all such rates by all such ways and means as any church rates may by law be collected, demanded, received, sued for, levied and recovered, &c." I was referred also to the preceding statute 57 Geo. 3, c. 34, which by sect. 26 enacted that it shall be lawful for the commissioners "to advance any money under this Act for the building, enlarging, or repairing any church, &c., upon having a sum equal to one-half part of the estimated expense of such building, enlargement, or repair, subscribed for, or deposited, or vested in any public fund, without requiring any such personal security as aforesaid; and in every such case it shall be lawful for the churchwardens . . . or the trustees of the said church or chapel, and they are hereby authorised and required to make rates, and shall give the pews in security for the repayment of the interest of the moneys advanced under the provisions of this Act, and for providing annually a fund of not less than the amount of the interest upon the sum advanced for the repayment of the principal thereof." And sect. 29 of the same Act provides that no such advance shall be made, "unless the application for such advance shall be made with the consent of not less than the majority in number, and of three-fourth parts in value, such value to be calculated and assessed from the last rate made for the relief of the poor in such parish, of the persons assessed to and paying such rates. . . Such consent to be certified by some justice of the peace or magistrate acting as such in each parish, one or more of the overseers of the poor of the parish or place in respect of which the application shall be made." The Queen's Advocate contended, as I understood him, that so far as that statute was concerned, the old law with respect to the exemption of the impropriate tithes remained unaltered; but that the introduction of the overseers of the poor into the subsequent Act, together with the other poor-law machinery, did have the effect of altering the old law. It was admitted that no instance will be found in which under 5 Geo. 4., c. 36, the impropriate tithes had been rated; but it was truly said that, if the objection was valid, the fact of its not having been taken earlier was of no avail. The Act itself does not specify the property on which the rate is to be levied; but it was said that the parties, who are to consent to the rate, are mentioned, and they are those who are assessed to the poor rate, and it must be presumed that they are to consent, because they are to be taxed; that tithe rentcharge is rateable to the poor, and that I ought therefore to read the statute as if it had these words in it—"such rates to be levied on all property assessed to the relief of the poor." It must be admitted that this contention is not without considerable weight. The proposition, however, goes further in its necessary consequences than the mere removal of the exemption of the impropriate tithes. Stock in trade is not rateable to the poor, but it is assessable for church rates; the standards of the two rates are different, for it has been holden that the poor-rate assessment is not necessarily a standard for the validity of a church-rate assessment. Upon the construction

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now contended for the law upon these subjects is also altered, without express words, by implication. An argument has been further drawn from contrasting the provisions of this statute with respect to loans with those of the Church Building Acts (58 Geo. 3, c. 45, s. 56, and 3 Geo. 4, c. 72, s. 5). By these Acts the rates for repayment are to be made in the usual manner by the churchwardens. It is further argued that I have already decided in the case of *Rippin* v. *Wilson and Bastin* (38 L. J. 33, Eccl.; 20 L. T. Rep. N.S. 622) that the expenditure of money raised by loan under this statute upon the repairs of the church is lawful; and that, therefore, it would be unjust not to hold that the impropriator, who may be relieved from the burden of repairing the chancel, shall not be assessable like any other parishioner to the burden of repairing the church. As to the argument of injustice, it must be remembered that the Act provides that the consent of the major part of the poor-rate payers and of the bishop of the diocese, to say nothing of the incumbent, who may be impropriator, shall be a condition precedent of any application for a loan; and it must be presumed that, unless it were for their interests, this consent would not be granted. Is is to be remembered that the obligation to repair the church continues binding for all time upon the impropriator, even if he were to be temporarily relieved by the operation of the present statute; and it is to be observed that, under the old law, the incumbent, who may be impropriator, presided and voted at all vestry meetings at which a church rate was passed. After such consideration, it appears to me that I cannot put the construction upon the Act which has been contended for by the Queen's Advocate, and to a certain extent, I am confirmed in this view by the decision in *re Batkin* 25 L. J. 128 M.C., where it was held that the jurisdiction of justices to enforce payment of a rate made for the repayment of money borrowed under the stat. 5 Geo. 4, c. 36, is the same as with respect to a church rate, and that they therefore had no power to order payment, when the party assessed and refusing to pay takes *bonâ fide* objections before them as to the validity and legality of the rate. And Wightman, J. in his judgment says: "Is the rate in question then to be considered, for this purpose, as differing from ordinary church rates? The stat. 5 Geo. 4, c. 30, s. 2, says that the rates made under it may be sued for, levied, and recovered by all such ways and means as church rates may be, as fully and effectually as if all powers, authorities, provisions, penalties, and forfeitures relating to the suing for, levying, and recovering church rates, were specially repeated in that Act. Whatever the intention of the Legislature may have been, the words of the Act are so strong and unambiguous, that I cannot distinguish the case from that of an ordinary church rate." The impropriator has by common law a right to the exemption of his tithes from rateability to the church rate. That right can only be taken away by the express words of a statute, or by a necessary implication arising from the construction of it. Express words there are none in this case; and the inference is too strong to be warranted by the doctrine of necessary implication, as applied to the purpose and language of the statute. I must therefore pronounce that the libel is proved, and adjudge the defendant to pay his assessment with costs.

Proctor for the promoters, *G. C. Ring.*

Proctors for the defendants, *Fielder* and *Sumner.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 20.

(Before KELLY, C.B., MARTIN, B., BYLES, BLACKBURN, and LUSH, JJ.)

REG. v. REDFORD.

Embezzlement—Master and servant—Benefit Building Society—Secretary—Trustees.

The trustees of a Benefit Building Society borrowed money for the purposes of their society on their individual responsibility (there being no rule of the society authorising them to borrow money). The money on one occasion was received by the secretary, and embezzled by him:

Held, that the secretary might be charged in the indictment for embezzlement as the servant of W. and others, W. being one of the trustees and a member of the society.

Case reserved for the opinion of this court at the quarter sessions for the city of Manchester, held on the 26th Aug. 1869.

William Gregory Redford was tried and found guilty on an indictment which charged him with the embezzlement of 500*l.*, the property of E. G. Williams and others, his masters.

For the purposes of this case the conviction of W. Gregory Redford is to be deemed and taken to be a good conviction, unless the facts stated are not evidence of the crime of embezzlement.

CASE.

There had existed in Manchester for some years a building society, the rules whereof were duly registered under the provisions of 6 & 7 Will. 4, c. 32. These rules may be referred to, and are to be taken as part of this case.

Under rule 11 George Christopher Williams and others were appointed, and still acted as the trustees of the said society.

Under rule 14 the prisoner was appointed by the trustees and managers to be secretary to the society, and continued to act as such secretary up to January last.

The trustees almost from the commencement of the society's operations had borrowed upon their individual responsibility, and on the security of promissory notes, signed by some of them respectively, moneys from persons willing to lend the same. The moneys thus borrowed were subsequently employed for the purposes of the society, *i.e.*, in making advances to members on mortgage and otherwise. These promissory notes were for the most part drawn out by the prisoner, and when signed by some of the trustees were delivered by him to the lender in exchange for the amount of the loan.

About the 23rd July 1868, the prisoner prepared such a promissory note, of which the following is a copy, as the same now appears.

500*l.* Manchester, July 23, 1868.

Two months after notice to the secretary, W. G. Redford, we jointly and severally promise to pay to John William Fuller the sum of 500*l.* together with interest thereon after the rate of five pounds per centum per annum from the date hereof, for value received.

CHARLES MEREDITH, THOMAS WIGHTBOURNE, GEORGE C. WILLIAMS, THOMAS ANDERTON, WILLIAM WILSON, B. TOWLSON, JAMES EYRE, Trustees and Managers to the Ninth South Lancashire Building Society.

Witness to signatures, W. G. REDFORD.

The body of the note, and the attestation, is in the prisoner's handwriting, and the other signatures were given by the managers and trustees in due course.

The evidence of the prisoner's receipt of the money which was the amount of the promissory

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note, consisted of the production of a letter written and signed by him, dated the 23rd July 1868, and of an entry in the list or statement of liabilities hereinafter-mentioned. The said letter was in the words following:

Ninth South Lancashire Benefit Building Society,
21, Dickenson-street.
W. G. Redford, Secretary.
Manchester, July 23, 1868.

Dear Sir,—The 500*l.* is safe to hand, and your leaving it with my clerks was perfectly right and in accordance with my instructions. If you wish the signatures witnessed, I shall be happy to do so any time you like to call here with the note.—I am, yours truly,

William G. Redford.

J. W. Fuller, Esq., Lower Brighton.

In the month of Jan. 1869 the said G. C. Williams went to the prisoner and found him writing out a document, which prisoner stated to be a list of his defalcations, in these words: "This is the amount of my defalcations, and I have no money." In this document, which was produced in evidence, there is an entry in the following words:

"J. Fuller. 500*l.* Copy destroyed, but I remember he would have it fully signed, so the names would be Meredith, Williams, Lightbourne, Wilson, Eyre, Anderton, and Toulson."

No part of the 500*l.* was ever paid by the prisoner to the society, or any of its trustees or managers, and on the 27th July 1869, that sum with interest was paid to Fuller by the seven makers of the promissory note.

It was objected before me on behalf of the prisoner that on the evidence this indictment was not proved.

1. Because if by the words "G. C. Williams and others," in the indictment, it was to be taken that the makers of the promissory note as individuals (whose money the 500*l.* was upon its receipt by the prisoner) were described, the relation of master and servant never existed between the prisoner and those individuals.

2. But if by the words "G. C. Williams and others," it was to be taken that by virtue of the statute 10 Geo. 4, c. 56, s. 21, incorporated with the statute 6 & 7 Will. 4, c. 32, the trustees of the society (whose servant the prisoner was) were properly described, then the money alleged to be embezzled was not money of his masters, the trustees, as such, the statute only vesting in the trustees, and enabling to be described accordingly in an indictment what was the property of the society as such.

3. That if the prisoner were the servant, and the money the property of the said G. C. Williams and others, the letter of July 23, 1868, which was the evidence of the receipt thereof by the prisoner, showed that the money was therefore in the constructive possession of his masters by the hand of a fellow servant.

I overruled these objections, and let the case go to the jury. The prisoner was found guilty and sentenced, but I reserved for the consideration of the court the following question:

Was there evidence of embezzlement by the prisoner to go to the jury; if there was not, the conviction is to be quashed, if there was, the conviction is to stand.

Henry W. West,
Recorder of Manchester.

Holker, Q.C. (*Macrory* with him), for the prisoner. The conviction was wrong, for the prisoner was not the servant of Williams and others. The third objection will not be relied upon. There is no rule of this society that authorises the trustees to borrow money, and it is found in this case that the 500*l.* was borrowed on the personal security of the trustees. [Blackburn, J.—Can the prisoner object that the borrowing of the money was a breach of trust by the trustees? Suppose a clerk in a railway company indicted for embezzlement, could he object that the money embezzled was obtained on the security of one of Lloyds' bonds? Martin, B.—Is this society a corporation?] No. [Martin, B.—If it is not a corporation, the society consists of a number of individuals like an insurance company, that calls itself by a certain name.] By sect. 21 of the 10 Geo. 4, c. 50, which is incorporated into the Building Societies Act (6 & 7 Will. 4, c. 32), the property of a building society is vested in the trustees or treasurer for the time being, and it is to be taken to be for all purposes of action or suit as well criminal as civil, and may be described in any such proceedings as the property of the person appointed treasurer or trustee of such society. Here it is clear that the money was borrowed by the trustees on their individual responsibility. [Blackburn, J.—The money was intended as a loan to the society, and the trustees were merely sureties for its repayment.] Until they applied the money to the purposes of the society it was their money. [Blackburn, J.—Suppose an infant wants a loan, and he requests a friend to obtain it for him on his personal security, and the friend sends the money to the infant by a person in the infant's employ, who embezzles it, why is not that person the servant of the infant?] The prisoner was not authorised to receive money by the rules of the society, and he held the money for the persons it belonged to, but he was not their servant. [Lush, J.—The trustees are members of the society, and you say it was their money, and that the prisoner was a clerk of the society. Now it has been held that a servant in the employment of a partnership must be considered as the servant of each member, and if he embezzle the private money of one he may be charged as the servant of that individual partner: *Rex* v. *Leech*, 3 Stark, 70; *Reg.* v. *Bailey*, 7 Cox C. C. 179; 1 Dears & Bell.] It is submitted that the prisoner was the servant of the trustees, and should have been indicted as their servant *qua* trustees.

Jordan, for the prosecution, was not called upon to argue.

Kelly, C. B.—The cases cited by my brother Lush are decisive of this case, and show that the prisoner may be described in the indictment either as the servant of the trustees of the building society, or of the trustees individually. If the prisoner was the servant of the society he is properly described as the servant of the persons of whom the society is composed, though it may consist of a great number of persons. If the money was, as in law and in fact it was in this case, the money of the society, the prisoner may be properly charged as in this indictment, with embezzling the property of Williams and others as the members of the society. If, on the other hand, as was argued, it was the money of the trustees by reason of their having acted as the representatives of the society, although they gave their personal security for its repayment, and intended to apply it for the purposes of the entire society, yet, until they so applied it, it remained the individual property of the trustees, then the prisoner may be charged as their servant. So that taking it either way the conviction was right and must be affirmed.

Martin, B.—When once it is ascertained that the society is not a corporation, every difficulty is solved. The members of the society may call themselves a society, but they are in reality nothing more than a number of persons formed into a partnership.

Byles, J. concurred.

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BLACKBURN, J.—These trustees made themselves individually liable for the repayment of this money, but they borrowed it for the society as sureties. There is no doubt that it was the money of the society, though there may be some doubt whether the trustees could have enforced the charge against the society. It is like the case of a railway company with no borrowing powers, borrowing money on the security of the directors personally; or, perhaps, it is more like the case of an infant borrowing money on the security of a friend. The indictment properly charges the prisoner as the servant of Williams and others, and the conviction must be affirmed.

LUSH, J. concurred.

Conviction affirmed.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Thursday, July 8.

(Present, the Right Hon. Sir JAMES W. COLVILE, Sir JOSEPH NAPIER and Lord Justice GIFFARD.)

WILSON AND ANOTHER (apps.) *v.* TRAILL (resp.)

Victoria—Garnishee summons—Property subject to attachment—Property "belonging to" defendant, or in which he is "beneficially interested"—Property entrusted to defendant for sale.

The Common Law Procedure Act (Victoria), 1865, *by sect.* 215, *gives a summary remedy for damages against a garnishee, who shall, after service of the writ and before the dissolution of the attachment, without the leave of the court, dispose of or part with any "property, of whatsoever nature, belonging to the defendant, or to or in which such defendant shall be legally or equitably entitled, or otherwise beneficially interested," attached in the hands of the garnishee. In proceedings taken under the above section:*

Held (affirming the judgment of the Supreme Court of Victoria), that the words of the statute require that the property attached should belong to the defendant, and imply an actual, and not merely a constructive, ownership in him; and that, therefore, where a garnishee parted with property, which though dealt with by the defendant as if he was the owner, had been really only entrusted to him for sale, a summons under the above statute was properly refused.

This was an appeal against a rule of the Supreme Court of the colony of Victoria, at Melbourne, dated the 16th Sept. 1867, and making an order a rule of court. The order had been made by a judge of the Supreme Court dismissing a garnishee summons in an action between the appellants and one Lancelot E. Threlkeld (trading under the name of L. E. Threlkeld and Co.) The appellants are merchants at Melbourne, and on the 17th May 1866, purchased through John Everard and Co, tea brokers, in Melbourne, from Messrs. L. E. Threlkeld and Co., auctioneers, of Sydney, a large quantity of tea, and in the following month Messrs. Threlkeld and Co., deposited with the Oriental Bank Corporation, at Sydney, to be transmitted to their branch, at Melbourne, certain bills of exchange drawn by them upon the appellants against the consignment of the tea, and gave directions to the bank to present the bills for acceptance, and to collect the amounts at maturity.

About the time of such deposit 318 and 49 chests of tea were shipped by Messrs. Threlkeld and Co. to Melbourne, and the bills of lading thereof were delivered to the bank, with directions to deliver the teas to the appellants on their acceptance of the bills.

The teas reached Melbourne in due course, but on presentation of the bills to the appellants they re-refused to accept them on the ground that some parcels of the tea did not correspond with that which they had purchased.

The appellants thereupon commenced an action in the said Supreme Court against Threlkeld and Co., for non-delivery of the tea which had been purchased.

The writ in such action was returned *non est inventus*, and on such return the appellants issued a writ of foreign attachment, directed to the respondent, as manager of the bank, attaching the teas in his hands for the purpose of making satisfaction to the appellants. Such writ was issued, and the proceedings thereupon were taken under sects. 211-216 of the Common Law Procedure Statute for Victoria 1865 (28 Vict. No. 274).

Sect. 211 is as follows:

In every action at law in the Supreme Court, on or arising out of contract, and in every action in such court for the conversion or detention of goods wherein the writ of summons or of *capias* shall (as to any defendant named therein) be returned *non est inventus*, if upon or after such return an affidavit shall be filed on behalf of the plaintiff (in addition to a full affidavit of the cause of action), that such cause of action arose within Victoria, and that to the best of deponent's belief such defendant does not reside within the colony, and is, to the best of deponent's belief, possessed of or entitled to, or otherwise beneficially interested in any lands, moneys, securities for money, chattels, or other property in the custody or under the control of any person or persons in the colony, hereinafter called the garnishee or garnishees (to be named in such affidavit), or that any such person or persons is or are idebted to such defendant, the plaintiff may proceed against such defendant by process of foreign attachment in the manner hereinafter directed. Provided that by leave of a judge (where it shall appear that the plaintiff may sustain injury by the delay) such affidavit may be filed before the return of such writ of summons.

The affidavit required by the said section was duly made.

Upon the return of the writ of attachment, the respondent was examined on the 23rd Oct. 1866, and an order was made by a judge of the Supreme Court that 218 chests of tea, part of the 318, should be attached to answer the appellant's claim, and that as to the remaining 100 chests and the 49 chests the attachment should be dissolved.

This order was made under sect. 216 of the said statute, the material part of which is as follows:—

Upon the return of every such writ of attachment as aforesaid, or as soon after as conveniently may be, and upon such other day or days of adjournment (if any) as shall in that behalf be directed, the said court or one of the judges thereof shall proceed to inquire and determine whether in fact the plaintiff's cause of action arose within Victoria, and if so, then what lands, moneys, chattels, and other property as aforesaid (sufficient or not more than sufficient to satisfy the plaintiff's cause of action, together with his costs of suit), then are or were at the time of the service of the said writ in the custody or under the control of any such garnishee or person as aforesaid, belonging to the defendant, or to or in which he was at that time entitled or interested as aforesaid, and what debts were then due to such defendant from any such garnishee or person, and the particulars thereof, and whether such lands, moneys, and other property and debts, or any part or parts thereof, are or can be made available for the purpose of making such satisfaction as aforesaid, and to what amount respectively; and for the purposes of such inquiry and determination it shall be lawful for the said court or judge in a summary way to examine or permit the said plaintiff to examine *viva voce* upon oath every such garnishee or person, together with such witnesses (if any) as the said court or judge may think proper to be so examined, and for that purpose to make such orders and issue such summonses to the several garnishees and to any witness or witnesses as may in that behalf be deemed expedient, and any such garnishee or person as aforesaid or witness who shall refuse or neglect to attend according to the exigency of any such writ of attachment, or to obey any such order or summons, or shall refuse to be so examined, shall be liable to be summarily proceeded against as in cases of contempt of court, and to be punished accordingly.

At the time of making the said order the respondent had received notice (as the fact was) that the

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teas at the time of their consignment to the bank, were and from thence had continued to be, the property of Messrs. A. Tange and Co., merchants of Sydney, by whom they had been placed in the hands of Threlkeld and Co. for sale on their account.

On the 20th Nov. 1866, the appellant drew up the following order, purporting to be based on the minute of order, made on 23rd Oct. 1866:

I do order that 218 chests of tea, part of 367 chests of tea, belonging to the defendant, Lancelot E. Threlkeld, now in the hands of the said George Hamilton Traill, acting manager of the Oriental Bank Corporation, be sold by the said George Hamilton Traill, and that the proceeds of the sale of the said 218 chests of tea be henceforth holden by the said George Hamilton Traill, subject to the said writ of foreign attachment issued in this cause, for the purpose of making satisfaction to the plaintiffs for their said claim in this action; and I do further order that as to the remaining 149 chests of tea belonging to the defendant, Lancelot E. Threlkeld, now in the hands of the said George Hamilton Traill, the said writ of foreign attachment be dissolved.

On the 26th Nov. the appellants proceeded in the action, as if Threlkeld and Co. were residing in Victoria. This was under sect. 218 of the said statute, which is as follows:

At any time after the return day of any such writ or attachment, it shall be lawful for the plaintiff to proceed in the action as if such defendant resided in Victoria, and had appeared to such action in person. Provided that such bond as is hereinafter in that behalf prescribed shall have been first duly entered into.

On the 5th Dec. 1866, the respondent obtained a rule *nisi* to set aside the said order of the 20th Nov. on the grounds that there was no jurisdiction to direct the sale therein directed, and that the proceeds of the said sale should have been ordered to be paid into court; and on the 24th Dec. the said rule was made absolute.

The appellants endeavoured to have such rule amended, but without success.

On or about the 9th Jan. 1867 the appellants' attorney, without having previously given notice to the respondent, or to Threlkeld, or to the attorney of either of them, of their intention so to do, obtained the signature of a judge of the said court to an order of attachment, dated back, viz., on the 20th Nov. 1866; which was in the same terms as the first order of the same date, which had been set aside, except that the second order omitted the direction for the sale of any part of the said teas.

The respondent was served with this second order on the 9th Jan. 1867; but he had, between the dismissal of the order of attachment and sale (of the 20th Nov. 1866), and the obtaining of the said second order, that is to say, on the 28th Dec. 1866, taken counsel's opinion as to what course he should pursue under the circumstances of the case, and under his advice had re-shipped the teas to the Oriental Bank Corporation at Sydney, who had on the 21st Jan. 1867, delivered them up to the said Tange and Co., without any payment or security to them, and without any agreement or promise for any payment or security, and without insisting upon any lien on the said teas or any of them.

On the 12th Feb. 1867 a summons was issued by the appellants against the respondent to show cause why he should not pay such damages as to the judge should seem meet, and the costs of the application on the grounds that he had disposed of or parted with, and sent out of the jurisdiction of the court the goods attached in his hands to satisfy the appellants' claim.

This summons was issued under sect. 215 of the said statute, which is as follows:

From the time of the service of such writ upon any such garnishee or person as aforesaid, all and singular the lands and other hereditaments, moneys and chattels, bills, bonds, and other property, of whatsoever nature, in the custody or under the control of such garnishee, then belonging to the defendant, against whom such writ issued, or to or in which such defendant shall then be legally or equitably entitled, or otherwise beneficially interested (and whether solely or jointly with any person or persons), and all debts of every kind then due by any such garnishee to such defendant, although the same, or part thereof, may be payable only at a future day, shall, to the extent of such defendant's right, title, and interest, therein respectively be attached in the hands of such garnishee, and (subject to any *bona fide* prior claims or liens thereon) be liable to the satisfaction of the particular demand or cause of action of which he or she shall, by the said writ, have had notice; and if any such garnishee or person, without the leave of the court or one of the judges, shall at any time after such service, and before the said attachment shall be dissolved, sell or otherwise knowingly dispose of or part with any such property, or pay over any such debt, or any part thereof, excepting only to or to the use of the plaintiff in such writ, he or she shall, upon the application in a summary way of such plaintiff to the court, or any judge thereof, and on proof of the facts, pay such damages to the plaintiff as such court or judge shall in that behalf think fit to order.

The said summons against the respondent was referred to the court, and by the court dismissed, and on the 16th Sept. the order dismissing such summons was for the purpose of appeal made a rule of court. Against this rule the present appeal was brought.

Forsyth, Q.C. and *Pontifex* were for the appellants

Sir *Roundell Palmer*, Q. C. and *Macnamara*, for the respondent, were not called on.

Judgment was delivered by Sir James W. Colvile.—It may be well, before stating the views of their Lordships upon the particular point involved in this appeal, to consider what the position of the parties was. The plaintiffs in the action, the appellants in this appeal, being resident in Melbourne, made a contract through their agents at Sydney for the purchase of certain teas. Upon the face of the contract those teas appeared to be the teas of Threlkeld, who now is found to have been the agent of an undisclosed principal, Mr. Tange. The teas were sent to Melbourne, and the form of the action shows that the purchasers, the appellants, had treated them as not being such teas as they had contracted to purchase, and they accordingly brought their action to recover the moneys which they had paid under the contract. Therefore that clears the question as to the property in the teas. The teas in the hands of the garnishee were the property of the vendor, whoever that vendor might be. The action was brought against the ostensible vendor, Threlkeld, in the Court of Melbourne. Neither Threlkeld nor Tange was personally subject to the jurisdiction of that court. The plaintiffs, therefore, took advantage of the law of foreign attachment, and upon the return of the writ of summons *non est inventus*, they attached these teas as the teas of Threlkeld in the hands of the garnishee. Then took place those various proceedings which their Lordships do not think necessary to enter into particularly, but the result was that the garnishee (for it will be convenient in dealing with this appeal to treat the acts of the bank of which he was an officer as his acts), finding, as he says, that the teas were not the teas of Threlkeld, that they were claimed, and properly claimed, by Tange, and that the bank had not any lien on them, parted with the teas, and sent them back to Sydney. In these circumstances the appellants applied against the garnishee for a summons under the 215th section of the Common Law Procedure Act for Victoria 1865 (28 Vict. No. 274). It is scarcely necessary to read again that clause which has been so much commented on, because it is perfectly clear —it is almost admitted— that it was essential both to the validity of the original attachment and to the prosecution of the remedy which the 215th clause gives against a garnishee who parts with the property that has been attached, that the property should belong to the defendant in the action. The question to whom these teas belonged cannot, in their Lordships' opinion, be affected by any of those

principles which are sometimes applied to sales by an agent on behalf of an undisclosed principal, and give to the vendee such rights of set-off or the like as he would have had if the property in the thing sold had been really and not ostensibly in the agent. In those cases the contract subsists, and the question is, in what mode it is to be carried out. Here there has been a breach of contract, and the party is suing in a particular way for the money which he has paid under that contract as upon a failure of consideration, and for damages sustained by reason of the breach of contract. The words of the statute require that the property attached should belong to the defendant. They imply an actual and not merely a constructive ownership in him. Their Lordships have already, in the course of the argument, intimated that there is no ground for saying that the garnishee was estopped by his conduct from showing in whom the actual ownership was. Upon the summons, various affidavits were filed upon both sides, and the judge came to the conclusion that the property in the teas was really in Tange and not in Threlkeld, the defendant in the action, and therefore that it was impossible to say that the defendant had sustained any damage by reason of the garnishee parting with property which was not properly subject to the attachment at all, and accordingly he dismissed the summons. The only substantial questions that seem to be raised by this appeal, are whether the court on the evidence before it should have come to a contrary conclusion, or whether the case was left in such a state of doubt that the court ought, under the power which a subsequent section (sect. 216) gives it, to have directed an issue as to the question of property to be tried? Their Lordships are of opinion that the first question must be answered in the negative; that upon the affidavits it is impossible to say that the balance of testimony was not against the contention of the appellants. With respect to the other question, although at times in the course of the argument their Lordships may have felt more doubt concerning it, yet, looking to the affidavits as corroborated by the acts of the parties, and the inferences which arise from the bank at Sydney giving up its claim of lien against Threlkeld on the conviction that the property was the property of Tange, they cannot say that there was such a case of doubt that the court below, in the exercise of its discretion, has erred in not granting an issue to try that question. They were asked to presume a sort of universal conspiracy against the appellants in this case, and that these parties have all sworn falsely in order to enable Threlkeld or the garnishee to escape from their responsibility for the benefit of Tange. Judging by the ordinary principles of human action, their Lordships think that they would not be justified in drawing any such conclusion. Their Lordships, therefore, feel that it is impossible for them to say that the judgment of the court below is wrong, or that the court was bound in its discretion to grant an issue, and they must humbly advise Her Majesty to dismiss this appeal, with costs.

Judgment affirmed.

Agents for the appellants, *Lawrie* and *Keen.*

Agents for the respondents, *Fuller* and *Saltwell.*

Dec. 2 and 4.

(Present—The Right Hon. the LORD CHANCELLOR (Hatherley), the ARCHBISHOP of YORK, Lord CHELMSFORD, Sir JAMES W. COLVILE, and Sir JOSEPH NAPIER.)

JOHN MARTIN (app.) *v.* THE REV. ALEXANDER HERIOT MACKONOCHIE (resp.)

Monition—Motion to enforce obedience—Communion service—Lighted candles on Communion Table—Elevation of the paten and cup—Kneeling during the prayer of consecration—Endeavour to obey—Literal and evasive compliance—Construction—"Kneeling" and "bending the knee"—Rubrics.

In a proceeding against the respondent, a clerk in holy orders, under the Church Discipline Act (3 & 4 Vict. c. 86), articles against him charged, first, that he used lighted candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light; secondly, that he, during the prayer of consecration, in the order of the administration of the Holy Communion, elevated the paten and cup above his head; and, thirdly, that he knelt or prostrated himself before the consecrated elements during the prayer of consecration.

By the monition of the Arches Court the respondent was admonished to abstain from the elevation of the cup and paten during the administration of the Holy Communion, as pleaded in the articles:

By the monition of the Privy Council, the respondent was (on appeal) admonished to abstain from the elevation of the cup and paten during the administration of the Holy Communion; from kneeling or prostrating himself before the consecrated elements during the prayer of consecration; and also from using lighted candles on the Communion Table during the celebration of the Holy Communion at times when such lighted candles were not wanted for the purpose of giving light:

On a motion to enforce obedience to the monition:

Held, first, that the respondent had not disobeyed the monition by using lighted candles on the Communion Table during the whole of morning prayer, the said candles having been extinguished immediately before the commencement of the Communion Service; this being a literal compliance with the terms of the monition:

Secondly, that the respondent had not disobeyed the monition by elevating the cup and paten, during the consecration prayer, to the level of his head or face, the monition being confined to the particular mode of elevation pleaded in the articles, viz., elevation above the head; but no sanction is hereby given to the notion that any elevation whatever of the elements, as distinguished from the mere act of removing them from the table and taking them into the hands of the minister is legal.

Thirdly, that the respondent had disobeyed, by reverently bending one knee at certain parts of the consecration prayer, his knee, occasionally but unintentionally, momentarily touching the ground in so doing, both the letter and spirit of the monition; the letter, because the act described was kneeling within the terms of the monition; and the spirit, because the very gist and purport of the monition was to enforce the intention of the Prayer Book and to prevent kneeling by way of reverence.

Fourthly, that the payment of costs of the monition by the respondent would be sufficient penalty for his disobedience, the court allowing him the benefit of his affidavit that he had never intentionally or advisedly disobeyed the monition.

A literal compliance with the terms of a monition is all

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that is required; but a mere literal compliance in an evasive manner will not suffice.

In considering whether a monition has been disobeyed, the monition in the first instance will be looked to; but the monition cannot go beyond the matters charged against a defendant, nor beyond the judgment pronounced thereon; and the judgment may be referred to to interpret the terms of the monition.

The courts will not draw a distinction, in acts which are a departure from or a violation of the rubric, between those which are important and those which appear to be trivial: (*Per Lord Cairns in* Martin *v.* Mackonochie, 19 *L. T. Rep. N. S.* 505, *approved.*)

In this case the present proceeding was in the form of a motion, on behalf of the appellant, to the Judicial Committee to declare that the respondent had not complied with a monition, inasmuch as he continued:—(1) to elevate the cup and paten during the administration of the Holy Communion; (2) to kneel or postrate himself before the consecrated elements during the prayer of consecration; and (3) to use lighted candles on the Communion Table at times when such lighted candles are not wanted for the purpose of giving light; and to enforce the said monition.

The monition referred to was that which followed the Order in Council on the report of the Judicial Committee on the appeal from the Court of Arches.

The report of the Judicial Committee, dated Dec. 23, 1868, was as follows:—

"Whereas in a certain cause of the office of the judge which was lately depending in the Arches Court of Canterbury, and was promoted and brought in virtue of letters of request under the hand and seal of the Right Reverend Father in God Archibald Campbell, by Divine permission Lord Bishop of London, by John Martin, a parishioner of the new parish of St. Alban's, Holborn, in the county of Middlesex, diocese of London, and province of Canterbury, against the Rev. Alexander Heriot Mackonochie, a clerk in holy orders of the United Church of England and Ireland, the incumbent and perpetual curate of the said parish, the Right Hon. Sir John Joseph Phillimore, Knight, Doctor of Laws, the judge of the said court, did, on the 28th March 1868, by his interlocutory decree, pronounce that the proctor for the said John Martin had sufficiently proved his intention deduced in the third, fourth, seventh, eighth, ninth, tenth, and eleventh articles, given in and admitted in the said cause, and that the Rev. Alexander Heriot Mackonochie, clerk, had offended against the statutes, laws, constitutions, and canons of the Church of England, in the particular matters alleged and set forth in the said articles in manner as hereinafter mentioned, and did therefore monish the said Rev. Alexander Heriot Makonochie to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, as also from the use of incense, and from the mixing water with the wine during the administration of the Holy Communion, as pleaded in the said articles, but did give no costs: And whereas an appeal from the said decree has been prosecuted to your Majesty in council, on behalf of the said John Martin, in so far only as the said judge did not, by his said decree, pronounce that the said Alexander Heriot Mackonochie had offended against the statute law and the constitutions and canons ecclesiastical, by having knelt or prostrated himself before the consecrated elements, during the Prayer of Consecration, and by having permitted and sanctioned such kneeling or prostrating by other clerks in holy orders, and did omit or decline to admonish him against so offending in future, and did omit or decline to pronounce that the said Alexander Heriot Mackonochie had offended against the statute law and the constitutions and canons ecclesiastical, by having used lighted candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light, and by having permitted and sanctioned such use of lighted candles, and did omit or decline to admonish him against so offending in future, and also did omit or decline to condemn the said Alexander Heriot Mackonochie in the costs incurred in the said cause on behalf of the said John Martin. And whereas the usual petition of appeal to your Majesty in council of the proctors of the said John Martin stands referred to this committee under and by virtue of your Majesty's General Order in Council of the 4th Nov. 1867, and whereas an appearance has been entered in the registry of your Majesty's Court of Appeals on behalf of the said Alexander Heriot Mackonochie, the respondent in the said cause of appeal, now the Lords of the Committee having, in obedience to your Majesty's said Order in Council, taken the said petition into consideration and read the proceedings and evidence transmitted from the court below, and on four former days heard counsel and proctors on both sides, and having maturely deliberated, have this day agreed humbly to report to your Majesty their opinion in favour of the appeal of the said John Martin that the decree of the court below ought to be amended to the extent hereinafter mentioned, that the principal cause ought to be retained, and therein that in addition to the matters in which the said Alexander Heriot Mackonochie, was in the decree appealed from pronounced to have offended, and from which he was thereby monished to abstain for the future, he the said Alexander Heriot Mackonochie ought to be pronounced to have offended against the statutes, laws, constitutions, and canons of the Church of England, by having within the said church of the new parish of St. Alban's, Holborn, knelt or prostrated himself before the consecrated elements during the prayer of consecration, and also by having within the said church used lighted candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light, and that the said Alexander Heriot Mackonochie ought to be admonished to abstain from the future from kneeling or prostrating himself before the consecrated elements during the prayer of consecration, and also from using in the said church lighted candles on the Communion Table during the celebration of the Holy Communion at times when such lighted candles are not wanted for the purpose of giving light, and further that he the said Alexander Heriot Mackonochie ought to be condemned in the costs incurred on behalf of the said John Martin, as well in the court below as in the said appeal."

By an Order in Council, dated Jan 14, 1869, the above report was approved. A monition then issued, which was duly served on the respondent on Jan. 20, 1869, in the following terms:—

"Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Reverend Alexander Heriot Mackonochie, clerk, the incumbent and perpetual curate of the new parish of Saint Alban's, Holborn, in our county of Middlesex, diocese of London, and province of Canterbury, greeting: Whereas, in an appeal by John Martin, a parishioner of the said parish, from a decree given on the 28th March 1868, in the Arches Court of Canterbury, whereby the judge of the said court did pronounce that you, the said Reverend Alexander Heriot Mackonochie, had offended against the statutes, laws, constitutions, and canons of the Church of England, and

did monish you to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, as also from the use of incense, and from the mixing water with the wine during the administration of the said Holy Communion, the Judicial Committee of the Privy Council did, on the 23rd Dec. 1868, agree to report to us their opinion in favour of the appeal of the said John Martin, that the decree of the court below ought to be amended to the extent hereinafter mentioned, that the principal cause ought to be retained, and therein that, in addition to the matters in which you, the said Reverend Alexander Heriot Mackonochie, were in the decree appealed from pronounced to have offended, and from which you were thereby monished to abstain for the future, you, the said Reverend Alexander Heriot Mackonochie ought to be pronounced to have offended against the statutes, laws, constitutions, and canons of the Church of England, by having, within the said church of the new parish of St. Alban's, Holborn, knelt or prostrated yourself before the consecrated elements during the prayer of consecration, and also by having within the said church used lighted candles on the Communion Table during the celebration of the Holy Communion at times when such lighted candles were not wanted for the purpose of giving light; and that you, the said Reverend Alexander Heriot Mackonochie, ought to be admonished to abstain for the future from kneeling or prostrating yourself before the consecrated elements during the prayer of consecration, and also from using in the said church lighted candles on the Communion Table during the celebration of the Holy Communion at times when such lighted candles are not wanted for the purpose of giving light; and further, that you, the said Reverend Alexander Heriot Mackonochie, ought to be condemned in the costs incurred on behalf of the said John Martin, as well in the court below as in the said appeal. And whereas, on the 14th Jan. 1869, we were pleased by and with the advice of our Privy Council to approve of the said report, and to order that the same should be carried into execution (justice so requiring) we do, therefore, humbly command you, the said Reverend Alexander Heriot Mackonochie, to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and from the use of incense, and from the mixing water with the wine during the administration of the said Holy Communion; and from kneeling or prostrating yourself before the consecrated elements during the prayer of consecration; and also from using in the said church lighted candles on the Communion Table during the celebration of the Holy Communion at times when such lighted candles are not wanted for the purpose of giving light. And hereof fail not.

"Given at London, under the seal which we use in this behalf, the 19th Jan. in the year of our Lord 1869. "H. C. ROTHERY,

"Her Majesty's Registrar (L.S.)"

The articles exhibited against the respondent in the Court of Arches and before the Judicial Committee charged, on the matters now in question, that he, in his church of St. Alban's, Holborn, on certain Sundays in the year 1866, during the prayer of consecration, in the order of the administration of the Holy Communion, elevated the paten above his head, and permitted and sanctioned such elevation, and took into his hands the cup, and elevated it above his head during the prayer of consecration, and permitted and sanctioned the cup to be so taken and elevated, and knelt or prostrated himself before the consecrated elements during the prayer of consecration, and permitted and sanctioned such kneeling or prostrating by other clerks in holy orders; and that he used lighted candles on the Communion Table during the celebration of the Holy Communion at times when such lighted candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted candles.

The judgment of the Court of Arches in the cause was given on March 28, 1868; that of the Judicial Committee, varying on appeal the judgment below, was given on Dec. 23, 1868. (See 18 L. T. Rep. N. S. 245; 19 *Id.* 503; L. Rep. 2. Adm. & Eccl. 116; *Id.* 2 Priv. Co. 365.)

The judgment of the Court of Arches was affirmed on the charge of elevation of the cup and paten (18 L. T. Rep. N. S. 269, 70; 19 *Id.* 506); and was reversed on the charges of kneeling during the consecration prayer (18 L. T. Rep. N. S. 270; 19 *Id.* 504-6), and of using lighted candles on the Communion Table during the celebration of the Holy Communion (18 L. T. Rep. N. S. 272-8; 19 *Id.* 506-7).

The following affidavits were those on which the present motion was founded:—

The affidavits of Edward John Pond and Henry Daugar, sworn Nov. 18th, 1869:

1. That we attended Divine Service at the church of St. Alban's, Holborn, on Sunday morning, the 18th July 1869. That after Morning Prayer was concluded there was a celebration in the said church of the Lord's Supper, or Holy Communion. That we remained and were continuously present during the whole of such Morning Prayer and celebration of the Holy Communion.

2. That on the said occasion of the Holy Communion, the Rev. Alexander Heriot Mackonochie officiated as the celebrating priest. That during the whole of the Morning Prayer and Communion Service, there were seven lamps suspended from the ceiling of the church, over the chancel, each lamp containing a coloured light, which lights were burning during the whole of the Morning Prayer and Communion Service.

3. That at the commencement of the said Morning Prayer there were eight lighted candles upon a shelf, about six inches above the level of the Communion Table, and which appeared to form part thereof, two of such candles being in candlesticks, and six in two candelabra, holding three candles each, such candlesticks and candelabra standing upon the said shelf. The said eight candles were extinguished immediately before the commencement of the said Communion Service, up to which time they had been kept continuously burning.

4. That neither such lamps nor such candles were required for the purpose of giving light.

5. That when the said Rev. Alexander Heriot Mackonochie, in celebrating the said Communion Service, came to that part of the prayer of consecration at which the rubric directs the priest to take the paten into his hands, he paused in reading the said prayer; that during such pause, and before taking the paten into his hands, he bowed himself down to the Communion Table, so that his forehead nearly touched the same; he then stood upright, and immediately afterwards knelt down upon the steps leading to the Communion Table; that after kneeling for a few seconds, he rose and again stood up and took the paten into his hands, and raised it level with his head; that he then replaced the paten upon the Communion Table; that he then again bowed down to the Communion Table so that his forehead nearly touched the same; he then again stood upright, and immediately afterwards knelt down upon the steps leading to the Communion Table; that after kneeling for a few seconds he again rose, stood up and proceeded with the said prayer of consecration until he came to that part at which the rubric directs the priest to take the cup into his hands; he then again paused in reading the said prayer; that during such pause, and before taking the cup into his hands, he bowed himself down to the Communion Table, so that his forehead nearly touched the same; he then stood upright, and immediately afterwards knelt down upon the steps leading to the Communion Table; that after kneeling for a few seconds, he again rose and stood up, and took the cup into his hands and raised it level with his head; he then replaced the cup upon the Communion Table; he then again bowed down to the Communion Table, so that his forehead nearly touched the same; he then rose and stood upright, and immediately afterwards knelt down upon the steps leading to the Communion Table; that after kneeling for a few seconds he again rose, stood up, and proceeded with the said prayer of consecration.

6. That the said Alexander Heriot Mackonochie, on handing the cup to the assistant priest, knelt down facing the priest, and bowed himself down very low, the said assistant priest at the same time holding up the cup as high as he could reach; the same was repeated when the said assistant priest returned the cup to the celebrant, after the communicants had partaken.

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7. That we verily believe that the said pauses and bowing and kneeling, on the part of the said Rev. Alexander Heriot Mackonochie, were designed and intentional, and were not accidental or caused by any infirmity.

We further make oath, that we also attended divine service at the said church on the morning of Sunday, the 4th July, and on the morning of Sunday, the 11th July 1869; that on each of such occasions, after Morning Prayer was concluded, there was a celebration of the Holy Communion, and we remained and were continuously present in the said church during the whole of such services; that precisely the same ceremonial in reference to lamps, candles, prostration, kneeling, and adoration, as is hereinbefore set forth, was observed in the celebration of the Holy Communion on each of such last-mentioned Sundays; that on the latter of such occasions the said Alexander Heriot Mackonochie was present and officiating at the celebration of the Holy Communion, but was not the celebrating priest.

There were also other affidavits, worded exactly as the above, referring to the ceremonial on various Sunday mornings in Oct and Nov. 1869.

A further affidavit of the above Edward John Pond, sworn 18th Nov. 1869, stated in addition, that, on Sunday morning, 14th Nov. 1869, "the said Alexander Heriot Mackonochie, on handing the cup to the assistant priest, knelt down facing the priest, and bowed himself down very low, the said assistant priest at the same time holding up the cup as high as he could reach; and the same was repeated when the said assistant priest returned the cup to the celebrant, after the communicants had partaken."

The following affidavit, it will be seen, differs from those above:

Affidavit of William Preston Willins, sworn 18th Nov. 1869:

1. That I attended Divine Service at the church of St. Alban, Holborn, on Sunday morning the 14th Nov. 1864. That after Morning Prayer was concluded, there was a celebration in the said church of the Lord's Supper or Holy Communion. That I remained and was continuously present in the said church during the greater part of such Morning Prayer, and during the whole of such celebration of the Holy Communion.

2. That on the said occasion of the celebration of the Holy Communion, the Reverend Alexander Heriot Mackonochie officiated as the celebrating priest. That during the whole Communion Service there were seven lamps suspended from the ceiling of the church over the chancel, each lamp containing a coloured light, which lights were burning during the whole of the Communion Service.

3. That during the said Morning Prayer there were eight lighted candles upon a shelf about six inches above the level of the Communion Table, and which appeared to form part thereof, two of such candles being in candlesticks, and six in two candelabra holding three candles each; such candlesticks and candelabra standing upon the said shelf. The said eight candles were extinguished immediately before the commencement of the said Communion Service, up to which time they had been kept continuously burning. That neither such lamps nor such candles were required for the purpose of giving light.

4. That the said Alexander Heriot Mackonochie, in celebrating the said Holy Communion, commenced the reading of the consecration prayer in an audible tone; his tone then gradually became almost inaudible, so that his words could not be distinguished. Suddenly he bowed himself down, so that his forehead nearly touched the Communion Table; he then apparently knelt on one knee on the steps of the Communion Table; he then rose and stood upright, and taking the paten into his hands, raised the same to the level of his face; he then replaced the same on the Communion Table, and, after an interval of a few seconds, bowed as before, knelt as before, rose and stood upright as before; and then taking the cup into his hands, he raised the same to the level of his face, and afterwards replaced it on the Communion Table.

5. That the said Alexander Heriot Mackonochie, on handing the cup to the assistant priest, knelt down facing the priest and bowed himself down very low, the said assistant priest at the same time holding up the cup as high as he could reach. That I verily believe that the said pauses, and bowing, and kneeling on the part of the said Reverend Alexander Heriot Mackonochie, were designed and intentional, and were not accidental or caused by any infirmity.

I further make oath, that I also attended Divine service at the said church on the morning of Sunday the 31st Oct., and on the morning of Sunday the 7th Nov.; that on each of such occasions after morning prayer was concluded, there was a celebration of the Holy Communion; and I remained, and was continually present in the said church during the whole of such services. That precisely the same ceremonial, in reference to lamps, candles, prostration, kneeling, and adoration, as is hereinbefore set forth, was observed in the celebration of the Holy Communion on each of such last-mentioned Sundays. That on such occasions the said Alexander Heriot Mackonochie was present and officiating at the celebration of the Holy Communion, but was not the celebrating priest.

Stephens, Q. C., with whom were *Archibald* and *Droop*, for the appellant.—Having stated the facts or the case and read the affidavits given above, submitted that the charge of disobedience to the monition was made out against the respondent.

The LORD CHANCELLOR called attention to the wording of the affidavit as to the elevation of the paten and cup. The affidavit was obscure in not showing whether the act complained of was before or after the consecration of the elements. The present was a criminal charge, strict proof was necessary, and their Lordships should not be left to infer the very gist of the charge.

The *Rev. A. H. Mackonochie* (the respondent) in person:—I appear under protest: (1) Because there is no legal method by which this court can enforce this monition, and (2) because the monition itself was null and void, at least as regards the elevation of the cup and paten. I propose to argue now the second of these points. The monition was bad as to the elevation of the cup and paten, because not warranted by the articles filed against me, nor by the judgment of the Dean of Arches thereon. The monition represents the Dean of Arches to have admonished me "to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion" These terms are too general. The Dean of Arches admonished me (and this appears on the order in council) to abstain from such elevation "as pleaded in the articles." Now, the articles on this point charged that I elevated "above the head:" (18 L. T. Rep. N. S. 246; L. Rep. 2 Adm. and Eccl. 118.) [The LORD CHANCELLOR observed that this was the amended form of the articles. Originally they contained the charge of elevating above the head "and otherwise;" but the latter words were struck out as too vague, by order of Dr. Lushington, the Dean of Arches.] The monition of the Dean of Arches, referring to the articles, was only to forbid the elevation therein charged, viz., "above the head." That this was so, appears further from his judgment, where he says (18 L. T. Rep. N. S. 270; L. Rep. 2 Adm. & Eccl. 208), "The kind of elevation which it is charged that at one time Mr. Mackonochie practised, and as to which witnesses were examined before me, amounts upon the evidence to the following acts: That after the consecration, both of the bread and the wine, he elevated the paten and cup respectively for an appreciable time, after which there was a pause before the service was continued. . . . This elevation Mr. Mackonochie asserts, and it is not denied, that he discontinued after conference with his diocesan, and upon the other grounds to which I have already referred, before the institution of this suit. I am very glad that he did so, because, in my judgment, *that kind of elevation* was unlawful; and I must and do admonish Mr. Mackonochie not to recur to it. *His present practice is not complained of*, and some elevation the rubrics of the present Communion Service must contemplate, when they order as follows: 'Here the priest shall take the paten into his hands,' *i.e.*, into both his hands; subsequently to which, he is ordered to break the bread. So also when he is directed to take the cup into his hand, there must be some elevation from the Holy Table." And at the end of his judgment (18 L. T. Rep. N. S. 278; L. Rep. 2 Adm. & Eccl. 246), he says, "I further admonish him not to recur to the practices which he has abandoned under protest, with respect to the elevation of the Blessed Sacrament." The Dean of

Arches, therefore, contemplated elevation "for an appreciable time," and "above the head," and forbad me to recur to this kind of elevation. But he did not forbid the elevation as practised by me at the time of the suit in the Arches. And my present practice is identically the same as it was at the time of that suit. On the charge as to kneeling, I submit that I have not had sufficient time. I had not notice till last Monday of the particulars of the charge. I am prepared to answer the affidavits if I have time for the purpose.

Stephens, Q. C. said that a copy of the affidavits had been sent by Moore and Currey (the appellant's proctors) to Brooks (who acted as proctor for the respondent in the former proceedings), and the receipt had been acknowledged by him on Nov. 19 last.

The LORD CHANCELLOR (after some deliberation among their Lordships), said: We think that the respondent ought to have an opportunity of preparing affidavits, and that he ought not to suffer from delay in serving him with notice. He may, therefore, file affidavits to-day (Thursday), and the appellant may file affidavits in reply to-morrow. Meanwhile the further hearing must stand over till Saturday next.

Dec. 4.—The following affidavits had been filed since the last hearing:—

Affidavit of the Rev. Alexander Heriot Mackonochie, sworn 2nd Dec. 1869:

1. The manner of elevation of the cup and paten at the said church of St. Alban's, during the consecration prayer in the service for the administration of the Holy Communion, adopted and sanctioned by me, has invariably been one and the same since I discontinued the elevation above the head from the 30th Dec. 1866, and is the same as that of which Sir Robert Phillimore, in his judgment in this case in the Court of Arches, said, "His present practice is not complained of:" (See 18 L. T Rep. N. S. 270.)

2. I did not, on either of the days or times mentioned in the affidavits on which this motion is founded, and sworn on the 18th Nov. last, nor have I ever since the service of the said monition on me, prostrated myself, or knelt on steps leading to the Communion Table, or elsewhere, when celebrating the Holy Communion, during any part of the consecration prayer. I admit that it is my practice during the prayer of consecration when celebrating Holy Communion, and whilst standing before the Holy Table, reverently to bend one knee at certain parts of the said prayer, and occasionally in so doing my knee momentarily touches the ground, but such touching of the ground is no part of the act of reverence intended by me. Whether my knee may have thus momentarily touched the ground on either of the days mentioned in the said affidavits on which I am stated to be the celebrating priest, I am of course unable to say.

Affidavit of the Rev. Henry Aston Walker. Sworn 2nd Dec. 1869:

1. I am and have been, ever since the consecration of the church, one of the curates of St. Alban's church, Holborn, and am generally present during the celebration of Divine service and of the Holy Communion at that church, and am well acquainted with the manner in which the Holy Communion is there celebrated.

2. I was present in the chancel during the celebration of the Holy Communion at that church on the 18th June 18·9, and the 14th Nov. 1869, referred to in the affidavits of Edward John Pond and Henry Dangar, Francis Beames and William Preston Willins, sworn respectively on the 18th Nov. last, and I say that the manner of elevating the paten and cup on those occasions was in all respects the same as that which has been invariably adopted by the respondent in that church since the 30th Dec. 1866, when the respondent discontinued the practice of elevating above the head, and in respect of which Sir Robert Phillimore, in his judgment in the Court of Arches in this case, said, "His present practice is not complained of."

3. The respondent did not prostrate himself or kneel upon the steps leading to the Communion Table, or elsewhere, at any time during the prayer of consecration, on the 18th July and the 14th Nov. 1869, as mentioned in the said affidavits; and, to the best of my belief, he did not touch the ground with either of his knees at all during that time on the occasions on which the respondent is accused of doing so. And having regard to the positions of the celebrating and assisting priests during the consecration prayer, as well as to the length and nature of their dress, I do not believe that it is possible for any person in the body of the church to say whether the respondent did kneel or not.

Affidavit of the Rev. Alexander Heriot Mackonochie, sworn 3rd Dec. 1869:—

1. That ever since the monition of this court in the above cause was served upon me I have endeavoured to obey it. And,

2. That I have never intentionally or advisedly in any respect disobeyed it, or sanctioned any practices contrary to that monition.

Affidavit of Francis Beames, sworn 3rd Dec. 1868:—

That after the kneeling mentioned in the last line but one of the fifth paragraph (of the affidavit sworn by me on 18th Nov. 1869), the said Alexander Heriot Mackonochie did not again take into his hand, or lay his hand upon, or in any way touch the said cup during the prayer of consecration, as I believe.

Affidavit of Edward John Pond, sworn Dec. 3, 1869:—

That after the kneeling mentioned in the last line but one of the fifth paragraph (of the affidavit sworn by me on 18th Nov. 1869), the said Alexander Heriot Mackonochie did not again during the prayer of consecration, to the best of my belief, take into his hands, or lay his hands upon, or in any way touch the said cup, and that if he had done so, from the position I occupied, I must have seen him do so.

The Rev. A. H. Mackonochie (proceeding with his argument):—The monition warned me to abstain from "kneeling or prostrating myself before the consecrated elements during the prayer of consecration." Taking the question of kneeling first. I maintain, as shown by my affidavits, that I have not so knelt. The Dean of Arches said in his judgment (18 L. T. Rep. N. S. 270; L. Rep. 2 Adm. & Eccl. 210) that "no charge of adoration of the Holy Sacrament itself, or of our Lord's body, being present after a corporal manner in the Holy Sacrament, was contained in the articles," and that "the argument was confined to the allegation of excessive or improper kneeling," and the Dean added that he was "far from saying that it was not competent to the priest to adopt that attitude of devotion," viz., kneeling. [Lord CHELMSFORD.—What you have to look at on the question of kneeling is the monition of the Privy Council, which on this point reversed the judgment of the Arches Court. The judgment may be referred to, to explain that monition, but not further.] This being a criminal proceeding, the strictest construction of the words of the monition ought to be adopted, and if, on that construction, it should appear that I have given a fair and reasonable obedience, I am entitled to a favourable judgment. Now, to "kneel" strictly means to "bear oneself upon the knees," as defined in Bailey's Dictionary. There are two essentials to the act; the knees must rest upon the ground, and that for an appreciable time. It is true that Johnson's Dictionary gives a different definition of "kneel," as, "to perform the act of genuflection, to bend the knee," but the examples he gives of that use of the word are the following passages:

> When thou dost ask me blessing, I'll kneel down,
> And ask of thee forgiveness.
>
> *Shakesp.* (King Lear.)

> Ere I was risen from the place that shew'd
> My duty kneeling, came a reeking post,
> Stew'd in his haste, half breathing, panting forth
> From Goneril, his mistress, salutation.
>
> *Id.*

A certain man, kneeling down to him, said, Lord, have mercy upon my son, for he is lunatic.

St. Matth. xvii., 14.

"*As soon as you are dressed, kneel down and say the Lord's Prayer:*" (Bp. Taylor's Guide to Devotion.) [Lord CHELMSFORD.—You say then that genuflection is not kneeling?] Yes; the mere bending of one knee, even if there be a momentary touching of the ground with it, would not be kneeling. "At the name of Jesus every knee shall

bow," this surely does not mean kneeling? [The Lord Chancellor.—Must we not understand your affidavit to mean that you bend the knee for the purpose of reverence?] Yes; certainly; but the point is as to the act, whether there was a kneeling within the terms of the monition, not as to the motive of the act: (See the judgment of Lord Cairns, 19 L. T. Rep. N. S. 505; L. Rep. 2 Priv. Co. 384). The affidavit of Mr. Walker shows that there might easily have been a misapprehension on the part of the witnesses, who, looking from the body of the church, say that I knelt down. As to prostration, I contend that this means bending down with the face very low towards the ground, if not actually to touch it. The affidavits in support of the present charge do not assert that I did any such thing. As to elevation (the Rev. respondent repeated what he had said on Thursday, and added that), on the affidavits of myself and Mr. Walker, it appears that my present practice is that which I have invariably adopted, since I relinquished, from Dec. 30, 1866, the practice of elevating above my head. [Lord Chelmsford.—Is your present practice to elevate to a level with your head, but not above it?] Yes; or rather to the level of my face. The articles charged elevation "above the head," the monition referred to elevation "as pleaded in the articles," and I therefore submit that no disobedience to the monition has been shown in this respect. As to lighted candles, the monition directed me to abstain from using "lighted candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light." Now, it appears from the judgment of the Privy Council, that the essence of my offence was the using of lighted candles "on the Communion Table," and "during, with reference to, and as an accompaniment of, the Communion Service," *i. e.*, at a particular place and a particular time. The affidavits show only that there were lamps over the chancel, not on the Communion Table, and lighted candles on the Communion Table, extinguished before the commencement of the Communion Service. The evidence, therefore, is insufficient. In conclusion, I have to assure your Lordshps that I have endeavoured to comply with the monitions of the several courts, and that I have not intentionally, or advisedly disobeyed this monition. I submit that I have shown an obedience to the strict terms of the monition, and that I am entitled to ask for protection from proceedings vexatious in their character.

Stephens, Q. C. in reply.—The respondent said that he appeared under protest. If he meant that there is no method of enforcing the monition, I propose to address your Lordships on that point. [The Lord Chancellor.—We need not hear you upon that.] The question is whether the respondent has given a substantial obedience to the monition. The monition must be construed with reference to the Book of Common Prayer, obedience to the rubrics of which it was the very object of the monition to enforce. Now, the rubric to the consecration prayer in the Communion Service clearly intended, not that there should be any formal elevation of the paten and cup, but that each should be raised from the table sufficiently to comply with the direction to the priest to take them into his hands. The rubric, in fact, orders merely the taking into the hands. The respondent has so far complied with the rubric. But the monition ordered the respondent not to elevate, and this he admits that he has done. [Sir Joseph Napier.—The monition certainly forbids "elevation" generally, but the articles must be referred to to explain what elevation was meant, and they say "above the head.] The respondent referred to the judgment of the Dean of Arches, who said that "his present practice was not complained of." That only meant that that practice was not before the court. The passage that follows does not sanction any elevation further than that necessary for compliance with the directions in the rubric: (18 L. T. Rep. N. S. 270; L. Rep. 2 Adm. & Eccl. 209.) The affidavits also proved that when the respondent handed the cup to the assistant priest, the latter held up the cup as high as he could reach." And the respondent would be responsible for the act of the assistant priest. [The Rev. A. H. Mackonochie observed that this act did not occur during the consecration prayer, and so was not within the terms of the monition.] As to kneeling, the term includes genuflection. And, further, kneeling was held by the Privy Council to be illegal, not from any consideration as to the degree of it, but because it was a violation of the rubric: (19 L. T. Rep. N. S. 505; L. Rep. 2 Priv. Co. 384.) And a genuflection would be as much a violation of the rubric as an actual kneeling. He should contend that there had been a non-compliance with the monition, and must ask their Lordships to enforce it, with costs, against the respondent.

Judgment was delivered by the Lord Chancellor.—In this case a motion has been made calling upon their Lordships to take proceedings in order to enforce the monition which has been served upon the reverend respondent with regard to the execution of a sentence pronounced in the first instance by the Court of Arches. This sentence was in some degree extended and modified by the judgment which this committee was called upon to pronounce, or rather by the decision which they were called upon, after argument, to recommend as fit to be made by an order of Her Majesty in Council. The order provided for several matters; as to three of which only it is now alleged that there has been a breach by the respondent of the monition issued in pursuance of the order. Those three matters are: First, that he continues to elevate the cup and paten during the administration of the Holy Communion; secondly, that he continues to kneel or prostrate himself before the consecrated elements during the prayer of consecration; and, thirdly, that he continues to use lighted candles on the Communion Table at times when such lighted candles are not wanted for the purpose of giving light. In order to see how far that which is complained of has been a breach of the monition, we must of course in the first instance look to the monition itself. The monition having recited that the respondent was pronounced to have offended against the statutes, laws, constitutions, and canons of the Church of England, by having knelt or prostrated himself before the consecrated elements during the prayer of consecration, and also by having within the said church elevated the cup and paten during the Holy Communion, and also by having used lighted candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of light, proceeds to direct him to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and from kneeling or prostrating himself before the elements during the prayer of consecration, and also from using in the said church lighted candles on the Communion Table during the celebration of the Holy Communion, at times when such candles are not wanted for the purpose of giving light. The evidence which is before their Lordships is addressed to these three several heads. We will deal with them in a different order from that in which they appear in the prayer of the application, and take

the use of lighted candles on the Communion Table at times when such candles are not wanted for the purpose of giving light, in the first instance, because with reference to that part of the case it appears to their Lordships that the affidavits do not make out the offence charged. In the first place, it appears that the offence charged is not in strict conformity with the monition, because the monition is itself confined to using those candles on the Communion Table during the celebration of the Holy Communion; and the charge which is made in the motion now before this committee is, that they were used on the Communion Table at times when they were not wanted for the purpose of giving light, leaving out the words "during the time of Holy Communion." Of course it is not competent for their Lordships to proceed beyond the actual monition which has been served upon the respondent. It is that which he is said to have disobeyed, and it is to disobedience of the monition only that their Lordships can address themselves. It is plain upon the affidavits that the candles have not been lighted during the Holy Communion, for the course taken by the respondent has been this, that the candles are lighted as he says they always have been, and were at the time of the proceedings herein being taken, and are kept burning up to the period of the Holy Communion, and then immediately before the commencement of the Holy Communion they are extinguished. There is no doubt, therefore, in this case of a literal compliance with the terms of the monition. The candles are not lighted during the period of the Holy Communion. They are lighted, indeed, when there is no necessity for their being lighted for the purpose of giving light, but they are extinguished before the Holy Communion; therefore the compliance with the terms of the monition has been literal and complete, and not, in that sense, evasive, for the respondent was limited to a particular time, in reference to the candles; and whatever one may feel as to the course of the reverend respondent, looking to the spirit of the monition, of course the monition could not go beyond the matters that were charged; the offence charged was one which he has abstained from; and in this respect, therefore, their Lordships are clear that the prayer of this motion cannot be complied with. The next charge is that he continues to elevate the cup and paten during the administration of the Holy Communion; and with reference to this matter, their Lordships feel that the case is placed in a position that is eminently unsatisfactory. On the former occasion the sentence of the judge in the court below was approved of with reference to this particular subject matter; therefore, that sentence is the sentence to which recourse must be had by their Lordships when interpreting the monition, which cannot of course proceed further than the sentence itself. The sentence in the court below was thus worded: the respondent was ordered "to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and also from the use of incense and from the mixing of water with the wine during the administration of the Holy Communion, as pleaded in the articles." Their Lordships think that the words "as pleaded in the articles," must be applied to those several offences which were charged in the passage just quoted, namely, the elevation of the cup and paten, also the use of incense, and the mixing of water with wine; and their Lordships are thrown back, therefore, to the articles to see what it was that was there pleaded, and they find this state of circumstances. Originally the third article pleaded that there was an elevation of the cup and paten beyond what was necessary for the purpose of complying with the terms of the rubric, which directs that at a particular part of the prayer of consecration, when the sacred elements are dealt with, the paten shall be taken into the hands, and at another part that the cup shall be taken into the hand or hands (for there is some little variation in the two parts of the rubric itself) of the officiating minister. That would have been, as it appears to all their Lordships, a charge which would have raised a distinct and definite issue, whether the elevation of the paten or the elevation of the cup were or were not a *bonâ fide* raising it so far only as is necessary for anything to be raised, that is, to be taken from the table, or whether or not there was some ulterior purpose, that is to say, an act of elevation wholly distinct from and going beyond what was necessary for the mere purpose of taking the paten and cup into the hands of the officiating minister. But the words, "and otherwise," were also inserted in the same third article in a part which rendered it very difficult to attach any definite sense to them. Those words are so vague that the learned judge before whom the case first came, Dr. Lushington, conceived that he could not admit the article in that form, and that the words introduced such a degree of vagueness as to render it improper to call upon the respondent to answer the charge in its then shape, and therefore the learned judge said that the article must be reformed. In the reforming of that article, those who reformed it appear to have gone beyond anything that was required by the decision of the learned judge in the course of the argument upon the admission of the articles. They not merely struck out these words, "and otherwise," but they also materially varied the language by describing definitely in the reformed article the act which had been performed, namely, that it was an elevation of the elements "above the head of the respondent." The article then became confined to that particular mode of elevation, instead of being a charge of elevation beyond what was necessary for the proper compliance with the rubric, and, therefore, when the sentence of the judge, which directs that he shall abstain for the future from the elevation "as pleaded in the articles," is considered, it appears to their Lordships that they are necessarily confined to that particular charge which is there contained, and that particular mode of elevation which is there complained of. We have been thus particular in going through all the circumstances of this case, which is left, as it appears to their Lordships, in a very unsatisfactory position, because it is most desirable, and their Lordships are all of opinion that it should be distinctly understood that they give no sanction whatever to a notion that any elevation whatever of the elements, as distinguished from the mere act of removing them from the table and taking them into the hand of the minister, is sanctioned by law. It is not necessary for their Lordships to say more (but most undoubtedly less we cannot say) than that we feel nothing has taken place in the course of this cause that can possibly justify a conclusion that any elevation whatever, as distinguished from the raising from the table, is proper or is sanctioned. All that their Lordships can say upon the present occasion is, that the point has never yet been in these proceedings raised, that a particular and definite mode of elevation only has been averred and complained of, and with that particular and definite mode of elevation we have nothing further to do, because it is conceded on all sides that such particular mode has been departed from. It is not for us to say how far the letter, to which the respondent himself has referred, and in a part of which he says that the simple compliance with the rubric, namely, taking the cup and the paten into his hands, would be sufficient for the purpose of satisfying a certain portion of his parishioners as regards the elevation of the elements, may or may

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not have misled the judges who had this case before them. They say that the matter complained of having been discontinued, had not been complained of, that is by the articles; and we have felt it to be right and proper to say that nothing we are now determining can, therefore, be pleaded hereafter as a justification for any mode of elevation which is to be distinguished from the mere act of removing the elements from the table and taking them into the hands of the minister. Inasmuch, then, as the reverend respondent has said upon oath, and it is not now contravened, that his course of procedure has only been that which he says he adopted at the time of the first hearing of the matter, owing to the complaint made of the higher elevation spoken of in the articles, their Lordships think they cannot in that state of circumstances say that he has thereby committed a breach of the monition which has been served upon him. The third matter which has been complained of is as follows; and as to this matter their Lordships think the case is open to very different considerations: The respondent was admonished "not to kneel or prostrate himself before the consecrated elements during the prayer of consecration;" and, without going through the affidavits, the exact state of circumstances may be taken to be as they appear upon the affidavits made by the respondent himself and by Mr. Walker, the gentleman who was present on the several occasions referred to in the motion. The affidavits in support of the motion stated distinctly acts of prostration and of kneeling during the period of the prayer of consecration. Into the details of those affidavits it is unnecessary to enter, because in the affidavit of the respondent there is this which seems to set the case in a very clear light as far as the facts are concerned. The respondent says, "I did not on either of the days or times mentioned in the affidavits on which this motion is founded, nor have I ever since the service of the said monition on me, prostrated myself or knelt on steps leading to the Communion Table, or elsewhere, when celebrating the Holy Communion during any part of the consecration prayer. I admit that it is my practice during the prayer of consecration, when celebrating the Holy Communion,"—the time, therefore, is exactly fixed to which the monition would apply,—"and whilst standing before the holy table, reverently to bend one knee at certain parts of the said prayer, and occasionally in so doing my knee momentarily touches the ground, but such touching of the ground is no part of the act of reverence intended by me. Whether my knee may have thus momentarily touched the ground on either of the days mentioned in the said affidavits on which I am stated to be the celebrating priest, I am, of course, unable to say." Mr. Walker is a little bolder upon that point, because he says this,—he was present on these days—"I say that the respondent did not prostrate himself or kneel upon the steps leading to the Communion Table or elsewhere at any time during the prayer of consecration on the 18th July and the 14th Nov. 1869, as mentioned in the affidavits; and to the best of my belief he did not touch the ground with either of his knees at all during that time on the occasions on which the respondent is accused of doing so." Then he further says this: "And having regard to the positions of the celebrating and assisting priests during the consecration prayer, as well as to the length and nature of their dress, I do not believe that it is possible for any person in the body of the church to say whether the respondent did kneel or not." Therefore, the case as stated is this, Mr. Mackonochie being enjoined against kneeling during this prayer, admits a gesture which he contends is not kneeling, but he admits a bowing of his knee, a bowing of it to an extent which occasions it at times momentarily to touch the ground, a bowing of it to an extent which renders it impossible (according to Mr. Walker's affidavit) for anybody to see whether he is or is not kneeling,—that is the distinct statement in the affidavits, viz., that nobody could see whether he is kneeling or not. First of all their Lordships would consider the literal question which is before them, whether there has been even a literal compliance with the monition in this act of Mr. Mackonochie. Their Lordships are all of opinion that there has not been even a literal compliance; that Mr. Mackonochie has knelt; and that bowing the knee in the manner which he has described is kneeling; and that it is not necessary that a person should touch the ground in order to perform such an act of reverence as will constitute kneeling. Of course there may be such a bowing of the knee as would not amount to kneeling in the sense of the monition, but Mr. Mackonochie very properly says that he takes no advantage of any suggestion of that sort—there may be an accidental bowing of the knee, arising from fatigue or otherwise; but here is a knee bent for the purpose of reverence, and in such a manner that those who behold cannot tell whether or not what Mr. Mackonochie and Mr. Walker call kneeling, that is, touching the ground with the knee, has been arrived at, and indeed Mr. Mackonochie says that at certain times his knee has momentarily touched the ground. This seems to their Lordships to be literally kneeling. But the case must be put much higher than that, because neither this tribunal nor any tribunal will suffer its orders to be tampered with by mere evasion; and a mere evasion it would be, to allow a person when ordered not to kneel (the whole gist and purport of the order, as I shall presently show, being the kneeling by way of reverence) to say, "I did all that I could do towards so kneeling; I bowed my knee; I nearly touched the ground with it—I did not quite touch the ground, but I did it in such a manner that all my congregation, all who were attending and seeing that which I did, could not possibly tell whether I were kneeling in that sense or not." It would be intolerable to allow any order to be trifled with in such a manner as must be implied if their Lordships were to give place for a moment to any such argument on the part of Mr. Mackonochie as that this was a compliance with the order. Now, with reference to this particular matter of kneeling, it is one, undoubtedly, of very great importance as regards the judgment which has been pronounced, and the occasion of that judgment. We cannot do better, with reference to this part of the subject, than to call attention to the purport and intent of the Book of Common Prayer, when prescribing what is to be done, and in omitting to prescribe that which it does not intend to be done. For that purpose I will refer to the judgment which was pronounced by Lord Cairns, as the judgment of the Judicial Committee on the former occasion. His Lordship thus expresses himself in that judgment (19 L. T. Rep. N. S. 505; L. Rep. 2 P. C. 382):—"Their Lordships are of opinion that it is not open to a minister of the church, or even to their Lordships, in advising Her Majesty as the highest ecclesiastical tribunal of appeal, to draw a distinction, in acts which are a departure from or violation of the rubric, between those which are important and those which appear to be trivial. The object of a Statute of Uniformity is, as its preamble expresses, to produce an 'universal agreement in the public worship of Almighty God,'—an object which would be wholly frustrated if each minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, or add to, or alter any of those details. The rule upon this subject has been already laid down by the Judicial Committee in *Westerton* v. *Liddell*, Moo. Spec. Rep. 156,

and their Lordships are disposed entirely to adhere to it: 'In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted.'" And then upon this very subject matter his Lordship further proceeds to say,—"There would indeed be no difficulty in showing that the posture of the celebrating minister during all the parts of the Communion Service was, and that for obvious reasons, deemed to be of no small importance in the changes introduced into the Prayer Book at and after the Reformation. The various stages of the service are, as has already been shown, fenced and guarded by directions of the most minute kind, as to standing and kneeling, the former attitude being prescribed even for prayers, during which a direction to kneel might have been expected. And it is not immaterial to observe that whereas in the first Prayer Book of King Edward VI., there was contained at the end a rubric in these words:—'As touching kneeling, crossing, holding up of hands, knocking upon the breast, and other gestures, they may be used or left as every man's devotion serveth, without blame,'—this rubric was in the second Prayer Book of Edward VI., and in all the subsequent Prayer Books, omitted." We may further add an observation as to the extreme care which is taken in the Prayer Book to guard all persons who might feel a scruple with reference to kneeling at the reception of the Holy Communion from any inference that might thereby be raised in their minds of a nature contrary to that which was intended by the Prayer Book itself to be expressed, namely, any intention of adoration of the holy elements. This is most particularly and carefully guarded against, and the reason for such kneeling is explained, and said to be "for a signification of our humble and grateful acknowledgment of the benefit of Christ, therein given to all worthy receivers, and for the avoiding of such profanation and disorder in the Holy Communion as might otherwise ensue." Then it is explained: "Yet lest the same kneeling should by any persons, either out of ignorance and infirmity, or out of malice and obstinacy, be misconstructed and depraved, it is hereby declared, that thereby no adoration is intended, or ought to be done, either unto the sacramental bread and wine there bodily received, or unto any corporal presence of Christ's natural flesh and blood. For the sacramental bread and wine remain still in their very natural substances, and therefore may not be adored; for that were idolatry, to be abhorred of all faithful Christians." And, again, carefully does our Church provide in her 28th Article against any such adoration as we have spoken of by this declaration—"The sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." Now that being so, and it being of the utmost importance that for the purposes of common prayer such union should be preserved as is essential to the happiness and comfort of all who are joining in this most holy ordinance; what can be a greater offence than the offence of either by addition or omission occasioning trouble or confusion in the minds of those who are invited to join in common prayer, and in one common act of reverence? Acts of reverence, where necessary, are enjoined; and the use of additional acts of reverence, where they are not enjoined, is, according to the judgment which has been pronounced in this very matter, a thing prohibited. If, therefore, the reverend respondent, in performing his own special act of reverence, does it in such a manner that no one can tell whether he is not doing the very thing which he is prohibited from doing, and has performed that special act of reverence at a time when there is no direction in the Book or Common Prayer for that performance, he certainly does that which militates, in every possible view of the case, both in letter and spirit, against the monition which he has received, and the reasoning which occasioned the monition to be issued. Whether or not Mr. Mackonochie can reconcile it with his view of what is right, that a judgment of this kind should be so narrowly scrutinized, that every possible limit should be placed upon it, and that notwithstanding the reasons which are assigned for it, namely, the desire of promoting uniformity in com non worship, it should be, as far as possible evaded, it is not for their Lordships to say. There may be some who feel great grief and sorrow at any act which may appear to be at variance with the common charity and love that should induce us at all times when assembled for worship, and most especially this highest and holiest act of worship, to be as far as possible of one mind, so that then at least our unity be not disturbed. But what one is justified in saying, as regards the act which is now complained of as a breach of the monition, is this, that it is not possible, happily, to reconcile with the administration of our law in its narrowest sense, any mere evasion of that which the law sanctions, of that which the law has ordered, by an authority which binds this reverend gentleman, as it binds every subject of the realm, to strict obedience. That obedience may be rendered grudgingly, if so it must be; it may be rendered in a manner which I am sure the reverend gentleman would not tolerate on the part of any of his flock, if it were a question of obedience to a higher power; it may be rendered, therefore, strictly within the limits which are exactly prescribed by the monition, but that monition may not be evaded. A mere literal compliance is not all that even the law requires; the compliance must not be literal in a sense which is but evasive. I will not, in the name of their Lordships, say more upon what I confess presses upon me individually very strongly, the narrowness of obedience shown by the course taken, as to keeping the candles lighted until the very moment when they are forbidden, and then extinguishing them, and as to the elevation of the elements to something which, even on the affidavits themselves, appears to me to be more than necessary for simply taking the cup and paten into the hands of the officiating clergyman, since we have been obliged to hold that these acts were, nevertheless, in literal compliance with the monition having reference to the articles. But here, in this matter of the kneeling, their Lordships find that there is, first, not even a literal compliance with the order; and, secondly, if upon any strained interpretation of the word "kneeling" (for strained as it appears to their Lordships it would be), they could arrive at the conclusion that they did not preclude the act of bowing one knee so low that it must at times touch the ground, and in a manner which cannot possibly be distinguished from kneeling by those who witness the act; still, if it was a representation of the forbidden act, as nearly as the party charged dared to represent it, and in such a guise as to convey to all at a distance the impression that the act of kneeling was really performed, that would be a species of evasion of the order which a court of justice would find it right and due to the maintenance of its own force and vigour to visit as being itself a breach of the order which had been made. For these reasons it has seemed to their Lordships (and it is the opinion of us all) to say that there has been a clear breach of this special monition. Their Lordships next take into consideration what is proper and right to be done. They did not hear Mr. Stephens upon the question as to whether or not this tribunal has the means of enforcing its orders. Happily it has been supplied

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(and I say happily, because it would be in vain to establish a tribunal which has no power to enforce its orders) with abundant means for that purpose by the statutes which have been passed in that behalf; but into the examination of those means, and the different modes that might be adopted for that purpose, we are not, for the reason I am presently going to mention, about to enter. In declining to take any more severe step than that of compelling Mr. Mackonochie to pay the costs of this discussion their Lordships have had to consider the affidavit which was last made by him, and to which they have been desirous to give the most favourable construction and allowance; and in that affidavit Mr. Mackonochie very properly says that he never intentionally or advisedly, in any respect, disobeyed the monition, or sanctioned any practice contrary to its provisions. I confess I think, as I have already intimated, that Mr. Mackonochie takes an extremely narrow view of that which the word "obedience" ordinarily implies, when he says that he has endeavoured to obey this order, but he does say that which, in a sense, for the purpose of clearing his contempt, he may have a right to claim the benefit of, that he never intentionally or advisedly, in any respect, disobeyed the monition. He now, we hope, will learn that mere literal compliance in a merely evasive manner will not suffice. Literal compliance with regard to the actual limits of the order is, of course, all that he is held to in law; for an obedience to the spirit of the order, we can only trust to his own feelings and his own conscience. And when he thus tells us that it has not been, and is not his desire wilfully to disobey the law, or to disregard its monition, their Lordships think that they are bound, upon this first occasion of the matter being brought before them of any non-compliance with the order, to allow Mr. Mackonochie the benefit of that affidavit; and they do not think it necessary, on the present occasion, to do more, after expressing their opinion judicially that the monition has been disobeyed with reference to kneeling during the prayer of consecration, than to mark their disapprobation of such a course of proceeding by directing that he should pay the costs of the present application. Their Lordships make no further order.

Proctors for the appellant, *Moore* and *Currey*.

Equity Courts.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Nov. 9 and 10, and Dec. 3.

JAMES v. LITCHFIELD.

Vendor and purchaser—Specific performance—Property sold as freehold—Part of property subject to lease—Notice of tenancy by purchaser—Compensation—Abatement.

Notice of a tenancy is notice of the extent of the tenant's interest as between vendor and purchaser.

A vendor agreed to sell certain property, and to deliver it to the purchaser as freehold. The purchaser, at the date of the contract, was aware that A., a third party, was in occupation of part of the property; he afterwards found out that A. had a lease for thirteen years of the property in his occupation.

On a bill by the purchaser for specific performance, with an abatement from the purchase-money in respect of A.'s interest:

Held, that he was entitled to no such abatement, inasmuch as, having notice of A.'s tenancy, he was bound to inquire into the extent of A.'s interest:

Held, also, that he was entitled to a decree for specific performance without an abatement, but that he must pay the costs of the suit.

This was a purchaser's suit for specific performance.

The defendant was the owner in fee of certain copyhold hereditaments situate at Hanwell, and consisting of five houses and about six acres of land. Two of the houses and a piece of land behind them were in the occupation of the plaintiff.

On the 12th Nov. 1868 the plaintiff wrote to the defendant and offered him 5000*l.* for the whole of the property; and on the 19th of the same month the defendant wrote a letter to the plaintiff accepting his offer; it was in the following words:—

Lower Norwood, Nov. 19, 1868.

Dear Sir, I accept your offer of 5000*l.* for my property at Hanwell, consisting of five houses and about six acres of land, provided a deposit of 500*l.* be paid to me to-morrow at one o'clock, and for the above sum I agree to deliver to you the said property as freehold, and to enter into a formal contract for the carrying out of the same as soon as it can be drawn up by my solicitor.—I am, my dear Sir, yours truly, WILLIAM LITCHFIELD.

C. W. James, Esq.

P. S. The meeting to be at the office of Mr. Bennett, 30, Friday-street, Cannon-street.

The deposit of 500*l.* was duly paid on the following day, and the defendant wrote on the back of his letter of the 19th Nov. a receipt in the following form:—

20th Nov. 1868.

Received the deposit of five hundred pounds, the timber to be included in the contract. WILLIAM LITCHFIELD.

500*l.*

Early in the following month the defendant's solicitor, Mr. Bennett, sent to the plaintiff's solicitors, Messrs. Dawson, Bryan, and Dawson, a formal agreement for the purchase, which for the first time disclosed to the plaintiff that a Mr. Allen had an agreement for a lease for twenty-one years from Christmas 1861, of five and a half acres of the land comprised in purchase, at the yearly rent of 23*l.* 10*s.*

A long correspondence ensued between the solicitors of the parties, the plaintiff's solicitors requiring an abatement from the purchase-money in respect of Mr. Allen's interest in the property; this being refused by the defendant, the present suit was instituted.

The bill prayed that the contract of the 20th Nov. 1868 might be specifically performed; that an abatement might be made from the plaintiff's purchase-money in respect of the agreement for a lease to Mr. Allen of the land, and that the defendant might be ordered to pay damages to the plaintiff for the loss sustained by the plaintiff in consequence of the non-performance of the contract.

It was not denied that the plaintiff, at the date of the contract, knew that the land was in the occupation of Allen, and the question was whether he was bound to ascertain the extent of Allen's interest in the land.

Southgate, Q. C. and *F. Waller*, for the plaintiff, submitted that as the vendor was unable to deliver the property as freehold in accordance with the terms of the contract, the plaintiff was entitled to a decree with an abatement from the purchase-money. They cited

Harris v. *Pepperell*, 17 L. T. Rep. N. S. 191; L. Rep. 5 Eq. 1;
Painter v. *Newby*, 11 Hare, 26;
Nelthorpe v. *Holgate*, 1 Coll. 203;
Milligan v. *Cooke*, 16 Ves. 1.

[Lord ROMILLY.—*Milligan* v. *Cooke* is not to be relied on as an authority.]

Martlock v. *Buller*, 10 Ves. 316;
Wood v. *Griffith*, 1 Swanst. 54;
Hanbury v. *Litchfield*, 2 My. & Kee. 629;

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Earl of Durham v. *Legard*, 13 L. T. Rep. N. S. 82; 34 L. J. 589, Ch.;
Seton v. *Slade*, 2 W. & T. Lead. Cas. 3rd edit. 501.

Sir *Richard Baggallay*, Q. C. and *W. W. Cooper*, for the defendant, contended that the plaintiff having known at the date of the contract that Allen had possession of the land, he was bound to ascertain what the extent of his interest was, and that this was, therefore, not a case in which the purchaser could have an abatement. They cited

Taylor v. *Stibbert*, 2 Ves. Jun. 439;
Hiern v. *Mill*, 13 Ves. 119;
Hall v. *Smith*, 14 Ves. 426;
Daniels v. *Davison*, 16 Ves. 249;
Lewis v. *Bond*, 18 Beav. 85;
Wilbraham v. *Livesey*, 10 Beav. 206.

Southgate, Q. C. replied.

Dec. 3.—Lord ROMILLY.—This is a suit for the specific performance of a contract with compensation, or rather abatement in respect of a portion of the property which is subject to a lease of which thirteen years are unexpired. The defendant, the vendor, in November of last year owned in fee certain copyhold hereditaments at Hanwell, in Middlesex, consisting of five houses and six acres of land. Two of those houses were then and still are in the occupation of the plaintiff. Another of the houses was then, and still is, in the occupation of a person of the name of Allen; the two other houses were then, and still are, in the occupation of two other persons who are yearly tenants. The five houses are adjoining each other, and the piece of land or orchard, consisting of six acres, lies immediately behind them. On the 12th Nov. 1868 the plaintiff wrote the following letter to the defendant. [His Lordship read it, and the letter in reply of the 19th Nov., and stated the circumstances relating to the discovery of Allen's lease, and continued.] The plaintiff insists that the great value of the land in his eyes consisted in the circumstance that the possession of it would begin at once in order to let it out on building leases, and he submits that he is entitled to compensation for this undisclosed encumbrance of which he had no notice prior to the receipt of the draft agreement. The plaintiff in his evidence does not deny that he knew that Allen was the tenant of this property, and the real question to be determined is, whether this knowledge put him on inquiry to learn from Allen the nature, extent, and character of his tenancy. The case of *Daniels* v. *Davison* (*sup.*) determines that, as between the tenant himself and the purchaser, the purchaser was bound to inquire, and cannot dispute the tenant's right. Does that duty apply to the case between vendor and purchaser as well as between purchaser and tenant? I have found no case exactly in point, but the principle appears to me to be the same and to be applicable to both cases. Why is the purchaser bound to inquire as regards the tenant, and yet not bound to inquire as regards his rights against the vendor? The principle is thus stated in argument in that case (*Daniels* v. *Davison*, 16 Ves. 251): "Whatever puts a purchaser upon inquiry shall be held notice; and if, therefore, he knows that a tenant is in possession, he is considered as having notice of the whole extent of his interest." This is adopted by the Lord Chancellor (Eldon), who decides accordingly; and I am unable to see any reason for a technical and, as it appears to me, an arbitrary distinction which should fix the application of the rule to one person, not extending it to all persons whatsoever If the purchaser, knowing of the tenancy, is bound to inquire as regards the tenant as to his interest in the land, and if the purchaser must be taken to be bound to know what would be the result of such inquiry as regards the tenant, why should he not be so bound as regards the vendor? And if the purchaser chooses to bind himself by agreement with the vendor, knowing of the tenancy, but without having accurately ascertained what was the extent and character of it, and what the results of such inquiry would have led to, he must, as it appears to me, be bound in the same manner as regards all other persons. I think also that no distinction can properly be drawn in a court of equity, because the matter rests in contract, and the conveyance of the legal estate has not been made to him. The purchaser bound himself by contract; he must be taken to have had present to his mind all those things of which he had notice, and those things which necessarily flow from and were incidental to that notice. He knew that Allen was tenant of this land; he was bound to inquire what the tenancy was, unless he was willing to be bound by the tenancy whatever it was. Why should he be bound by the fact that Allen was tenant, and yet not bound by the fact of what the extent of his interest was under that tenancy? I am, therefore, of opinion that the plaintiff is entitled to no abatement in respect of Allen's interest in the land. He may, however, take a decree for specific performance without any abatement from the purchase money if he so elects, but he must in any event pay the costs of the suit.

Solicitors for the plaintiff, *Dawson, Bryan, and Dawson.*

Solicitor for the defendant, *J. C. G. Bennett.*

Monday, Dec. 13.

GILLIATT *v.* GILLIATT.

*Sale of land by auction—Reserved price—Employment of puffer—*30 *&* 31 *Vict.* c. 48.

Since the passing of the Sale of Land by Auction Act 1867 (30 *&* 31 *Vict.* c. 48) *the employment of a puffer renders a sale void unless it is expressly stated in the conditions of sale that a right to bid is reserved.*

Consequently, where the conditions stated that the land would be sold subject to a reserved price, and, no right to bid being reserved, a puffer was employed by the vendor:

Held, that the sale was void, notwithstanding the fact that the puffer did not bid beyond the reserved price, and that the land was knocked down to the purchaser at the reserved price.

Adjourned summons.

In this case certain lands in Sussex were put up for sale by auction by order of the court. Among the conditions of sale was one to the effect that the sale was subject to a reserved price, which had been fixed by the judge to whose court the cause was attached. The conditions did not reserve a right to bid.

The property was knocked down to a Mr. Bridges for 29,000*l.*, the reserved price. The purchaser, having afterwards discovered that a puffer had been employed to bid up to the reserved price, and that he did, in fact, bid up to 28,900*l.*, took out a summons to set aside the purchase on the ground that the employment of a puffer where no right to bid was reserved by the conditions of sale, was illegal under the provisions of the Sale of Land by Auction Act 1867 (30 & 31 Vict. c. 48), by the 5th section of which it is enacted that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any

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person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person.

And it is provided by the 6th section of the same Act, that where any sale by auction of land is declared either in the particulars or conditions of such sale to be subject to a right for the seller to bid, it shall be lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper.

The summons was now adjourned into court.

Jessel, Q.C. (*Whitehorne* with him) for the purchaser, submitted that the sale was clearly void under the provisions of the Act.

Sir *Richard Baggallay*, Q.C. (*Langworthy* with him), for the parties having the conduct of the sale, contended that the employment of a puffer, provided he did not bid beyond the reserved price, was allowable even before the passing of the Act, which had made no change in this respect. The intention of the Act was only to prevent the employment of a puffer when the sale was without reserve. The statement that a price was reserved justified the vendor in running it up by a puffer to that price. As to the old law, they cited

Mortimer v. *Bell*, 13 L. T. Rep. N.S, 348; L. Rep. 1 Ch. 10.

Lord ROMILLY.—The Act clearly requires it to be stated in the conditions of sale, whether the land is to be sold without reserve, or subject to a reserved price, and also whether a puffer is to be employed, or, in the words of the Act, whether a right to bid is reserved. Here no right to bid was reserved, and nevertheless a puffer was employed. I am of opinion that the sale was therefore void, and must be set aside.

Solicitors for the purchaser, *Bridges* and *Co.*

Solicitors for the vendor, *Young*, *Maples*, and *Co.*

Wednesday, Dec. 15.

DEARE v. SOUTTEN.

Husband and wife—Desertion—Moneys advanced for necessaries—Remedy in equity against husband.

A husband deserted his wife and left her without means of support. She then filed a bill praying that the trustees in whose names stood a sum of Consols in which she had an absolute interest defeasible in a certain event, might be directed to pay the dividends to her, and a decree to that effect was made. The dividends which fell due just before the date of the decree had been received by the husband, and one of the trustees advanced moneys to the wife for her maintenance till the next dividends became due:

On a bill by the trustee against the husband:

Held, that the husband was liable to repay the moneys so advanced.

At the time of her marriage Mrs. Soutten was entitled to the income of sums of stock amounting to about 14,000*l.*, to which she afterwards became absolutely entitled. There was no settlement or agreement for a settlement made on the marriage. She also became entitled after her marriage to an absolute interest, defeasible in the event of her dying without leaving issue living at her death, in a sum of 9936*l.* 7*s.* 3*d.* Consols standing in the names of the plaintiff and two other trustees.

Soon after she became absolutely entitled to the 14,000*l.*, her husband obtained possession of it, and applied it to his own use, and, as the plaintiff alleged, he then deserted his wife and ceased to maintain her.

In Feb. 1868 Mrs. Soutten, by her next friend, filed a bill against her husband and the trustees of the sum of 9936*l.* 7*s.* 3*d.* Consols, praying that a proper settlement thereof might be made by order of the court, and that the trustees might be ordered to pay the whole of the dividends thereof to her, and might be restrained by injunction from paying any part of the dividends to her husband. The cause did not come on for hearing till the 15th July 1868, and it then appeared that the husband had received the dividends which became due on the 5th July 1868, and refused to repay the same or any part thereof for the maintenance of Mrs. Soutten, and his Lordship, considering that he could make no order as to such dividends, directed the subsequent dividends to be paid to Mrs Soutten during her life.

The bill alleged that Mrs. Soutten was entirely without means of support up to the 5th Jan. 1869, when the next dividends became due, and that during the period between the decree and that date the plaintiff, who was one of the trustees in whose names the Consols were standing, paid to her various sums amounting to 192*l.* for her maintenance and support; and it was proved that these sums had been actually applied by Mrs. Soutten in the purchase of, and payment, for necessaries for her maintenance and support, and for rent, rates, and taxes of the house in which she lived.

The bill charged that the defendant, the husband, was bound in equity to repay to the plaintiff the sums so advanced to Mrs. Soutten.

The prayer was that the defendant might be ordered to repay to the plaintiff the sums which the plaintiff had advanced to Mrs. Soutten since the plaintiff had ceased to live with and support her, and which had been actually laid out by her in the purchase of necessaries.

Archibald Smith, for the plaintiff, said that it was clearly settled that there was no remedy at law, but that there was no doubt that this court could grant the relief asked for. He cited

Harris v. *Lee*, 1 P. Wms. 482;
Hutchinson v. *Standley*, Annual Register 1776, p. 117; Reg. Lib. 1775, No. 216, b;
Jenner v. *Morris*, 1 Dr. & Sm. 218; and on appeal 3 L. T. Rep. N. S. 871; 3 De G. F. & J. 45.

Idle, for the defendant, contended that the court would not decree payment in such a case as this; Shadwell, V.C. had so decided in *May* v. *Skey*, 16 Sim. 588. [LORD ROMILLY.—That case was distinctly overruled in *Jenner* v. *Morris*.] He argued that all the advances having been made subsequently to the filing of the bill in *Soutten* v. *Soutten*, they should have been provided for in that suit, as the court would have directed an advancement to be made out of the capital of the wife's property under the 57th section of the Improvement of Jurisdiction Act (15 & 16 Vict. c. 86).

Rowley v. *Burgess*, 2 W. R. 652.

He also cited

Bright's Husband and Wife, p. 258;
Guy v. *Pearkes*, 18 Ves. 196;
Coster v. *Coster*, 1 Kee. 199;
Atherton v. *Newell*, 1 Cox, 229;
Re Ford, 8 L. T. Rep. N. S. 625; 32 Beav. 621;
Hulme v. *Tennant*, 1 Bro. C. C. 16;
Duke of Bolton v. *Williams*, 2 Ves., jun. 248;
Johnson v. *Gallagher*, 4 L. T. Rep. N. S. 72;
Rawlyns v. *Vandyke*, 3 Esp. 250;
Davis v. *Cook*, 4 L. J. 203, Ch.

Lord ROMILLY, without calling for a reply, said:—I am of opinion that I must make the decree asked for. The wife files a bill asking to have the dividends on a sum of Consols paid to her for her maintenance. Her husband, who has deserted her,

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receives the dividends in July, just before the decree is made in the suit, and the wife is left without any means of support. One of the trustees in whose names the fund stands advances money to the wife for her maintenance till the dividends become payable under the decree; and he now asks the court to make the husband repay the money so advanced to the wife. The cases cited by Mr. Idle as to the wife's property being liable do not apply to this case; they are all cases where the husband could not be found, and there is no doubt that the capital of the wife's property is liable where the husband cannot be reached. I must make a decree in the terms of the prayer of the bill. The defendant must pay the amount within a month together with the costs of this suit, unless he elects to have an inquiry, in which case he must be decreed to pay such sums as shall be found to have been properly advanced and expended in the purchase of necessaries, and in that case the amount will not be limited to that expressed in the bill to have been advanced.

Solicitors for the plaintiff, *Boys* and *Tweedies.*

Solicitor for the defendant, *Mitton.*

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Tuesday, Nov. 16.

WILLIAMS *v.* THE EAST LONDON RAILWAY COMPANY.

Agreement to purchase leaseholds from lessee—Apportionment of rents under 119*th section of Lands Clauses Consolidation Act* 1845*—Notice to treat with lessor—Specific performance—Costs.*

A railway company agreed with the plaintiff, the lessee of certain leaseholds, to purchase a portion of the property. The agreement provided (inter alia) "that the rents payable by the vendor under the said leases should be apportioned under 119*th section of the Lands Clauses Act, if necessary."*

Subsequently on the lessor, who was not a party to the agreement, refusing to enter into an arrangement as to the apportionment, a summons was taken out for the purpose of having the apportionment determined by a metropolitan magistrate under the statute. On the summons coming on to be heard the magistrate decided that he could not proceed with the matter unless the company served the lessor with notice to treat for the purchase of his interest.

The company declined to give such notice, and the plaintiff thereupon filed a bill against them, praying that they might be ordered specifically to perform the agreement, and to do all necessary acts for carrying it into effect, including the apportionment of the rents and the giving the necessary notice to treat to the lessor, and for costs:

Held, that the court could not order the company to serve the lessor with notice to treat, but that the agreement must be specifically performed, and that each party must do all things necessary for carrying it into effect, having regard to the precise terms of it and to the provisions of the Land Clauses Consolidation Act; and that as the view taken by the magistrate had occasioned the suit, each party must bear his own costs.

The material question in this suit, which was instituted against the East London Railway Company for the specific performance of an agreement for the purchase of certain leasehold houses, was whether the defendants (the company) would be compelled under a clause in the agreement to obtain the lessor's sanction to the apportionment of the rents between the houses in question and others under the same leases. The facts were as follows.

By an indenture of lease dated the 5th Sept. 1844, William Hoon became the lessee of nine houses in Fleet-street-hill and Petley-street, Bethnal-green, for a term of sixty-one years, at an aggregate rent of 40*l.*, subject to certain covenants, and, among others, to one on the part of the lessee, not to carry on any noisy or offensive trade on the premises, with a proviso for re-entry by the lessor for non-payment of rent, or on breach of any of the covenants. By another indenture of even date with the former, Hoon became lessee of nine other houses in Charles-street, Bethnal-green for a similar term, and subject to the same covenants, at an aggregate rent of 41*l.* 12*s*, Mr. Charles Salisbury Butler being the lessor in both instances.

William Hoon died in Nov. 1861, and by his will he appointed the plaintiff, Henry Reader Williams, his executor.

On the 15th Nov. 1867 the defendants entered into an agreement with the plaintiff for the purchase of his interest (as Hoon's executor), of a portion of the houses held under the above-mentioned leases, for the sum of 1250*l.* The agreement provided (*inter alia*) that if, from any cause whatever, the purchase should not be completed on the 1st Dec. then next, the vendor should be entitled, at his option, either to the rents or to interest on the said purchase-money at the rate of 5*l.* per cent. per annum until the actual completion, without prejudice to his right to completion or otherwise. The vendor was to release his right of pre-emption (if any) of the property purchased. A proportionate part of the accruing rents up to the day of the company entering into possession, or into receipt of the rents, was to belong to the vendor, and to be paid and allowed by him to the company, the vendor to pay all outgoings thereon up to the time of the company being let into possession, or into the receipt of the rents and profits of the premises, including the proportionate part of the rents, rates, and taxes up to such time, but subject to the vendor's right of option contained in the last condition. The vendor was to retain in his possession the two indentures of lease of the 5th Sept. 1844, under which the premises were held, and which related also to other property of the vendor, and enter, if required, by and at the cost of the company, into the usual covenants for production and furnishing copies thereof. The company were to pay all the vendor's costs according to the Lands Clauses Act, and the sum of 15*l.* 15*s.* for preliminary expenses. The agreement further provided "that the rents payable by the vendor under the said leases were to be apportioned under the 119th section of the Lands Clauses Act, if necessary."

The section above referred to enacts "That if any lands shall be comprised in a lease for a term of years unexpired, part of which lands shall be required for the purposes of the special Act, the rent payable shall be apportioned between the lands required and the residue of the land, and the apportionment may be settled by agreement between the lessor and the lessee on the one part, and the company on the other part; and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by two justices."

Shortly after the date of the above agreement, a draft agreement for the apportionment of the rents was prepared and forwarded to Mr. Butler, the lessor, for his approval. Mr. Butler, however, objected to entering into the agreement, and declined to execute it. After some correspondence between the solicitors of the parties on the subject, the plaintiff took out two summonses, one against

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the company and the other against Butler, for the purpose of having the question of apportionment determined by one of the metropolitan police magistrates, under the 119th section of the Lands Clauses Consolidation Act 1845.

The summonses came on to be heard on the 11th June 1868, before Mr. Ellison, at the Worship-street Police-court, and it then appearing that the defendants had not given Butler notice to treat for the purchase of his interest in the property, Mr. Ellison expressed an opinion that in the absence of such notice he could not grant the application, and adjourned the matter for three weeks in order to give the defendants an opportunity of serving notice.

Ultimately, the defendants having declined to give notice, this bill was filed praying that it might be declared that the defendants had accepted the title of the plaintiff to the leasehold premises comprised in the said agreement of the 15th Nov. 1867, and that they might be decreed specifically to perform the said agreement, and to do all necessary acts for the due performance thereof, including the apportionment of the rents under the said leases, under the 119th section of the Lands Clauses Consolidation Act 1845, and the giving notice to treat to the said Charles Salisbury Butler for the purchase of the said hereditaments; and that they might be ordered to pay to the plaintiff the said sum of 1250*l.*, the plaintiff being ready and willing on such payment and such apportionment of rent to execute an assignment of the said premises (the draft whereof had been agreed upon between the plaintiff and the defendants), and to vest the said premises in the defendants, free from all incumbrances. And that the defendants might pay the costs of the suit.

Dickinson, Q. C. and *Ellis*, for the plaintiff, contended that it was of the utmost importance for his protection that there should be apportionment. Without it the lessor might at any time, upon a breach by the defendants of any of the covenants in the lease, re-enter upon the whole property. It formed an integral part of the agreement, and as the magistrate had decided that he had no power to act, unless the lessor had had notice to treat from the defendants, and as the defendants had declined to give that notice, the plaintiff had no other resource than to come to this court for the relief prayed. They cited

Slipper v. *Tottenham and Hampstead Junction Railway Company*, L. Rep. 4 Eq. 112; 16 L. T. Rep. N. S. 446.

Greene, Q. C., *Fooks*, Q. C., and *W. Fooks*, for the defendants submitted that they had done all in their power towards the completion of the contract. They had expressed their willingness to enter into covenants for the plaintiff's protection, but they could not be compelled to step beyond their contract, and it was no part of the contract that they should treat with Mr. Butler. There was nothing to show the nature of his interest in the property. He might, for all they knew, be merely a lessee, holding under another landlord, who might himself have the fee simple of the property; but whatever his interest was, they might never want it for the purpose of their line, and could not either legally or equitably be required to purchase it. To compel companies to purchase the interests of landlords in such cases, would involve consequences most injurious to the promotion of railways, and to the interests of the public. They cited

Bailey v. *De Crespigny*, L. Rep. 4 Q. B. 180; 19 L. T. Rep. N. S. 618.

The VICE-CHANCELLOR.—There is no doubt that the agreement is clear and binding upon both parties, and that it is an integral part of it that there should be an apportionment of the rents. The necessity for an apportionment so far as the plaintiff is concerned is apparent, and the defendants have not resisted it, for it appears that both parties went before one of the metropolitan magistrates to have the question determined, and it is in consequence of this decision that the present litigation has arisen. The magistrate decided that, unless the defendants gave the lessor notice to treat for the purchase of his interest, he had no power to deal with the case, but the defendants not wishing to purchase the lessor's interest, declined to give the required notice, and thereupon the magistrate dismissed the summons before him. The plaintiff, treating this as a proper decision, files this bill for specific performance of the agreement, and asks that the defendants may be ordered to serve the notice on the lessor. That order, however, the court cannot make; but as I consider that an apportionment ought to be made under the statute, and that the plaintiff is entitled to a decree, though not the one he asks, I shall direct that the agreement be specifically performed, and that both the plaintiff and the defendants do and concur in all things necessary for carrying it into effect, having regard to the precise terms of it, and to the provisions of the Lands Clauses Consolidation Act 1845. With reference to the costs, as the view taken by the magistrate has occasioned the suit, and, as the mistake made before him was common to both parties, I think it would be too severe to compel either party to pay the whole costs, and I shall therefore direct that each party bear their own.

Solicitor for the plaintiff, *J. H. Lydall.*

Solicitors for the defendants, *Wilson*, *Bristowe*, and *Carpmael.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Wednesday, Aug. 4.

Re SHEPHEARD'S SETTLED ESTATE.

Settled Estates Act—Devise in trust to manage estate—Ultimate gift to children—Title.

When an estate is devised as to part by way of succession, and as to the other part there is a trust preventing it coming into possession until a certain period, the whole is a "settled estate" within the meaning of 19 & 20 *Vict. c.* 120, *and the* 28*th section gives a purchaser a safe title.*

In this case certain property devised to trustees, by the will of Samuel Shepheard, had been made the subject of a petition under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), and sold; and the purchaser raised the question whether it was a settled estate within the Act, and that was now the question brought before the court upon summons.

The testator by his will dated the 12th Nov. 1858 devised the property in question to trustees and their heirs upon trust to let and manage the same to the greatest advantage, as they should think fit, in their discretion, during his wife's lifetime, and during the infancy of any of his children; also upon trust to pay to or permit his wife to receive one moiety of the clear rents and profits (deducting for repairs and insurances) for her life, and then in trust for all the children equally in fee simple as tenants in common.

Upon the testator's death in 1866 there were three children, two still under age; and the widow, the trustees, and the child who had attained twenty-one presented a petition, in which all the

children concurred, the infants by their guardian, under the Leases and Sales of Settled Estates Act, for a sale. That sale took place under an order made on the petition; but on the question of title an objection was taken, on behalf of the purchaser, that one moiety of the estate was not settled within the Act—namely, that portion which was given in trust for the children in fee, subject to the trust for management, until they attained twenty-one.

Upon the objection being taken in chambers, the petitioners took out the present summons to decide the question.

W. W. Cooper appeared in support of the summons, and contended that this was a "settled estate" within the meaning of the Act, there being a limitation as to half by way of succession, the children not being entitled as to the other moiety until they were all of age. There was no one to dispute the sale, and under the 28th section a perfect title could be made:

Re Thompson's Settled Estates, John. 418;
Beisley v. *Carter*, L. Rep. 4 Eq. 230; 19 L. T. Rep. N. S. 472;

The case was therefore free from difficulty.

A. C. Humphreys, for the purchaser, insisted that half of this property was not "settled" within the meaning of the Act; and the court therefore could not order a sale. The trust for the children, with trusts for their benefit whilst under age, was not within the Act: (*Re Burden's Will*, 28 L. J. 840, Ch.) The conveyance did not preclude the purchaser from calling in question the jurisdiction.

The VICE-CHANCELLOR.—In this case certain property is devised by the will of Samuel Shepheard upon trusts, as to one moiety for the wife and children, and subject thereto upon trust for the children in fee equally. A petition was presented under the Leases and Sales of Settled Estates Act for a sale, and an order was made, and the estate sold accordingly. The purchaser has now *bonâ fide* raised the question which has been argued, and not, as I understood it, merely by way of captious objection. Now the trustees have the legal estate devised to them of the whole estate, to manage it during the life of the widow and the infancy of the children, and pay a moiety of the net rents to the widow for life; this moiety, therefore, is no doubt a "settled estate." Then, subject thereto, there is a trust for the children in fee equally. As to the other moiety, therefore, there is no estate in possession of the children until they are all twenty-one. That also, in my opinion, constitutes a limitation in succession under the Act, and the will operates as a settlement under the Act. I consider that this statute should have a liberal construction put upon it, having regard to what the intention of the Legislature was. It was to make all real estate (except those the subject of private Acts, such as the estates of the Dukes of Marlborough and Wellington) capable of sale, as under proper powers in settlements, and I think that if there be an undivided share of an estate subject to a settlement, the whole ought to be so subject and considered as a settled estate. Here the whole estate is so subject, as I have decided. This question, however, is not a material one to a purchaser, for under the 28th section of the Act the sale, once made, cannot be called in question on the ground that there is no jurisdiction, except as to some person who was not present, and whose concurrence was necessary. Here all concur; those *sui juris* in person, the others by their proper guardian. He will therefore here get a perfectly good title. *Re Thompson* (*sup.*) is distinguishable from this case, there being, as to part of the estate, parties absolutely entitled in possession. *Beisley* v. *Carter* (*sup.*) confirms my view of the 28th section. *Re Burden's Will* (*sup.*) is not now an authority, the 27 & 28 Vict. c. 45 limiting the question of settlement to the period when it comes into operation.

Solicitors for the petitioners, *Cualiffe* and *Beaumont*.

Solicitors for the purchaser, *Harrison, Beal*, and *Co.*

Saturday, Dec. 11.

DUGDALE *v.* DUGDALE.

Practice—Marshalling assets—Deficient personalty—Abatement by pecuniary legatee and real estate rateably.

A testator gave 500*l.* *and specific articles to his wife, and a moiety of his real estate to her for life, or during her widowhood, and subject thereto to his children. The personalty, including the proceeds of an advowson directed to be sold to pay debts, &c., proved insufficient to pay such debts, legacies, and funeral expenses, and it was proposed in the minutes to insert a declaration that the* 500*l.* *legacy, and the specific gift in the real estate should make up the deficiency rateably, following* Hensman *v.* Fryer, *L. Rep.* 3 *Eq.* 420; 17 *L. T. Rep. N. S.* 394.

The court refused to allow it to be inserted.

This was an administration suit with reference to the estate of Henry Dugdale, who, by his will (which was of some length) gave in substance (after a legacy of 500*l.* and a specific bequest to his wife, Grace Dugdale), all his real estate to Adam Dugdale and Thomas Dugdale, upon trust as to one moiety thereof to his wife, Grace Dugdale, for her natural life, and during her widowhood, and subject thereto to his children. The testator's personal property, including the proceeds of an advowson directed to be sold to pay debts, &c., was insufficient to pay his debts, and the legacies given by his will, and it was proposed in the minutes of decree, which had been prepared (the cause coming on as a short cause), to insert a declaration that the deficiency ought to be raised and paid out of the legacy of 500*l.* to the wife, and the real estate rateably. This was following the rule laid down in the case of *Hensman* v. *Fryer*, decided originally by Kindersley, V.C. and on appeal by Lord Chelmsford, L. Rep. 3 Eq. 420; 17 L. T. Rep. N. S. 394. The clause in the minutes was as follows: "And it appearing that the testator's personal estate and the proceeds arising from the sale of the advowson of Anthorne in the will mentioned, and thereby devised in trust to pay the testator's debts, legacies, and funeral expenses, will not be sufficient for the payment of such debts, legacies, and funeral expenses, declare that the personal estate of the testator not specifically bequeathed, and the proceeds arising from the sale of the said advowson, form together the primary fund out of which the testator's debts, legacies, and funeral expenses ought to be paid, and that the deficiency ought, as between the defendant Grace Dugdale, who is entitled under the said will to a legacy of 500*l.*, and is also entitled to the use for her life of certain specifically bequeathed articles of furniture, and other personal estate in the will particularly described, on the one hand; and the person entitled under the general devise of the real estate contained in the said will, on the other, to be raised and paid out of the said legacy of 500*l.* and out of the said furniture, and other personal effects so specifically bequeathed and out of the general real estate of the testator rateably in proportion to the respective value."

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J. Pearson, Q. C. and *Bedwell* appeared for the plaintiffs.

Ford for the widow.

The VICE-CHANCELLOR.—I consider the decision in the case of *Hensman* v. *Fryer* (*sup.*) upon this question of marshalling is founded on a misapprehension of the decision of *Tombs* v. *Stocks*, 2 Coll. 502. I cannot, therefore, allow the proposed declaration to be inserted in these minutes. But I do not mean to decide that question now; for it is one which ought to be raised when this cause comes on upon further consideration.

Solicitors, *N. C.* and *C. Milne.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

Thursday, Nov. 18.

CHESTER v. CHESTER.

*Practice—Death of the plaintiff—Revivor—*15 *&* 16 *Vict. c.* 86, *s.* 52.

An interested person in a suit, who had liberty to attend the proceedings, and had been served with a copy of the decree, applied on the death of a sole plaintiff to revive the suit:

Held, that he was entitled to do so, and order to revive made.

This was a motion to revive a suit in consequence of the death of the sole plaintiff. The suit was one for the administration of the real and personal estate of one Wm. Mann, deceased. The usual decree had been pronounced in June 1865. The churchwardens and overseers of St. Mary, Newington, were interested in the division of the testator's estate.

The sole plaintiff died on the 15th Sept. 1869.

Dauney, on behalf of the churchwardens and overseers of the parish, moved for an order to revive, and that the parish officers might have the future conduct of the cause.

Methold for a defendant, one of the executors of testator's will.

The VICE-CHANCELLOR made the order asked for, to be in the same form as if a supplemental suit had been instituted with liberty to serve copies on the other parties interested in the cause.

Solicitors: *Chester* and *Co.*; *J.* and *W. Butler.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Friday, Nov. 19.

PEACOCK v. YOUNG AND ANOTHER.

Trespass—Liability for act which tends to incite to the doing of damage—"Natural consequence" of act.

Y., a candidate for election as member of Parliament, was accompanied through a borough by a crowd of persons forming a procession in his honour. The windows of certain houses, belonging to members of the opposite political party, were broken by the mob in their course; and Y., standing up in a carriage, waved his hat in the air, but with no intention of encouraging the mob in their acts of violence, and made no attempt to leave the carriage or stop the procession, though he remonstrated with those who could hear him on the disgraceful character of their proceedings:

Held that, under these circumstances, Y. was not liable for the damage caused by the breaking of the windows.

This was an appeal from the decision of a deputy of the judge of the County Court of Wisbeach, and the following is the case as stated by the judge who tried the cause:—

This was a plaint before me sitting as judge in the County Court in Cambridgeshire, at Wisbeach, by which the plaintiff claimed the sum of 10*l.* for damage done by the defendants to his windows and furniture.

This the defendants denied.

The facts as they appeared before me were as follows:

1. In September last, the time in question, the plaintiff was a furniture dealer, having a house and shop, where he carried on his business, in a main street of Wisbeach, and the defendant Young was one of the members of Parliament for the county of Cambridge, and a candidate for re-election at the recent general election for that county. He had been five times mayor of the borough of Wisbeach, was a town councillor, borough magistrate, a large shipowner and merchant, and a person of great influence in Wisbeach where he resided. The defendant Robert White was a labourer or mechanic.

2. On Sept. 28 there were four candidates seeking election for the county, viz., Lords Royston and Manners, supported by what was called the Pink and White, and the defendant and Mr. Brand by what was called the Blue party. For some days previous to that day it was known in Wisbeach that Lords Royston and Manners would come accompanied by an escort from the surrounding country, and address the electors at Wisbeach. A committee had been there formed for promoting the election of the defendant and Mr. Brand, and with a knowledge of the intended visit of Lords Royston and Manners, the defendant's committee in Wisbeach invited Mr. Brand to visit the town on the same day, for the alleged purpose "that he might accompany the defendant in quiet canvass in the rural districts."

3. On the morning of that day the defendant was in the town, and passing the plaintiff's shop, observed some pink and white flags exhibited there, as they were at various other houses, and exclaimed to a witness standing at the shop door, "That fellow Peacock promised me his vote."

4. The cavalcade accompanying the Lords Royston and Manners, consisting mainly of horsemen, soon after arrived at the outskirts of the town, where they were met, and their progress impeded, by an organised body of men and boys, provided with blue flags and wisps of straw, by the aid of which, and shouting, and loud noises, they tried to frighten the horses, and so drive back the processsion. The conduct of the mob, when in conflict with the horsemen, was witnessed by the defendant Young, who describes it as the most painful scene he ever witnessed. The cavalcade, however, forced its way through the crowd, and proceeded to an hotel in the town, in which Lords Royston and Manners addressed them.

5. Very soon after the cavalcade had forced its way through the mob, the defendant Young drove his carriage through the mob to the Midland Railway Station, where he met his colleague, and mentioned to him that "there had been a tremendous row in the town."

6. Instead of proceeding to the rural district the carriage returned with them to the old market place in the town, where the mob were waiting. The horses were immediately taken from the carriage, and it was drawn by the mob over the river through the High-street to the timber market where the horsemen were stationed listening to the speeches of the other candidates. Another con-

flict then ensued; the carriage was dragged through the concourse of horsemen, and thence along the streets to a house known as Toomey's, at the other end of the town near another railway station. At this point the carriage was turned round and brought back by the same route to the defendant Young's committee-room, where he and his colleague proceeded to address the assemblage in front of it. After this they went to the defendant Young's house, and neither candidate canvassed any rural district that day. Throughout the entire progress from the old market place to Toomey's, and thence to the committee-room, the conduct of the mob was of the most disorderly character. The windows of every known opponent of the blue party and of anyone who exhibited a pink and white flag or colour were smashed with stones and missiles, and the inmates of those houses hooted at. In passing the plaintiff's house the damage complained of was proved to have been done, a portion of it occurring on the return of the carriage. The defendant White was identified as one of the crowd who had tried to turn the horsemen back, and broke some panes of glass.

8. The windows of the houses along the line of this procession were filled with ladies and gentlemen, and others of their adherents, who had evidently assembled in expectation of it. Throughout the entire journey to and from Toomey's the defendant Young and his colleague stood up in the carriage waving their hats in the air, as stated by several witnesses, during the smashing of the windows, amid a continued uproar of shouting and cheering, which would effectually prevent anything they said being heard. In order to rest the persons drawing the carriage the procession halted several times.

9. When the defendant addressed the assembly fron his committee room he expressed his regret that so many windows had been destroyed, adding, "that those of any poor person should be paid for," and said, "that though he had had quieter and quicker rides through the town, he had never experienced a pleasanter one."

10. On behalf of the defendant Young it was deposed that "notwithstanding his position and influence he was unable to extricate himself from the mob, that when the horses were removed from the carriage against his will, finding the mob determined he submitted himself to them;" that he repeatedly begged the mob to desist from breaking the windows, that though his hat was waved continually during their forced journey, it was not to encourage the rioters, "but intended for ladies and gentlemen of his party by whom the windows of the houses of his friends were crowded;" that he had not hired or paid money to any of the mob, and that the remark about the plaintiff's promise was not addressed to any person, but made in a loud remark to himself "when riding down the street on horseback."

11. Upon this evidence I was satisfied, although it was not shown to me that the mob had been hired or paid by the defendant Young, and I accepted his statement that he was unexpectedly dragged through the cavalcade of horsemen down to and from Toomey's; that the waving of his hat in the air while standing up in the carriage was not intended by him to encourage the mob in continued acts of damage, and he did repeatedly tell those near him that the acts of damage were disgraceful, and ought not to be repeated, and he regretted their occurrence, yet that the great tumult and noise prevented these remonstrances being heard by the crowd; that he made no attempt to leave his carriage or stop the procession when he found that they were not attended to. That the mob were evidently organised by some one or more in his interest to arrest the progress of the cavalcade, and make the counter demonstration of this procession, and that he accepted their services for the latter purpose. That considering his influence and position, had he left his carriage, which I had no doubt he could have done, at all events at Toomey's, or threatened to do so if more windows were broken, he could have restrained the mob so organised and disposed to promote his interest from committing further damage, That the standing up in the carriage and waving his hat in the air, though this may have been intended only for the persons at the windows, were voluntary acts improper under the circumstances, as they were calculated to incite and encourage the mob to continued acts of violence, and induced them to suppose that what they were doing was acceptable to him whose election they combined to promote.

12. Under these circumstances, believing that the defendant Young was a person of intelligence fully capable of appreciating the effects of his own acts, and that the defendant White had taken an active part in the entire proceedings of the mob, I held that the defendants were liable for the damage done, and gave a verdict for plaintiff, but gave the defendant Young leave to appeal against the decision if wrong in point of law.

The question for the opinion of the Court of Queen's Bench is whether under the circumstances proved the defendant Young was liable in point of law for the damage sustained by the plaintiff. If the Court of Queen's Bench should be of opinion that the defendant is so liable, then the judgment of the County Court is to be confirmed, but if the Court of Queen's Bench should be of opinion that the defendant is not liable then the judgment of the County Court is to be reversed.

A rule *nisi* had been obtained in the case calling on the judge of the County Court to show cause why the case, as stated by him, should not be amended by adding certain evidence, which it was alleged he had not set forth in the case. This rule, it appears, had been served personally on the judge.

Dowdeswell, Q. C. on behalf of the County Court judge, showed cause against the rule, and complained of the unusual procedure adopted in calling on the judge to show cause, the ordinary course being to call on the respondent to do so, notice being given to the judge. The evidence alleged to be omitted was contained substantially in the case as stated by the learned County Court judge.

Hawkins, Q. C. (with whom was *Cotterell*), in support of the rule, urged that the County Court judge had no *locus standi*, as the intention was that the respondent alone should be called on to show cause on notice being given to the judge. [BLACKBURN, J.—It may have been unintentional, but the rule does call on the County Court to show cause, and in the same form in which it calls on the plaintiff to do so. COCKBURN, C. J.—And in that respect it departs from the ordinary course.]

By the COURT.—Everything which the appellant wishes to have stated in evidence is substantially contained in the case as stated by the County Court judge, he having completely exonerated Mr. Young from any suspicion of having organised or paid the mob, or incited them to violence. The rule will therefore be discharged with costs.

Hawkins, Q. C. (with him *Cotterell*) then argued in support of the appeal. There was no evidence which would render Mr. Young liable for the wrongful acts of the mob in breaking the windows of the plaintiff. There was no contract between the mob and Mr. Young, who did all he could to quiet them. No one can be liable for a

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wrongful act unless he expressly or impliedly authorises it; and there is nothing whatever to show any authorisation by Mr. Young of the wrongful acts of the mob.

Mellish, Q. C. (with him *Mereweather*) on behalf of the respondent.—The appeal is only on the point of law involved in the case; this court being bound by the facts, and even by the inferences of fact drawn by the County Court judge. Now it is found by the judge that the defendant did, though unintentionally, acts "improper under the circumstances," which were calculated to and did incite and encourage the mob to continue their acts of violence;" and it is a principle of law that every man is liable for the natural consequences of his acts, even though he does not intend or desire that those consequences should follow. The respondent, doubtless, did not wish the windows to be broken; but hearing windows being broken as he went in procession through the town, he came back again in the same manner, and waved his hat to persons in the windows. Such an act was improper, and had a direct tendency to encourage the mob, and the respondent is found by the judge to have been "a person of intelligence fully capable of appreciating the effects of his own acts." [BLACKBURN, J.—He merely did an act which under the circumstances it was imprudent to do; but he did not intend the wrong which was done in consequence,] He is responsible for what was the natural consequence of his imprudence. [COCKBURN, C. J.—It is not a natural consequence of a person's waving his hat that windows should be broken.] Where the mob assembling to honour the respondent had already been breaking windows, it was a natural consequence of waving his hat that they should continue to break them; and he is liable for it however he may have disapproved of it. In *Gregory* v. *Piper*, 9 B. & C. 591, where a master ordered a servant to lay down a quantity of rubbish near his neighbour's wall, but so that it might not touch the same, and the servant used ordinary care in executing his master's orders, but some of the rubbish naturally ran against the wall, it was held that the master was liable in trespass, though he had given orders that the work should be done so that the rubbish should not touch the wall. [BLACKBURN, J.—Was not the *ratio decidendi* in that case that the act of the servant was done in carrying out his master's orders?] In *M'Laughlin* v. *Pryor*, 4 M. & G. 56, Tindal, C. J. says, "The general rule is that all persons acting together at the time of the commission of a wrongful act are presumed to assent thereto, and are considered in law as equally trespassers, and are all looked upon as principals. The inquiry is, not whether the act was wilful, but whether it was wrongful, and an immediate injury resulted from it; any inquiry into the intention of the party is quite unnecessary," and Lord Ellenborough, in giving judgment in *Leame* v. *Bray*, 3 East, 593, said: "The true criterion seems to be according to what Lord De Grey, C.J., says in *Scott* v. *Shepherd*, whether the plaintiff received an injury by force from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." Where a person converted his premises near a highway into a shooting ground, where persons came to shoot at pigeons which frequently escaped, and persons collected outside of the ground and in the neighbouring fields to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot, it was held in *Rex* v. *Moore*, 3 B. & Ad. 184, that evidence of this supported an indictment against the owner of the premises for having caused such persons to assemble, discharge fire-arms, &c., inasmuch as their so doing was a probable consequence of his keeping ground for shooting pigeons in such a place. Littledale, J. said: "It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position; because if it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead anyone to expect the result, he will be answerable for it." And in America it has been held that where the defendant foolishly went up in a balloon which descended into the plaintiff's garden and attracted a crowd, who trod down the plaintiff's vegetables and flowers, the defendant was answerable for the injury done by the crowd as well as by himself.

Guille v. *Swann*, 19 I. Rep. 381 cited in Sedgwick on Damages, 4th edit. p. 87.

COCKBURN, C. J.—I think the whole question in this case turns on the finding of the County Court judge, and I take the effect of his finding to be on the whole this, that Mr. Young accepted the services of a crowd of people to drag him in triumph through the streets, and in the course of their progress windows were broken by the crowd, which was in favour of, and was accompanying, Mr. Young; but Mr. Young, while on the one hand he remonstrated with the crowd as far as language could go, and endeavoured to put a stop to their proceedings, on the other did one or two things which a prudent man would under the circumstances have abstained from doing. In the first place, in answer to the greetings of his partisans of both sexes, he waved his hat; and the judge has found that that was calculated to have, and did have, the effect of encouraging the mob. The judge says that if he had stopped the procession and got out of his carriage, there might have been an end put to the whole proceedings of the mob. I may take it, therefore, as found that Mr. Young was guilty of an act of imprudence, and that is all that is found. But I cannot see, because a gentlemen canvassing in the course of his electioneering is accompanied by a crowd of people, that they are therefore his agents, he doing nothing intentionally to encourage them. If he does some act which is no more than an imprudence, he cannot be held responsible for what the mob may do in consequence, in an action of trespass, which this is substantially.

BLACKBURN, J.—I am of the same opinion. The case coming before the County Court judge without pleadings, if it appeared that the defendant was in any way liable for the damage sustained by the plaintiff, it would be proper to find against the defendant. The judge has found against the defendant, and has stated for us the facts on which he has so found. I quite agree with Mr. Mellish that when a person is a party to such proceedings as took place on this occasion, he is responsible for the effects of them, and that if a person causes people to form a procession with the object of glorifying his own party, and does so or causes it to be done under circumstances which would lead to the windows being broken, even though he does not wish them to be broken, this would be evidence to show that he was a party to the breaking. But that is not the case with regard to the defendant on the finding here. The County Court judge finds in effect that Mr. Young was not a party to the breaking in that sense, giving credence to Mr. Young's statement. He then goes on further to state the grounds on which he does think Mr. Young liable, and I can

find no other ground than this, that if Mr. Young had got out of his carriage there was a high probability that the disturbances would have ceased, that a prudent man would have known that, and also the effect that taking off his hat would have, and that Mr. Young had in this way neglected his duty. But this does not make him in an action of trespass a party to what was done. Can we see then that there was a legal duty on the part of Mr. Young not to remain in his carriage under the circumstances of the case? I do not think so. The judge has acquitted Mr. Young in trespass, which would have been a good ground of liability, and found him guilty of negligence under what would have been a bad count in an action for negligence.

LUSH, J.—I am of the same opinion. I entertained considerable doubt at one time as to the defendant's liability, owing to the finding of the County Court judge. But, taking the whole of the judge's finding together, the conduct of Mr. Young is not to be taken as amounting to an incitement of the mob, but consisting only in doing an act by lifting his hat, which was calculated to, and did, excite the mob in their acts of violence, an act perfectly innocent in itself, but one which was likely to excite the mob. That is, I think, the utmost which is found by the learned judge, and on such a finding I think the judgment cannot be sustained, and must be reversed.

Judgment of the County Court judge reversed.

COURT OF COMMON PLEAS.

Reported by DOUGLAS KINGSFORD, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Friday, Nov. 19.

HORSEY v. GRAHAM.

Agreement to procure transfer of lease—Statute of Frauds, sect. 4—Non-production of necessary document on motion for a rule—Costs.

An agreement by the defendant to procure for the plaintiff the transfer or sale of the unexpired term of a lease for 13 years of a public-house, was

Held to be a contract as to an interest in lands within the 4th section of the Statute of Frauds. (Keating, J., dubitante.)

If on a motion for a rule the production of a document is necessary, and proper notice to produce it has been given by the other side, the attorney, who neglects to produce it, will have to pay the costs of the motion.

The declaration stated that before and at the time of the making the agreement declared upon a certain public-house was held by one Carlton, as tenant under a lease, for an unexpired term of 13 years at a rent of 40*l.* per annum, granted by Messrs. Mann, Crossman, and Co., in which public-house were things relating to the trade of a public-house keeper; that the plaintiff was desirous of purchasing the said term and things, and of carrying on in the said house the trade of a public-house keeper, as the defendant well knew; that certain negotiations had been carried on between the plaintiff and the defendant for the purchase by the plaintiff of the said term and things, and the plaintiff had deposited with the defendant 10*l.* in part payment of the purchase-money, should these negotiations terminate in such purchase, but otherwise to be returned by the defendant to the plaintiff; and that thereupon it was agreed between the plaintiff and the defendant that the defendant should and would procure a sale, assignment and transfer, to the plaintiff of the said unexpired term, and everything to, in, upon, and annexed to the said public-house as aforesaid, for the sum of 60*l.*, to be paid by the plaintiff for the same, that the plaintiff would purchase the same, and take such transfer and assignment at and for the price of 60*l.*, that the aforesaid sum of 10*l.* should be retained by the defendant as a deposit, and in part payment by the plaintiff of the said 60*l.*, that the plaintiff should then pay to the defendant a further sum of 10*l.* as further deposit and part payment, and should pay the residue of the said sum of 60*l.* on the completion of the said assignment and transfer, and all conditions, &c., were performed, &c.; yet the defendant did not nor would procure the sale, &c. of the said term and things, but failed and refused to do so, and would be henceforth unable to obtain such sale, &c., whereby the said deposits were lost to and other damage was incurred by the plaintiff. And the declaration also contained counts for money had and received, and on accounts stated.

The pleas were, traverses of the agreement and the breach of it, and (to the second count), except as to 20*l.*, never indebted.

Joinder of issue on the pleas.

In this case the plaintiff wanted to get the lease of a public-house, the Builders' Arms, in the Bermondsey-new-road, and having seen in the window the notice, "This house to let, apply to Mr. Graham," he applied to the defendant, an auctioneer and agent, accordingly. At that time the public-house was occupied by Carlton, who had a lease of it, from the brewers, Messrs. Mann, Crossman, and Co., of which a term of thirteen years was unexpired.

Graham told the plaintiff that he could get the house for him, and the following document, signed by Graham's son, was given to the plaintiff:

Auction, Estate, House, and General Agency Offices, Kennington-green, March 10, 1869.

Received from Mr. Henry Horsey 10*l.* (by cheque) as a deposit on the Builders' Arms, Bermondsey-new-road, subject to my being able to obtain lease, fixtures, utensils, and possession with 50*l.* cash, otherwise the deposit aforesaid to be returned. JOHNSTON GRAHAM, (for J. M. G.)

The plaintiff again called at the defendant's offices, and saw his son, who told him that his father would want 60*l.* in order to get the house. The plaintiff assented to this, and paid another 10*l.* on deposit, for which he had the following receipt:

Auction Estate, &c. Agency Offices, March 15, 1869.

Messrs. Mann, Crossman, and Co. having refused to see Mr. Horsey into the Builders' Arms, Bermondsey New-road, for 50*l.* cash, Mr. Horsey now informs me that he can muster 60*l.* cash. Such being the case I hereby agree to get the lease and everything for such sum of 60*l.* cash. Mr. H. has this day paid a further deposit of 10*l.*

JOHNSTON GRAHAM, (for J. M. G.)

On this occasion the defendant's son made an addition to an indorsement which had, on the former occasion been made on the receipt then given. This indorsement was as follows:—

Cash (by cheque)	£10	
To be found	40	
	£50	J. G.
Further deposit (gold)	10	
	£60	J. G.

On March 17 the defendant wrote plaintiff a letter, saying: "Consider your matter settled; I will let you know early next week what day change is arranged for."

The plaintiff, relying on this letter, sold the business of a fishmonger that he was then carrying on, and prepared to take possession of the Builders' Arms. The lease, however, was transferred to some one else, and the plaintiff then brought this action.

At the trial the words "subject to my being able," in the receipt of March 10, appeared to have

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been erased, and the evidence was contradictory as to the time at which this erasure was made.

The jury found a verdict for the plaintiff, damages 50*l.*, for the loss of the public-house, and 20*l.* 1*s.* on the money counts.

Garth, Q. C., for the defendant, subsequently moved for and obtained a rule, pursuant to leave reserved, to set aside the verdict and enter a verdict for the defendant on the first count, on the ground that there was no sufficient evidence within the Statute of Frauds to support the plaintiff's case; or for a new trial, on the ground that the judge misdirected the jury in telling them that they might find a verdict for the plaintiff, upon the parol evidence, in not leaving to the jury the point whether the defendant contracted as principal or agent, and in not requiring the jury to say at what time the erasure above referred to was made.

Francis Turner (with whom was *Henry James*, Q. C.) showed cause against the rule.—When the rule was granted, the receipt, in which the erasure is said to have occurred, was not produced by us, and its non-production was remarked by the court. We had not received proper notice to produce it. [BOVILL, C. J.—That then is a sufficient answer. But attorneys ought to understand distinctly that, where on a motion for a rule the production of a document is necessary, and proper notice for its production is given to the other side, if it be not produced, the attorney will have to pay the costs of the motion.] The jury have found a parol agreement by the defendant to get the public-house for the plaintiff, and such agreement was enough. This agreement was not within sect. 4 of the Statute of Frauds, and writing was therefore unnecessary. But if writing was necessary, then it is submitted that there was a sufficient memorandum according to the statute. The statute was intended to apply only where the contractor has some interest in land, which he agrees to give up; not to such a case as the present where the agreement was to use best endeavours and influence with the landlord in order to procure the interest in land from a third party. In *Cocking* v. *Ward*, 1 C. B. 868; 15 L. J. 245, C. P., it was agreed between the plaintiff, who was the tenant of a farm, and the defendant, that the plaintiff should surrender his tenancy and prevail on the landlord to accept the defendant as tenant in his place, and that the defendant should then pay him for so doing 100*l.*; and it was held that the contract amounted to a sale of an interest in land within the statute. But there part of the contract was the surrender of the tenancy which the plaintiff then had. So, too, in *Hodgson* v. *Johnson*, E. B. & E. 689; 28 L. J. 88, Q. B., the agreement held within the statute, was that the defendant should give up his tenancy of a brickyard, and should endeavour to induce the landlord to accept plaintiff as a tenant in his (plaintiff's) place. In *Wright* v. *Stavert*, 2 L. T. Rep. N. S. 175; 29 L. J. 161, Q B., the defendant agreed by parol with the plaintiff, who kept a boarding-house, to pay for the board and lodging of himself and servant, and accommodation for a horse, 200*l.* a year from a given day, terminable by either party, by a quarter's notice. The defendant having refused to enter on the occupation, it was held that this was not a contract of an interest in or concerning land within sect. 4 of the Statute of Frauds. Crompton, J. said, "the argument amounts to no more than that the defendant should become an inmate of the plaintiff's establishment; and no contract was shown for the entire and exclusive possession of any particular piece of land. . . . . The cases relied upon by the defendant, as explained by Bayley, J. in *Edge* v. *Strafford*, 1 Cr. & J. 391; 9 L. J. 101, Ex. are at once distinguishable, viz., that as soon as the argument was come to there was created an *interesse termini*, and it would amount to a demise as soon as executed by the entry of the proposed occupier. I agree with the Chief Justice (Cockburn) that the cases (on the 4th section of the Statute of Frauds) have been carried far enough." The plaintiff is at any rate entitled to succeed on the count for money had and received, for as to this the consideration was executed. In *Griffith* v. *Young*, 12 East. 513, a tenant agreed with his landlady that if she would accept another for her tenant in his place (he being restrained from assigning the lease without her consent) he would pay her 40*l.* out of 100*l.* which he was to receive for the goodwill, if her consent were obtained. It was held that the old tenant having received the 100*l.* from the new tenant was liable in an action for money, had and received, the consideration being executed and the case therefore taken out of the Statute of Frauds. And in *Savage* v. *Canning*, 1 Ir. Com. Law Rep., where a special oral contract was entered into between plaintiff and defendant, one term of which fell within the Statute of Frauds, it was held that the special contract could not be enforced, yet that the entire work and labour to be done under the contract having been performed, and the benefit of it accepted by the defendant, the plaintiff could recover the value of the work and labour on the common counts, although up to trial the special contract was relied on. Morris, J. (at p. 446) said, "Suppose a party has executed work and labour under contract, and that the equivalent he is to get is something which it is impossible for him to enforce against the defendant for want of compliance with the Statute of Frauds, can he recover no compensation whatever, because he cannot recover the precise amount of remuneration for which he stipulated? . . . I think the plaintiff can bring an action for work and labour done by him, and the benefit of which the defendant has enjoyed, notwithstanding the existence of a special contract, bad by the Statute of Frauds, under which the work has been done." The case of *Rein* v. *Lane*, 15 L. T. Rep. N. S. 466; 8 B. & S. 83, was also referred to.

Garth, Q.C. (*A. L. Smith* with him) in support of the rule.—This contract was within the Statute of Frauds. *Rein* v. *Lane* (*ubi sup.*) is not in point, for that was decided on consideration of the purpose of the statute 5 & 6 Vict. c. 79 as to stamps on charter-parties, a consideration which would not apply to the Statute of Frauds. The case of *Kelly* v. *Webster*, 12 C. B. 283 is directly in point. There the judge of a County Court held that an agreement to pay a sum of money in consideration of the giving up of a tenancy under a parol agreement for a lease was not within the Statute of Frauds. That judgment was reversed on appeal; and Maule, J. said, "When anything is done which substantially amounts to a sale or parting with an interest in land, the contract is 'for or relating to the sale of an interest in or concerning lands, tenements, and hereditaments' within sect. 4 of the Statute of Frauds. After the decision of this court in *Cocking* v. *Ward*, I think it is impossible to say that the ruling of the County Court judge was right."

BOVILL, C. J.—The action in this case was brought on a contract by the defendant to procure for the plaintiff the transfer to him of the unexpired term of a public-house called the Builders' Arms. It seems to me clear that it would be trifling with the words of sect. 4 of the Statute of Frauds, to say that this is not an interest in or concerning lands, for an interest in land was contracted to be conveyed to the plaintiff. It is said, however, on the other side, that as the defendant had no interest in the land at

the time the contract was made, that therefore the 4th section does not apply. But it must be remembered that in such a contract, there is also an implied contract that the defendant will deduce a good title; it is not alleged in the declaration that the defendant has any interest in the premises, but that he will procure a transfer of the premises, and deduce a good title by obtaining the concurrence of all necessary parties. Now, if this had been an action by a purchaser against a vendor of land, there would not have been any doubt about the matter, although at the time of the contract the vendor had not a good title; the contract in that case would have been that the vendor would deduce a good title. The very object of the Statute of Frauds would be defeated if we were not to hold that this contract came within it. The Statute of Frauds, by sect. 17, applies also to the sale of goods and a guarantee for the price of goods would be within the statute, and require writing. A guarantee on the sale of goods has, however, for the purposes of the Stamp Acts, been held to be within the exemption in 55 Geo. 3, c. 184, sched. part 1, title "Agreement," as a "memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandise." Yet, in the case of *Rein* v. *Lane* (*ubi sup.*), decided on the stat. 5 & 6 Vict. c. 69, s. 2, and schedule, it was held that a guarantee for the due fulfilment of a charter-party, was not a "memorandum, letter, or other writing . . . for or relating to the carriage of goods on board ship," which by the above statute would have been required to be stamped as a charter-party. It was argued in *Rein* v. *Lane* that the words of the above statute, being similar, ought to receive the same construction. Blackburn, J., however, explains why this should not be. He says: "No doubt, in one sense this guarantee is a writing 'relating to' the charter-party, as a guarantee for the payment of the price of the goods sold is an instrument 'relating to' the sale of goods; and if the two clauses occurred in enactments on the same subject, they ought to receive the same construction. But the exempting clause in 55 Geo. 3, c. 184, was introduced for the purpose of encouraging the sale of goods, and, as Lord Ellenborough said in *Warrington* v. *Furber*, 8 East, 245, was to be liberally construed; it includes every instrument 'whereof the sale of goods is the primary object,' as was said in *Smith* v. *Cator*, 2 B. & A. 781, when, but for that instrument, the contract of sale would not have been entered into, and the sale would not have taken place, so that it is the meritorious cause of that which the Legislature wished to encourage. On the other hand, the clause in question (that of 5 & 6 Vict. c. 79) imposes a tax, and the construction of it is the reverse to that of an exempting clause; the object is indeed to reach all documents which are in substance and effect charter-parties, but not to clog the making of them by imposing the same stamp on collateral instruments." Considering the object of the Statute of Frauds, we must hold that the present agreement was one that was thereby required to be in writing. In *Seaman* v. *Price* (*ubi sup.*) it was assumed that such an agreement as the present must be in writing. As it is uncertain, on the finding of the jury, which of these documents is the real contract, and as the jury have not found when the erasure was made, there must be a rule for a new trial.

KEATING, J.—I am of the same opinion that there should be a rule for a new trial. I have some doubt how far this contract is within sect. 4 of the Statute of Frauds. I do not intend, however, formally to dissent from the opinion of the rest of the court. I should be more clear about it if any distinct authority had been produced. My doubt is whether the words "contract, or sale of lands, or any interest in, or concerning them," can be intended to apply to a case like the present, where one of the contracting parties has not any interest to part with under the contract. But my doubt is not sufficient to justify me in dissenting from the rest of the court, especially as the Chief Justice thinks the point so clear.

BRETT, J.—Proof only of a verbal contract is not sufficient to support an action upon any contract or sale of lands, or any interest in or concerning them. Supposing in the present action, to put the converse case, the defendant had sued the plaintiff for not accepting the lease of the public-house, obtained for him by the defendant in pursuance of the contract. Could it then have been contended that the contract was not within the Statute of Frauds, as being only with reference to work and labour to be given by the defendant in procuring the lease? It could not. In the Irish case, cited in argument, the plaintiff relied on the money counts in order to recover his commission. I think there ought to be a new trial.

BYLES, J. concurred.

Attorney for the plaintiff, *Brady.*

Attorneys for the defendant, *Shum* and *Crossman.*

Tuesday, Nov. 23.

REGISTRATION APPEAL.

KIRTON *v.* DEAR.

County vote—Incumbent of district church—Fees on marriages, baptisms, and churchings performed within the church—Stipend paid by the Ecclesiastical Commissioners and the treasurer of Queen Anne's Bounty —8 Hen. 6, *c.* 7.

K., as incumbent of the district church of St. A., in the parish of B., in the county of M., had a freehold for life in the said church and churchyard. By orders in council the sums of 150*l. and* 50*l. were ordered to be paid annually to the incumbent of the said church by the Ecclesiastical Commissioners of England and the treasurer of the governors of Queen Anne's Bounty respectively. Under and by virtue of an order in council, K., as such incumbent, was entitled to and in receipt of the fees paid in respect of marriages, baptisms, and churchings performed in the said church, and the income arising from these fees exceeded* 40*s. per annum. It was proved that K., as incumbent, was in receipt of fees paid in respect of burials of persons dying within the district attached to the said church, though the said burials took place in another parish; these fees amounted to more than* 40*s. a year. No evidence, however, was given of his right or title to these fees. No assignment of pew rents had been made, nor was K. in receipt of any income from pew rents:*

Held, that K. was not entitled to a vote for the county of M. in respect of the church, as the church was not itself worth, nor could K. make it worth, 40*s. a year to him, and the fees and other emoluments, which he was as incumbent entitled to and in receipt of, could not be considered as giving the church a value.*

On appeal from the decision of the revising barrister for Middlesex, the following case was stated for the opinion of the court:—

Charles Kirton duly claimed to have his name inserted on the list of voters for the county of Middlesex, and Dear duly objected to his name being inserted therein.

The facts of the case are as follows: The said Charles Kirton duly claimed in respect of a freehold benefice situate in the polling district of Bethnal-green, in the parish of St. Matthew, Bethnal-green,

in the said county, such freehold benefice being known or distinguished by the name or title of St. Andrew, Bethnal-green.

It was proved before the revising barrister that the said Charles Kirton was duly appointed by licence of the Bishop of London, dated the 10th June 1864, to the office of perpetual curate or incumbent of the church of the perpetual curacy of St. Andrew, Bethnal-green, in the said county, and he was by the said licence authorised to receive and enjoy all and singular the stipends, profits, and advantages whatsoever belonging to the said office.

The district chapelry attached to the said church of St. Andrew was assigned to the said church by an order of Her Majesty in Council, dated the 3rd April 1843, made on the recommendation of the Church Building Commissioners, and under and by virtue of the several statutes next hereinafter mentioned, that is to say, (1) the 58 Geo. 3, c. 45, (2) the 59 Geo. 3, c. 134, (3) the 7 & 8 Geo. 4, c. 72, and (4) the 1 Vict. c. 75, and which said order in council was published in the *London Gazette* of the 16th June 1843. That by another Order of Her Majesty in Council, dated 10th June 1843, and published in the *London Gazette* of the 16th June 1843, and made on the recommendation of the Ecclesiastical Commissioners for England and under and by virtue of the statutes next hereinafter mentioned, that is to say, the 3 & 4 Vict. c. 113, and the 4 & 5 Vict. c. 39, the annual sum of 150*l.* was ordered to be paid by the said Ecclesiastical Commissioners to the incumbent for the time being of the said Church of St. Andrew, Bethnal-green, by equal half-yearly payments, as therein mentioned.

That by another Order of Her Majesty in Council, dated the 8th Aug. 1853. and published in the *London Gazette* of the 9th Aug. 1853, and made on the recommendation of the Ecclesiastical Commissioners for England, and under and by virtue of the several statutes next hereinafter mentioned, that is to say, the 3 & 4 Vict. c. 113, and the 2 & 3 Vict. c. 49, it was ordered that the annual sum of 50*l.* should be paid to the incumbent of the said church of St. Andrew, Bethnal-green, by the treasurer of the governors of the Bounty of Queen Anne out of a sum of 475*l.* charged, as therein mentioned, on the tithes or payments in lieu thereof, part of the revenue of the rectory of St. Andrew Undershaft with St. Mary Axe in the city of London.

That under and by virtue of the hereinbefore mentioned Order in Council of the 3rd April 1843, the said C. Kirton as the incumbent for the time being of the said church of St. Andrew, Bethnal-green, is entitled to and in receipt of, the fees paid in respect of marriages, baptisms, and churchings performed in the said church, and that the income arising from such fees is more than 40*s.* per annum over and above all rents and charges payable out of or in respect of the same.

That the said C. Kirton is in the receipt of fees paid in respect of burials in Bow Cemetery of persons dying within the said district attached to the said church of St. Andrew, but no evidence was furnished of right or title of the said C. Kirton to such fees, or of the persons from whom the same were received.

The income from such burial fees amounts to more than 40*s.* a year over and above all rents and charges payable out of or in respect of the same.

That no assignment of pew rents has at any time been made to the said C. Kirton under or by virtue of any of the Acts in that behalf made and provided, and that the said C. Kirton is not in receipt of any income from pew rents or the letting of pews.

The revising barrister was of opinion that the said C. Kirton was not, in right of his said office of perpetual curate or incumbent of the said church of the perpetual curacy of St. Andrew, Bethnal-green (irrespective of the source from which the income as coming to him in right of his said office was derived), entitled to have his name inserted in the list of voters for the said county. He was also of opinion that the said C. Kirton was not by virtue of his office seised of or entitled, either at law or in equity, to a freehold estate in lands or tenements in the same county and in the same parish as that for which he claimed to be registered, of the clear yearly value of 40*s.*, over and above all rents and charges payable out of or in respect of the same.

He therefore disallowed the claim of the said C. Kirton to have his name inserted in the list of voters for the said county.

If the court should be of opinion that his decision was wrong, the register was to be amended by inserting the name of the said C. Kirton, with his place of abode and the particulars of his qualifications in the said list.

Sir *John Karslake*, Q. C. (*Morgan Howard* with him) for the appellant.—There is no question as to Mr. Kirton being seised in fee of his church. By stat. 3 & 4 Vict. c. 113, a common fund was created which is distributed by the Ecclesiastical Commissioners. From this fund Mr. Kirton receives 150*l.* a year, and he receives 50*l.* a year from Queen Anne's Bounty. His benefice then is worth more than 40*s.* per annum. By Order in Council, dated 3rd April 1843, the incumbent is entitled to fees on baptisms, marriages, and churchings performed in the church. These fees are of more than 40*s.* annual value. The burial fees also are of more than that value. In point of value the site and fabric of the church are worth more than 40*s.*, independently of the church being a source of income. The claim is made under 8 Hen. 6, c. 7. We need not look at the Reform Acts. If it be said that the two sums of 150*l.* and 50*l.*, each of which is derived from land though not within the parish, cannot be said to make the benefice in which he has a freehold of the requisite value, then surely Mr. Kirton may rely upon the fees which he receives as holder of the benefice, and for services performed within the church. These fees make up part of the value of the church. [BRETT, J.—Supposing that Mr. Kirton were entitled to these fees as incumbent, but not for services performed in the church.] I might then be met by saying that the services might be performed out of the parish. If a man has a freehold office connected, as this is, with the tenure of land, it is sufficient that his office produces 40*s.*, and immaterial that this 40*s.* is not produced from the land. [KEATING, J.—If Mr. Kirton received 50*s.* a year from personal property as his only emolument, but still held the church, would he be entitled to a vote?] The question is difficult to answer; but I contend that if the office cannot he held without the right to receive money, then by virtue of his office alone he is entitled to a vote. Then, again, Mr. Kirton might, no doubt, get an assignment of pew-rents; he only forbears to do so on account of the poverty of the parish. That ought to be taken into account in estimating the value of the church. Thus in *Astbury* v. *Henderson*, 24 L. J. 20, C. P.; 15 C. B. 251; K. & G. 6, it was held that where a man had been offered 15*l.* a year for a plot of building ground, but in fact the land in its then state was not worth 40*s.* a year, he was held entitled to a vote. [BOVILL, C. J.—It is sufficient to say that, as matters stand, Mr. Kirton has no power to receive pew-rents.]

Simon, Serjt. (*Michael* with him) for the respondent.—The question is whether Mr. Kirton's office is one, the emoluments of which are derived out of land. It is contended on behalf of Mr. Kirton, first

that the benefice, *qud* benefice, entitles him to a vote; and, secondly, that, if that is not so, the fees and other payments made to him as incumbent, connected with the site of the church, give a vote. But I contend that this benefice is not one of the old type; it has not existed from time immemorial, nor has it any glebe attached to it. What is meant by a benefice? not the land attached to an office, but the office itself. In this sense it is used in Acts of Parliament. If then a benefice is an office, the claimant must show that its duties are paid by at least 40*s.* a year arising out of land within the county. A freehold office of the value of 40*s.* is not sufficient. This was decided in *Hall* v. *Lewis*, 31 L. J. 45, C.P.; 5 L. T. Rep. N. S. 491; *Bushell* v. *Easter*, 31 L. J. 44, C. P.; 5 L. T. Rep. N. S. 580); in a case also of a clerk of the peace (Middlesex, 2 Peck. *Selby's case*), and in that of the masters in Chancery (2 Peck. 93). Then as to the two sums of 150*l.* and 50*l.* a year, they are not shown to arise from land within the county. As to the intrinsic value of the church and land, that has nothing to do with the question; suffice it to say that the claimant has not and cannot get 40*s.* a year out of the land. Then as to the fees, they are not paid except for services rendered. The fee is not for the use of the church, but for the services of the clergyman. There is no common law right to those fees. Even in the ecclesiastical courts, it has been held that they are for services done, and irrespective of the church.

Burdeaux v. *Lancaster*, 1 Salk. 332;
Patten v. *Castleman*, 1 Lee Eccl. Cas. 387;
Topsall v. *Ferrers*, Hob. 175.

[BRETT, J.—How has that been since Lord Hardwicke's Marriage Act? On a marriage, if another clergyman perform the ceremony, the rector of the parish in whose church the ceremony is performed, has a right to a fee. If so, what is that but a payment for the use of the church?] He has no right to a fee under such circumstances. A clergyman is entitled to a fee on performing the baptismal or matrimonial service in a private house, just as much as if he had performed the ceremony in the church.

Sir *J. Karslake*, Q. C. in reply.—As to the burial fees, it is true that they are not derived from land within the parish; still it must be remembered that they are given to the incumbent by an Act of Parliament, which substitutes them for fees, which, but for the Act, would have been payable to the incumbent in respect of the churchyard of his own church. The incumbent ought not to be put in a worse position by reason of an Act of Parliament saying that no further interments shall take place in his churchyard. Then as to the fees on baptisms, marriages, and churchings, the barrister has found that Mr. Kirton "is entitled to and in receipt of" them. It is said that these ceremonies *may* be performed out of the church; but the case finds that the fees in question are paid in respect of marriages, &c., which, as a matter of fact, *are* performed within the church. These fees are so connected with the church as to give a value to it. In the cases cited, the offices and the emoluments are wholly unconnected with land.

BOVILL, C. J.—It is not disputed that Mr. Kirton, as incumbent of the church of St. Andrew, Bethnal-green, has a freehold office, and is entitled to the freehold of the land on which the church stands. In that capacity, and as freeholder of the church, he is entitled to certain emoluments. As incumbent he is entitled to the land and building. As incumbent, he is entitled, under an Order in Council dated the 16th June 1843, to 150*l.* a year, and also to receive a further sum of 50*l.* a year from the treasurer of the Governors of Queen Anne's bounty. As incumbent, he is also entitled to certain fees for baptisms, marriages, and churchings; and as incumbent he is also entitled to certain payments by the Act of Parliament establishing the cemetery at Bow. All these separate emoluments accrue to him in his character of incumbent, and by reason of his office. But we are asked to hold not only that he enjoys these emoluments in right of his office, but that he derives them from land, and that, too, land within the parish. As to the church itself, as a church, it is not found that it has any value for letting, or that it produces any income. No assignment of pew-rents has been made, and no emoluments are derived from either church or land, nor has the incumbent any power to obtain profit from either. He has no power to let it, and it has no value for occupation. Then as to the stipend from the Ecclesiastical Commissioners, it is not to be contended that that is derived from land. It is derived from a common fund, and created by Act of Parliament, and in no sense or shape can it be said to be derived from land within the county to which the incumbent is entitled. The same remark applies to the stipend from Queen Anne's Bounty and to the payments made in respect of burials under the Act. The only part of the claim as to which Mr. Kirton seems to me to have a chance of success is that relating to the fees on baptisms, marriages, and churchings. But then can it be said that these fees arise from the land, or that the land in respect of them becomes of 40*s.* value. These fees are paid when services are performed, and seem to me to have no connection with the land. The right to the fees depends either on custom or Act of Parliament. They do not arise from either ownership or use of land. It seems to me that they are paid for services performed in the church; and although it is true that some of these ceremonies must by law be performed in the church, still some, perhaps, need not be. On these grounds I think that Mr. Kirton is not shown to have any source of income from land within the parish, and consequently that the decision of the revising barrister must stand.

WILLES, J.—As I have not heard all the arguments, I give no judgment.

KEATING, J.—I also think that the revising barrister was right. The only point that has been seriously insisted on in support of the claim is, that as the incumbent is entitled to fees on baptisms, marriages, and churchings performed within the church, the church thereby becomes of 40*s.* value; in other words, that, inasmuch as these ceremonies take place within the church, and Mr. Kirton has by virtue of his office a freehold in the church, they enhance the value of the church. But I think that my brother Simon has assigned to these fees their proper character. These fees are not payable by common right. Whatever proceedings may have taken place in the ecclesiastical courts, a court of common law will not countenance them unless the right to them be founded on immemorial custom or Act of Parliament. This was very clearly laid down by the Court of Queen's Bench in the case of *Bryant* v. *Foot*, L. Rep. 2 Q. B. 161; 16 L. T. Rep. N. S. 55, which was affirmed afterwards in the Exchequer Chamber, 18 L. T. Rep. N. S. 578; L. Rep. 3 Q B. 497, and is now law. That case decides in the strongest way that, when the fee claimed is so large that it could not possibly have been paid in the reign of Richard I., that is evidence that it cannot be claimed by immemorial custom; and as it was not claimed by Act of Parliament, it was disallowed altogether. My brother Simon is right in saying that the fee is

paid only for services performed, and it is wholly irrespective of land or of the place where the ceremony is performed. No doubt the Act of Parliament says that marriages are to take place in the church; but the annexation of personal services to a particular place does not make the reward for those services a freehold. On these grounds I, too, think that the decision of the revising barrister must be affirmed.

BRETT, J.—Since the Registration Act (6 & 7 Vict. c. 18) a man who claims a county vote as a 40s. freeholder, must show that he has land of that value, not only within the county, but within the parish. As I understand this case, the question is not whether Mr. Kirton has a freehold within the parish, but, assuming that he has one, is it of 40s. value? I think that the revising barrister has made a right estimate of the value of the church. As to the two sums payable to the incumbent, the one from the Ecclesiastical Commissioners, the other from the Governors of Queen Anne's Bounty, I may say that, even if those sums do arise from land, it is not land within the parish. Then again as to the cemetery fees, even if we were to hold that they are payable in respect of the use of the cemetery, the cemetery is not within the parish. The only point that can be relied on is the claim to the fees for marriages, baptisms, and churchings, which take place within the church of which Mr. Kirton has the freehold. But the cases clearly show, that before Lord Hardwicke's time these fees were paid only in respect of personal services, and indeed before his time it was not to be argued that they were payable in respect of the use of the church. The question then arises, whether in consequence of Lord Hardwicke's Act providing that some of these ceremonies shall take place within the church, that can be said to have made the fees arise out of the church, and depend more on the use of the church than they did before. I think not. The payments are claimable by custom for personal acts; they are made for services performed in the church, but not for the use of the church or anything belonging to it. Thus they do not add to the value of the land, and thus the claimant has not shown himself to be possessed of lands and tenements of the value of 40s. All that can be said of him is that he has land, and that he performs services on it which bring him in 40s. On these grounds I also am of opinion that the decision of the revising barrister must be affirmed.

Simon, Serjt., asked for costs.

Decision affirmed with costs against the appellant.

Marriott, Jordan, and *Cooper*, attorneys for appellant.

William Gardiner, attorney for the respondent.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Monday, Nov. 8.

MAXSTED v. MORRIS.

Stock exchange—Sale of shares to jobber—Name ticket—Transfer not executed by or brought to knowledge of nominee—Carrying over without nominee's authority—Bankruptcy of nominee—Ratification of authority—Repudiation of transfer—Liability of jobber to indemnify vendor from calls.

On the 14th June 1866, the plaintiff's brokers sold for him to the defendant, a jobber on the Stock Exchange, twenty O. and G. shares (15l. paid up) at 16½ discount, and received from the defendant a name ticket, in which the name of E. S. was inserted as the purchaser at one-eighth, and the consideration stated to be 2l. 10s., whereupon the transfer was completed, by inserting therein the consideration (2l. 10s.) and the name of E. S. as the purchaser, in accordance with the ticket, and was executed by the plaintiff and handed by his brokers to P. and Co., the London brokers of E. S., but it was never executed by E. S., nor sent to him, nor was he aware that any transfer had been executed; and the shares remained on the register in the plaintiff's name as holder. Previously to this, on the 29th April 1866, E. S. had, through M., a country broker, instructed P. and Co. to purchase for him, which they accordingly did, 1000 O. and G. shares for the account day of the 15th May. This transaction was a mere speculation on the part of E. S., and he never intended to take a transfer to himself, as was known from the first to M., but not to P. and Co. until after the purchase was made by them, and shortly before the account day of the 15th May; on the 10th May O. and G. stopped payment, and E. S. was applied to by M. for money to take up the shares, or to carry them over, but he did not pay or provide any money for that purpose, nor did he give authority to M. or to P. and Co. to carry the shares over beyond the 15th May; nor was he consulted by them, nor did he do or say anything further in the matter. On the 14th May M. wrote to P. and Co. informing them that E. S. could not meet his engagements as regarded the shares, and that M. could not meet them either, and therefore authorising P. and Co. to do "whatever they thought best." Thereupon P. and Co. carried over the contract in respect of a portion of the said 1000 shares to the then next account day on the 30th May, and again subsequently from that day to the account day of 14th June, on which last mentioned day they gave E. S.'s name for twenty of these shares, by means of the before mentioned name ticket which was then handed by the defendant to the plaintiff's brokers, as above mentioned; M. being aware and approving of what P. and Co. had so done. Two calls were made on the said shares by the liquidators in Aug. and Oct. 1866 respectively, and were paid by the plaintiff. In Oct. 1866, E. S. was declared bankrupt, and the plaintiff proved for the amount of the first call, on which a dividend was declared, but was never received by him. P. and Co. proved and received a dividend on the amount of the purchase money of the 1000 shares, but both plaintiff and defendant were, at the time of the bankruptcy proceedings, ignorant of the before mentioned transactions between E. S., M., and P. and Co.

In an action by the plaintiff to recover from the defendant, as on a contract of indemnity as purchaser of the shares, the amount paid by the plaintiff for the above mentioned calls, it was

Held, by the Court of Exchequer (Kelly, C. B., and Channell, Pigott, and Cleasby, BB.), giving judgment for the plaintiff on a special case, that the shares having been carried over from the 15th May without any authority, express or implied, from E. S. for so doing, the contract was at an end so far as E. S. was concerned on that day; and that the contract of the 14th June, therefore, was not binding on him, and therefore the defendant, not having given to the plaintiff a contract binding on E. S. as the ultimate purchaser, had not discharged himself from the responsibility which, by the usage of the Stock Exchange, rests on the jobber, under such circumstances, as the purchaser, and so remained liable to indemnify the plaintiff against the calls, according to the rule laid down in Maxsted *v.* Paine (*1st action*), 20 *L. T. Rep. N. S.* 34; *L. Rep.* 4 *Ex.* 81; 31 *L. J.* 41, *Ex.*

Held, also, that neither the taking no notice by E. S. of M.'s application for money to take up or carry over the shares, nor the proceedings in bankruptcy, amounted to a ratification by E. S. of the carrying over the share

on the 15th and 30th May, and the giving in his name on the 14th June, or by the plaintiff of the acceptance of such name as that of the actual purchaser; and that no repudiation of the transfer on the part of E. S. was necessary.

This was a special case stated for the opinion of the court pursuant to an order of Nisi Prius, dated the 23rd March 1868.

The action was brought to recover from the defendant the sum of 400*l.* and interest, the amount of two calls of 10*l.* per share upon twenty shares in Overend, Gurney, and Co. (Limited), under the circumstances hereinafter set forth.

The pleadings are annexed to and form part of the case.

The cause was set down for trial, at the Spring Assizes held at Kingston, for the county of Surrey, on Monday, the 23rd March 1868, and a verdict was entered by consent for the plaintiff, and the above-mentioned order was made; and it was agreed that judgment should be entered up according to the opinion of the court upon the following

SPECIAL CASE.

1. The plaintiff is a gentleman residing at Hull, in Yorkshire, and the defendant is a stock and share dealer or jobber, and is a member of the Stock Exchange, and carries on business on the London Stock Exchange, and at No. 2, Hercules-passage, Old Broad-street, in the City of London.

2. The plaintiff was, at the time of the sale to the defendant hereinafter mentioned, the owner and original allottee of twenty shares in Overend, Gurney, and Co. (Limited), for which he paid 300*l.* These shares were 50*l.* shares, with 15*l.* paid-up.

3. Overend, Gurney, and Co. stopped payment on the 10th May 1866, and on the 11th of the following June the company passed a resolution to wind-up voluntarily, and on the 22nd June 1866 an order was made by Kindersley, V.C. to continue the voluntary liquidation under the supervision of the Court of Chancery, and William Turquand and Robert Palmer Harding, public accountants, were appointed the liquidators.

4. On the 13th June 1866, the plaintiff instructed his stockbrokers, Messrs. Sandeman, Dobree, and Co., to sell the said twenty shares for him, and on the following day, the 14th June, Messrs. Sandeman, and Co., in pursuance of their instructions, sold to the defendant on the Stock Exchange, in the ordinary course of business as a stockjobber, the said twenty shares at 16½ discount per share, that being the market price of the day.

5. The following entry of the sale was made in Messrs. Sandeman, Dobree, and Co.'s bargain book: "20 Overends, 16½, June 14, N. Morris, E. P. Maxsted." A similar entry being also made by them in their checking book, and the following entry was made by the defendant in his checking book: "14th June, Overend Gurneys 20, Sandeman and Co., 16½, 14th June." Messrs. Sandeman and Co. handed to the plaintiff the following account or sold note, and on the 24th June 1866 received from him 31*l.* 5*s.* in payment.

2, Royal Exchange Buildings, London, 14th June 1866.

	£		
Shares, 15*l.* paid, at 16½ dis.	£30	0	0
Brokerage	1	5	0
	£31	5	0

Norman Morris. SANDEMAN, DOBREE and Co.

6. The sale and purchase of shares on the Stock Exchange is either for cash, in which case the transaction is supposed to be settled on the day it is entered into, or for "the account," the "account" being a day fixed by the committee of the Stock Exchange on which all transactions entered into since the previous account are completed; and the practice of the Stock Exchange in carrying out the transaction is this:—The broker of a buyer, who intends to become a transferee of shares, draws a ticket stating the name and address of the buyer, the price at which he buys, and the name of the buyer's broker, and delivers it to the jobber, from whom he has purchased, such jobber passes it on to the person from whom he has purchased, and the same ticket is again passed on, until it again reaches the hands of the broker for the original seller. This broker procures a transfer to be executed by his principal in favour of the ultimate buyer, or person named in the ticket. On the day on which the purchase is to be completed, the broker for the original seller takes a ticket, and a transfer of the shares, to the broker who issued the ticket, and from his hand receives, from the ultimate buyer, the consideration money stated on the ticket. The differences between the amount actually paid, and the prices of the intermediate bargains, are then paid and received by the several jobbers and brokers through whom the transaction was passed.

7. The 14th June 1866, the day on which the plaintiff's shares were sold to the defendant, was the first "account" day in Overend, Gurney, and Co. shares for that month, and *the defendant on that day handed to Messrs. Sandeman, Dobree, and Co., the following "name ticket:"*

Consideration 2*l.* 10*s.*

Ticket No. 472. Twenty Overend, Gurney, and Co. shares at one-eighth to *Edward Smith, of Norwich, M.D.*
Pater and Co., 75, Old Broad-street, 13th June 1866.

8. Messrs. Sandeman and Co. filled in the transfer of the shares by inserting therein the said consideration. and the name of the said Edward Smith, in accordance with the above-named ticket, which transfer *was duly executed by the plaintiff*, a copy of the transfer as filled up is annexed, and marked B.

9. On the 18th June Messrs. Sandeman and Co., in accordance with the practice of the Stock Exchange, handed this transfer along with the certificates of the shares, and the said name ticket to Messrs. Pater and Co., the persons whose names appear on that ticket as the said Edward Smith's stockbrokers, and in exchange for these documents received from them the sum of 2*l.* 10*s.*, being the consideration stated in the said ticket, which amount Messrs. Sandeman and Co. placed to the credit of the defendant, along with the 30*l.* payable to him in respect of the sale to him of the said twenty shares, but *the said transfer was never executed by the said Edward Smith, nor sent to him, nor was he aware that any transfer to him had been executed, and the plaintiff's name remained on the register of shares* in Overend, Gurney, and Co. as holder of the said twenty shares.

10. The said Edward Smith, through Edward Morgan, a broker, at Norwich, had given three orders to the said Messrs. Pater and Co., dated respectively 19th, 26th, and 27th April, 1866, for the purchase in the whole of 1000 shares in Overend, Gurney, and Co., at the market price of the day, for the account of the 15th May.

11. The transaction, so far as the said Edward Smith was concerned, was a mere speculation in the rise or fall of the market, and he *never intended to take a transfer of the said shares, or of any of them, to himself; this was known from the first to Morgan, but was not known to Pater and Co. until after the purchase next mentioned, and Pater and Co. were not aware who Morgan's principal was until a day or two before the said 15th May, and after all the shares had been purchased.*

12. Until Morgan applied to Smith for money, as hereinafter mentioned, Morgan believed Smith to be a person of considerable property.

13. Upon the receipt of the said orders, Messrs. Pater and Co. bought shares, in accordance with the said orders, to the number in the whole of 1000. The contracts, in respect of a portion of the said

1000 shares, were closed on the said 15th May; the contracts in respect of another portion were carried over to the next account day, the 30th May, and from that day again to the following account day, namely, the 14th June, under the circumstances mentioned in paragraphs fourteen and seventeen.

14. After the said purchase, and shortly before the 10th May, the said Edward Smith was applied to by his said broker, Morgan, to furnish money for the purpose of either taking up the said contracts, or carrying them over, the market having gone down since the said purchase.

15. The said Edward Smith *did not pay the consideration money* for the shares which were so *purchased on his behalf, or for any of them, nor did he provide any of the money so required for taking up or carrying over the said contracts; he did not give any express authority either to Morgan or to Pater and Co. to carry over the contracts, or any of them beyond the 15th May; he was not consulted by either Morgan or Pater and Co, nor did he do anything further in the matter* after being applied to by Morgan as mentioned in paragraph 14.

16. Messrs. Pater and Co., on the 14th May, *had been informed by Morgan that Smith was Morgan's principal*, and was without any means of taking up or carrying over the contracts for the shares.

17. On the 14th May 1866, Pater and Co. received a letter from Morgan in the following terms:—"Our client cannot meet his engagement as regards the 1000 Overends, and we unfortunately cannot meet them, *therefore we authorise you to do whatever you think best.*" On the receipt of this letter, Pater and Co. gave Morgan's name for 880 of the 1000 shares (*a*), and carried over contracts in respect of 120 of the said shares to subsequent account days as before mentioned.

18. On the account day of June 14, contracts in respect of the greater portion of the 120 shares being still open, Pater and and Co. *gave Smith's name* for twenty shares by means of the ticket mentioned in paragraph 7, and also for other of the 120 shares which they did not succeed in carrying over beyond the account of June 14. Morgan was at the time aware and approved of their doing so.

19. There is no custom of the Stock Exchange that, in case of a purchase of shares by a broker for a principal, for the next account, the broker may, *without express authority*, carry the shares over, if the principal do not when the day arrives, give a name for them, or provide him with funds for taking them up. The *usual and proper course* in such a case is for the broker to submit to have the shares sold out against him in the market by the official broker, a person appointed for the purpose by the committee of the Stock Exchange. The buyer from the official broker thereupon gives a name, and the broker of the defaulting principal pays to the person from whom he bought, the loss, if any, occasioned by the transaction; but the name of the defaulting principal does not appear in any way in the market.

20. A broker of the London Stock Exchange, who receives instructions from a country broker, *looks to the latter only, and not to the client of the country broker, as his principal; but there is no rule or custom of the Stock Exchange which forbids his giving the name of the client of the country brokers under the circumstances mentioned in the preceding paragraphs* 10 *to* 18.

21. The statement of the practice and usage of the Stock Exchange, as printed in the report of the case *Grissell* v. *Bristowe*, in the L. Rep. 3 C. P. 112, is to be taken for the purpose of this case to be correct and to form part of this case: (See report of the case also 17 L. T. Rep. N. S. 564.)

(*a*) See the report of the case of *Street* v. *Morgan*, *ante* p. 432.

22. Both the plaintiff and the defendant were, at the time of the proceedings in the bankruptcy of the said Edward Smith hereinafter referred to, altogether *ignorant of the existence of the abovementioned transactions between Smith, Morgan, and Pater and Co.*

23. On the 20th Aug. the liquidators of Overend, Gurney, and Co. (Limited) made a call of 10*l.* per share, payable on the 15th Sept., and the plaintiff paid the said call on the said twenty shares, amounting to 200*l.*, on the 25th Oct. 1866; and on the 10th June 1867 the court made a second call of 10*l.* per share, payable on the 25th June, and the plaintiff paid the said second call, amounting to 200*l.*, on the 25th Aug. 1867. It is admitted for the purposes of this case that both calls were properly paid by the plaintiff.

24. The said Edward Smith, the alleged transferee of the said shares, was declared bankrupt on the 15th Oct. 1866, and one James Pope Kitchen, as *representing the said Messrs. Pater and Co.*, was subsequently appointed the creditors' assignee.

25. The plaintiff afterwards, on the 21st Jan. 1867, tendered a proof against the estate of the said Edward Smith for 200*l.*, the amount of the first call of 10*l.* per share on the said twenty shares paid by the plaintiff. The proof was opposed by the creditors' assignee, and was, in the first instance, admitted as a claim only. The claim was afterwards, on the 22nd Feb. 1867, admitted as a proof, but without prejudice to the right of the assignees to apply to expunge the same if so advised.

26. The plaintiff's name appears in the list of creditors entitled to a dividend of 5*d.* and one-sixteenth of a penny on 200*l.*, that is to 4*l.* 4*s.* 4*d.*, declared in March 1867, but the plaintiff *has never received any dividend* in respect of the said proof. *No proof in respect of the second call hereinbefore mentioned has been tendered.*

27. The said James Pope Kitchen proved, *on behalf of the said Messrs. Pater and Co.*, against the estate of the said Edward Smith for the sum of 14,679*l.* 7*s.* 3*d.*, being *the purchase-money for the said* 1000 *shares, and the said Messrs. Pater and Co. received a dividend of* 5*d.* 1-16 *in the pound upon the said proof.*

28. The defendant repudiates all liability in respect of the said shares sold to him, and has refused to pay the plaintiff the amount of the said calls, or to indemnify him.

29. The printed rules of the Stock Exchange and the memorandum and articles of association of Overend, Gurney, and Co. (Limited), may be referred to by the court and either party for the purpose of this case.

30. The correspondence between Morgan and his solicitor (Mr. Tillett) on the one side, and Pater and Co., and Kitchen, who represented them, on the other side, is set out in the appendix, and may be referred to by either party on the argument of the case, subject to any objections to the admissibility of any portion of it, as evidence in this action.

31. The court is to be at liberty to make any amendments in the pleadings on such terms as to the court shall seem proper, and also to draw any inferences of fact.

The question for the opinion of the court is, whether under the circumstances above stated the defendant is liable to pay the amount of the above calls on the said twenty shares. If the judgment of the court is in favour of the plaintiff, then judgment is to be entered up for the plaintiff for 400*l.* and interest from the time the calls were paid at 5*l.* per cent. per annum and costs: if the judgment of the court is in favour of the defendant, then judgment is to be entered up for the defendant with costs.

The following extract, from the correspondence and telegrams set out in the appendix to the case,

and referred to in the argument of counsel and the judgments of the court, are material.

11th May 1866. Letter.—Morgan and Co. to Pater and Co.—"We have yours of yesterday, and transfer of five Overends, as to which should have thought, under the circumstances, that the settlement in Overends as to carrying over or otherwise would have to be postponed till next week. Please let us know to-morrow. *One thousand of the Overends are bought by one man, and suppose by your wires no carrying over can be done; if they must be taken up, we hear his bankers may be induced to assist him*, which would probably depend much upon whether Overends do or do not resume business. It is confidently expected here (Norwich) that they will do so, and that the suspension is only temporary. Name for the odd twenty, or we will send you to-morrow if necessary. *The panic has been truly fearful.*"

Same date. Letter.—Pater and Co. to Morgan.—"We note by your wire to-day that you would send instructions as to Gurneys to-night. We fear we shall have to take up the whole or nearly so, and, if so, must of course ask you to let us have a credit here not later than Tuesday morning, and if any are carried over, please send the difference on them directly."

12th May 1866. Telegram.—Morgan to Pater.—"Should have wired sooner, but occupied in the matter. *Most deeply grieved to find buyer can do nothing without assistance from his bankers.* If Overends open again, they may possibly take the whole up for him. Buyer, within the year, was worth 30,000*l.* or 40,000*l.*, and we believe he was at date of transaction. Has still large income from profession. *He has fearfully and fraudulently deceived us.*"

Same date. Letter.—Morgan to Pater.—"Our client cannot meet his engagements as regards the 1000 Overends, and we unfortunately cannot meet them; *therefore we authorise you to do whatever you think best.* Mr. Brown will explain the reasons for our not writing more fully."

14th May 1866. Letter.—Morgan to Pater.—"The transaction, so far as the buyer is concerned, *is nothing more nor less than a complete swindle*, and he shall be dealt with accordingly. My solicitor thinks it comes legally so entirely within the term I have used, that he shall be able to make him set aside a larger portion of his income to meet his liability to us. The history of the transaction is this," &c.

Same date. Letter.—Pater to Morgan.—"We have been compelled to-day to pass your name for 900 of the Gurneys, as we could not sell them on so short a notice, and, besides, that would involve an immense sacrifice, which neither your client, nor yourself nor ourselves, are in a position to bear."

15th May, 1866. Telegram.—Morgan's solicitor to Pater and Co.—"Morgan has placed your letter of the 14th in my hand. I must request that Morgan's name be immediately withdrawn in respect of all the Overends, and *Edward Smith, of Norwich, M.D., be substituted.* I am responsible for this advice."

Same date. Letter from same to same.—"I am decidedly of opinion that Smith's name must be passed, and must object against Morgan's name being used."

Same date. Letter.—Pater and Co. to Morgan.—"We were surprised and pained at receiving a message from your solicitor that you refused to allow us your name for the 880 Gurneys, *though you had given our Mr. Brown a written authority to do what was best for all our interests.*"

6th June, 1866. Morgan to Pater and Co.—"In reference to yours of the 1st inst., it appears to us, as regards Dr. Smith, he is not in a position to free himself from his liabilities. *The transaction is of such a swindling character that if he was opposed he would certainly not, we imagine, get his certificate;* and the Bankruptcy Court, we apprehend, would put him in no better position than he is now in."

12th June, 1866. Letter.—Pater and Co. to Morgan.—"We have carried over thirty of the 100 Gurneys still open, and we are afraid we shall have to pass Dr. Smith's name for them, or yours."

The plaintiff's points for argument: First, that as the defendant was the original purchaser of the shares from the plaintiff he is bound to indemnify the plaintiff against all future liabilities upon them. Secondly, that the defendant was bound to furnish the plaintiff with the name of a *bonâ fide* and responsible purchaser for the shares, or to take them himself; and that in the absence of his doing so he is liable to indemnify the plaintiff against subsequent calls. Thirdly, that no transfer of the shares having been ever accepted by the defendant's nominee the defendant remains liable to the plaintiff. Fourthly, that the defendant had no power or authority to pass the name of Smith as the purchaser, as Smith never did in fact become the purchaser or transferee of the shares in question. Fifthly, that nothing has taken place to divest the defendant of his original and primary liability to indemnify the plaintiff against further liability on the said shares.

The defendant's points for argument: First, that the defendant is not liable for the amount of the call, as the contract for the purchase of the twenty shares referred to in the case was made by him as a jobber in his regular course of business, in accordance with the usages and customs of the London Stock-Exchange. Secondly, and also for that the plaintiff accepted the defendant's nominee as a transferee, and executed a transfer of the said shares to such nominee, which was received and accepted by him. Thirdly, and also for that the plaintiff for the amount of the calls paid by him proved against the estate of such transferee after such transferee had been adjudicated a bankrupt. Fourthly, that it appears upon the case that the defendant had done everything that he was under any liability to do, with respect to the twenty shares referred to in the case when the call was made, and that it does not appear by any statement in the case, that the defendant has incurred any liability to pay to the plaintiff the amount of the call, or to show that the plaintiff is entitled to recover from the defendant any part of the amount paid by the plaintiff in respect of the said call.

Pollock, Q. C. (with him *Watkin Williams*) for the plaintiff.—The rights and liabilities of Smith and of the defendant also were determined on the 15th May, and it is clear that Smith, who is now put forward by the defendant as liable, would, by reason of the difference in the price of the shares, be prejudiced by the carrying over from that date to the 14th June. Moreover, Morgan had no authority from Smith for so carrying them over, but it was done by Morgan and Pater without authority for the purpose of staving off the evil day from themselves. Paragraph 20 will be relied on by the defendant, and it is not denied on the plaintiff's part that the custom there mentioned may be a wholesome one in any question as to commission between a town and country broker, but it has no bearing on the question in this case. The name given as the ultimate purchaser must be that of a *bonâ fide* purchaser, and when Smith's name was given he was *not* a purchaser; true he was originally a purchaser for the 15th May, but having given no authority to carry over, his liability as purchaser ceased on the 15th May. For that, the decision of this court in the first action of *Maxsted* v. *Paine*, 20 L. T. Rep. N. S. 34; L. Rep. 4 Ex. 81; 38 L. J. 41, Ex., is an authority. Looking at the question in the light of the decisions in the Exchequer Chamber, in *Grissell* v. *Bristowe*, 19 L. T. Rep. N. S. 390; L. Rep. 4 C. P. 36; 38 L. J. 10, C. P., and by Lord Cairns L. C., in *Coles* v. *Bristowe*, 19 L. T. Rep. N. S. 403; L. Rep. 4 Ch. App. 3; 38 L. J. 81, Ch., the alternative custom is for the broker to give either his own name or that of a real purchaser. Whatever name is put in the ticket, through whatever channel or number of brokers it may come, the name ultimately given must be that of the real purchaser, so that it is a binding contract on him to take these shares. But on the 14th June, when his name was given, Smith was *not* a purchaser. The correspondence, set out in the appendix to the case, between Morgan and Pater shows the nature of the transaction as regards Smith between them and him. Under no circumstances can Smith be considered a buyer. The decisions in *Grissell* v. *Bristowe*, in the Exchequer Chamber (*ubi sup.*), and *Coles* v. *Bristowe*, in Chancery (*ubi sup.*), do not govern the present case, which, as well as *Maxsted* v. *Paine*, No. 1 (*ubi sup.*), is distinguishable therefrom. Without some such limitation of the rule as to the liability attached to the name handed in as the buyer, as is found in *Maxsted* v. *Paine* (No. 1), there would be no protection against a man's being held liable for an indefinite period. No doubt there are

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facts in *Maxsted* v. *Paine* (No. 1), (*ubi sup*), which go beyond the present case, but the governing fact there was, as in the present case, the carrying over without authority. With regard to the plaintiff's proving against Smith's estate, which will be relied on by the defendant, he did it in ignorance of the facts. But he has received no dividend, and has since withdrawn. A man proving against the estate of a person called "George Jones," and finding out afterwards that it was not the "George Jones" who was his debtor, would not be estopped from afterwards proving against the right "George Jones." So here, Smith turns out not to be a person liable to the plaintiff, and the latter, therefore, cannot be answered by the doctrine of election. It was a mistake of facts and not of law. The plaintiff, it is submitted, is entitled to be indemnified by the defendant against the calls.

Mellish, Q.C. for the defendant.—The real question is, did Smith authorise the name ticket, and was he then a purchaser? Not such a purchaser probably, as the plaintiff was bound to accept had he objected; because, doubtless, if the plaintiff's broker had inquired into the transaction during the ten days allowed by the rules of the Stock Exchange, it may be the plaintiff would have objected, and would not have been bound to execute the transfer to Smith; but he has executed and delivered it, and it was subsequently acted on by all parties as a valid transfer. The plaintiff acted on it by proving against Smith's estate for the first calls, and Pater and Co. by proving for the purchase money; and neither Smith nor his assignees, nor any of the creditors, have made any objection to the transaction, but all was carried out on the assumption that the transfer was valid. Were Overend and Gurneys to be re-established, and these shares to become highly valuable, neither the plaintiff who had executed the transfer and proved for the call, nor the defendant who had given in Smith's name could say that either Smith or his assignees were not entitled to the shares, and to all profits accruing or arising from them. It is now too late, therefore, for the plaintiff to fall back upon or to set up a claim against the defendant; the transaction as to the jobber has been completed. All that the jobber agrees to do is to find a proper purchaser, and if he gives in the name of one, and the transfer is executed without inquiry, and is not repudiated by the transferee, the matter is at an end. [KELLY, C. B.—All that may be conceded, but it comes at last to the question in the special case, was there any authority by Smith to the defendant to make Smith liable as the ultimate purchaser of these shares on the 14th June?] The shares having been bought originally by Smith's order for the 15th May, the crash occurred before that day arrived, when the money must have been provided by somebody, or the shares would have been lost or sold at an enormous loss. Neither Smith, Morgan, nor Pater could find the money for the 15th May. Smith, on being applied to for it, does the most natural and wisest thing in his position, namely, *nothing*; he neither sends money nor instructions, but is silent. A purchaser by his own order cannot so escape from his liability. As Smith neither sent money nor instructions, and neither Morgan nor Pater could find it, Morgan, Smith's broker, gave instructions to Pater to carry these shares over. Can this be said then to be entirely without authority? The first case of *Maxsted* v. *Paine* (*ubi sup.*) differs from the present case in two respects; first, there was there no transferee or purchaser at all, whilst here Smith was the original purchaser by his own orders; and, secondly, there was there a direct repudiation of the transfer by Maxwell, whilst here Smith has never repudiated at all. The second case of *Maxsted* v. *Paine*, 20 L. T. Rep. N. S. 748; L. Rep. 4 Ex. 203; 38 L. J. 129, Ex., is a direct authority that, if the seller accepts the transferee and does not repudiate the contract, though he might have done so at the time, he cannot afterwards fall back upon the broker. By executing the transfer the seller, as was put by Cockburn, C. J. in the Exchequer Chamber in *Grissell* v. *Bristowe* (*ubi sup.*), deprives himself of the power of delivering the shares to the jobber. The shares are now vested in Smith or his assignees, for good or evil, and the plaintiff cannot transfer the beneficial interest in them to the defendant. That is the test. It is too late now for Smith to repudiate. His conduct at the time was an *implied* authority, and his subsequent bankruptcy a ratification of it. It is submitted first that there was originally a sufficient authority by Smith for the purchase, and, under the circumstances, an *implied* authority to the broker to deal with the shares in the best way for his own protection, as between him and the person giving the original order, and so a sufficient authority as against Smith for carrying them over. And, secondly, if there were not an authority originally, yet he had allowed himself to be made bankrupt on the footing of these transfers being valid, and had allowed the call and the price of the original purchase-money to be proved for against his estate, and had not, up to this moment, repudiated any part of the transaction, and it would now be too late to do so; and the beneficial interest having passed to Smith, a purchaser has been procured with the plaintiff's consent, and it is now too late for him to bring this action against the defendant. He cited also

Paine v. *Hutchinson*, before the Lords Justices, 18 L. T. Rep. N. S. 380; L. Rep. 3 Ch. App. 388; 37 L. J. 485, Ch.

Pollock, Q. C. was not called on to reply.

KELLY, C.B.—I am of opinion that the plaintiff is entitled to the judgment of the court. The plaintiff had entered into a contract with the defendant for the sale to him of twenty shares in the Overend and Gurney company, and the contract took place, and was to be executed and carried into effect on the 14th June. The plaintiff having sold the shares to the defendant, and the defendant having purchased them of the plaintiff, became, upon the authority of decisions both in the Exchequer Chamber and in the Court of Chancery, bound to indemnify the plaintiff, the seller, against any calls which might thereafter be made. Two calls have been made since this contract was entered into, and the plaintiff has been called upon under them to pay the sums of money specified in the case, and this action is brought to recover back those sums from the defendant, as the purchaser of the shares. Upon the facts, so far as I have now stated them, he, having been the purchaser of those shares, is no doubt bound to indemnify the plaintiff against these calls, and the plaintiff therefore is entitled to judgment. But it is contended on the part of the defendant that, although he was the original purchaser of the shares, yet under and according to the usage of the Stock Exchange he has given in the name of another person, in due time on the name day, and therefore that person has become liable to the claim of the plaintiff, and that he, the defendant, is discharged. Now the custom is in effect this, that if the purchaser of shares within the time when the contract is to be carried into effect, and the shares transferred by the seller, and accepted by the purchaser, gives in the name of another person as the ultimate purchaser, with the authority of that other person, and that other person is accepted by the seller as the ultimate

purchaser, the jobber or the original purchaser is discharged. Has this been done in this case? The circumstances of the case are these. First, negatively, Dr. Smith whose name was given, certainly never authorised the defendant to purchase any shares or to give in his name as the purchaser of any shares, on the 14th June; he never, directly or indirectly, authorised the defendant to enter into the contract, for his benefit or on his behalf, which the defendant has entered into with the plaintiff; but what he did was this: In the month of April he authorised one Morgan, a broker at Norwich, and Morgan authorised Pater, his London broker, and it may be taken, if necessary, that Pater had authorised the defendant, to contract for the purchase of a thousand shares of Overend, Gurney, and Co., for the then next account day, which was the 15th May; and there can be no doubt that if, on the 15th May, it turned out that the plaintiff had been the seller of any or all of these shares, and that the defendant had on that day given in the name of Smith, and the plaintiff had accepted that name as the purchaser, Smith would have been bound to complete that purchase and accept the transfer; and if he had been unable to pay the purchase-money, or had refused to accept the transfer, still he would have been liable at law to be deemed the purchaser, and liable from that time forth to indemnify the plaintiff against any calls which might be made in respect of the shares so purchased. But it turned out on the 15th May, the account-day, and when the liability of Smith accrued to accept the 1000 shares which had been purchased on his behalf, that he was unable to find the money, and Morgan gave certain instructions to Pater and Co., and some communication or other seems to have been made to the brokers of the seller of the 1000 shares which had been purchased, under which a settlement took place (to which it is unnecessary to refer) of, I think, 880 shares. But as to 120 of the shares, the contract was carried on, or forward as it is called, according to the usage of the Stock Exchange, until the 30th May, and then again until the 14th June, when the shares in question were ready to be transferred by the plaintiff into the name of Smith. Now, in order to discharge the defendant from the performance of the contract into which he had entered, two circumstances must concur. First of all, having given in the name of Smith, Smith must have been accepted and adopted by the plaintiff as the ultimate purchaser of the shares, and that appears to have taken place—it is unnecessary to consider what steps might have been taken during the ten days either to object to or reject the proposed ultimate purchaser. Here, without availing himself of any such custom or privilege, the plaintiff at once appears to have accepted Smith as the purchaser, and to have executed the transfer to him. But the other circumstance which must occur in a case like this to entitle the plaintiff to treat the nominee as the purchaser, is that the nominee, who is sought to be treated as the ultimate purchaser, must have given the requisite authority to the broker or jobber, to give in his name as the ultimate purchaser, under the contract which has been entered into with the seller. Has that been done? Clearly it was not done. No authority had been given to enter into a contract to be executed on the 14th June; an authority had been given and was executed to purchase, on behalf of Smith, the 1000 shares, but it was for the 15th May. On the 15th May, what were the rights and liabilities of the parties? The broker or the jobber who represented Smith, had a right to call upon Smith to pay the price of the shares and to accept the transfer, and, if he was unable to do so, or refused to do so, then, according to the usage of the Stock Exchange, the broker or jobber, or the representative of Smith, was entitled to take the shares. He should have allowed the seller to sell the shares as against him, to use the language of the Stock Exchange, and the person who is called the "official broker" to become the purchaser; then the nominee, who has given the authority for the shares to be purchased in his name, would have become liable upon that sale, or upon the resale of the shares as against the purchaser, to make good to the seller, or the jobber or broker, the difference between the price which he had contracted to pay and the price which had been realised by the sale. This custom was disregarded. No sale of the shares as against the defendant, or as against the broker or jobber of Smith, or as against Smith himself, took place according to the custom, or in any other way. But what was done was this, the representative of Smith took upon himself to carry forward the contract from the 15th May to the 30th May, and afterwards from the 30th May to the 14th June. If Smith had authorised him to do this, Smith would have been liable on the 30th May, or again on the 14th June, to accept the transfer, and in all respects to execute the contract as purchaser, and to carry it into effect; but he has given no such authority, and it seems to me manifest that to hold that he became liable to accept the purchase and the transfer, and to become the purchaser or to pay the difference upon the 14th June, would be in direct derogation of the contract into which he had entered; and would expose him to a liability which he had never incurred, the liability to allow the shares to be sold as against him on the 14th June. Just let us see what would be the effect of a transaction of this nature, if Smith were bound by it, having given no authority to carry forward the contract from the 15th May against the usual rule, or indeed to make any contract, or to carry any contract into effect except one for the 15th May. Let us suppose that Smith had originally contracted for the purchase at 15*l.* a share. On the 15th May, according to the usage of the Stock Exchange, the shares might have been sold against him, and they would on that day have sold for 1*l.*, that is 14*l.* discount; there are several prices mentioned, but I will take it, in this case, that the shares might then have been sold at 14*l.* discount, or in other words, at 1*l.* a share, and the loss of Smith upon that transaction would have been the 14*l.* a share, namely, the difference between the 15*l.* per share contract price and the 1*l.* a share realised upon the sale of the shares that day. When we arrive at the 14th June the shares were not only at a discount of 15*l.*, the original price at par, but they were at a further discount of 30*s.* a share. The loss, consequently, upon the 1000 shares of Smith, if he had been bound to carry the contract into effect, as the ultimate purchaser on the 14th June, or to allow the shares to be sold against him, would have been 2*l.* 10*s.* a share, instead of 1*l.*, to which alone he would have been liable and have been the loser of on the 15th May. It is impossible, to say that this, having been done without Smith's authority, is a contract binding upon him, and it is only by giving to the plaintiff, the seller, a contract binding upon Smith as the ultimate purchaser that the defendant, the real and original purchaser, can be discharged. That raises the question whether, upon the whole of the facts here, Smith can be deemed to have given any authority to the broker, or jobber, or whoever represented him on the occasion, to carry forward the contract from the 15th May to the 30th, and from thence to the 14th June? Now, in the first place, it is expressly found by the case that, although it is the usage of the Stock Exchange that, on the account

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day, without any express authority, or without any authority at all on the part of the ultimate seller or the nominee, the shares may be sold as against him, no custom exists on the Stock Exchange under which, without the authority of the nominee, and without the authority of persons sought to be charged, the ultimate purchaser, the broker, or anyone can carry forward the contract. Then is there any authority to be implied from the facts here? It is contended by the defendant that if an individual, who becomes a purchaser of shares in a particular name, is unable to perform his contract by finding the money to pay the price of them, the broker is authorised to do anything that he may think best for the interest of all parties; but I am clearly of opinion that that is not so. The whole question of this expressed or implied authority which is given, is to allow the shares to be sold as against the ultimate purchaser, and then either the seller or the broker will have a claim as against the ultimate purchaser; and if that course had been adopted on the 15th May, either the seller or the broker would have had a claim against Smith for the difference between the price at which he had contracted to purchase, and the price which would have been realised upon sale of the shares on the 15th May. But I am clearly of opinion upon every principle of reason and justice as well as of common sense, that no broker or jobber has authority to carry forward the contract, that is, to appoint another and a distant day for the execution of the contract, by which his principal may be largely prejudiced without that principal's authority. Here Smith, the principal, would have been largely prejudiced, to the extent I have pointed out, of 2*l.* 10*s.* a share by carrying over his contract from the 15th May to the 14th June. Having given no authority to the broker to carry forward, there was no contract, and the broker having carried forward, cannot therefore make Smith, his principal, liable to carry that contract into effect on the 14th June, and consequently has not brought himself within the practice and usage of the Stock Exchange of substituting another nominee for himself, with power to the seller to resort to any remedy against the nominee which the law would have given him against the original purchaser. He therefore must be taken to be the original purchaser, and must be liable to indemnify the plaintiff against calls. It has, indeed, been argued by Mr. Mellish that, the transfer having been made by the plaintiff, and the instrument of transfer having been executed by him to and in the name of Smith, some repudiation on Smith's part is necessary to do away with the effect of that instrument. I am again clearly of opinion that no such repudiation is necessary, and that it is not competent to any body, by the execution of an instrument purporting to transfer property or shares to another person, to impose upon that other, the transferee or grantee, the obligation to do any act whatever. The name of any gentleman in this court, or of one of the Rothschilds, might have been given as the purchaser of these shares, but no one would say that the obligation is imposed upon them to inquire into the transaction, and to repudiate a transfer which they had given no authority to anyone to make for them. The instrument, therefore, is a document brought into existence under a mistake. The broker having given in that name, the seller was led to suppose that it was given with the authority of the person named. It turns out that it was not given with that person's authority. I am of opinion, therefore, that the transfer which was executed under those circumstances was mere waste paper, and is absolutely null and void. But it has also been contended that the plaintiff, by proving under Smith's bankruptcy, has adopted Smith as the purchaser, and cannot now insist upon treating the defendant, the original purchaser, as being liable to this demand. It appears to me, however, that the question is, not whether the plaintiff may have claimed this sum of money, or proved for it, under the bankruptcy against Smith, but whether Smith is liable, or whether the plaintiff has by law a demand against Smith, which is capable of being enforced in law or in equity, which he now seeks to enforce against the defendant; and on the ground I have already stated I am of opinion that that is not so. Then it is said that Pater and Co. have either petitioned for this bankruptcy, or that they have proved under it for the amount in question, and against the estate of Smith. But, again, I am of opinion that nothing that Pater and Co. could do would affect the rights of Smith, or nothing that Smith's assignees could do; nothing that could have taken place, in any way, in relation to this transaction between Pater and Smith, can at all render Smith liable to this demand, unless Smith had given authority which, on the ground already stated, I am clearly of opinion he never has given, for the carrying over of this contract from the 15th May to the 14th June. It remains only to observe that, upon principle, this is the decision which I do not hesitate to pronounce in this case. I must say I think that the case of *Maxsted* v. *Paine* (No. 1), L. Rep. 4 Ex. 81; 20 L. T. Rep. N. S. 34; 38 L. J. 41, Ex., is clear and decisive upon the very point now before the court for decision, and I am, therefore, of opinion that the plaintiff is entitled to the judgment of the court to be indemnified against the calls which have been made upon him.

CHANNELL, B.—I am of opinion that the plaintiff is entitled to our judgment, and that upon the ground so fully stated by my Lord Chief Baron. There is no doubt, according to the decisions, as I understand them, that the defendant, the jobber, comes under the primary liability to the plaintiff; the liability from which, in a given event, he would be discharged. The question is whether what has taken place in this case shows that the defendant has given in the name of a person, with that person's authority, so that the shares should all vest in Smith the transferee so as to discharge the defendant? Now, in the first place, I entertain very grave doubt whether the transfer was worth anything at all. It was not made on the 15th May, nor on the 30th May, nor until the 14th June, and the defendant had given no authority, according to the usage of the Stock Exchange, for a transfer to him with reference to the account being wound-up and settled on the 14th June. And, taking it to be the fact that there has been a transfer executed in point of form and of fact, I am yet to see whether the defendant's nominee has authorised the carrying it out on the 14th June. It appears to me that a very few facts, stated in the special case, put an end to this inquiry. The case clearly shows the authority which Smith originally gave, and then it goes on to say that he did not pay the consideration money for the shares which were so purchased on his behalf, or for any of them, nor did he provide any of the money as required for taking up or carrying over the contract. He did not give any express authority either to Morgan or to Pater and Co. to carry over the contracts, or any of them, beyond the 15th May. He was not consulted by either Morgan or Pater and Co., nor did he do anything further in the matter. So that, according to the case, there was no express authority on his part; he was not even consulted, and he did nothing. Now paragraph 19 says, "There is no custom of the Stock Exchange that, in the case of a purchase of shares by a broker for a principal for the next account, the broker may without express authority

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carry the shares over if the principal do not, when the day arrives, give a name for them or provide him with funds for taking them up." And it goes on further to say, "The usual and proper course in such a case is for the broker to have the shares sold out against him in the market by the official broker." Now I find there is no express authority, and that nothing was done at all on the part of Smith, and he was not even consulted. Further than that, I find that the case states, not only in the absence of express authority, but affirmatively states, what is the proper course to be taken under such circumstances. I cannot conceive that paragraph 20, which Mr. Mellish has called our attention to very properly, is strong enough. It is as follows:—"A broker of the London Stock Exchange who receives instructions from a country broker, looks to the latter only, and not to the client of the country broker, as his principal, but there is no rule or custom of the Stock Exchange which forbids his giving the name of the client of the country broker under the circumstances mentioned in the preceding paragraphs, 10 to 18." Under these circumstances, it appears to me that there is an absence of any authority as against Smith, and that there was no giving in the name of a purchaser so as to exonerate the defendant, and that under these circumstances the rule laid down in this court in the case of *Maxsted* v. *Paine*, No. 1 (*ubi sup.*), applies, and that the plaintiff is entitled to judgment.

PIGOTT, B.—I am of the same opinion. I agree with the reasons given by my Lord Chief Baron and my brother Channell, for the judgments at which they have arrived, and I think the defendant is liable to make good the 400*l.* to the plaintiff for the calls upon these shares. There is no doubt, upon the facts, that the defendant did purchase these shares of the plaintiff on the 14th June. Therefore his duty upon that contract was, either to pay these calls, or to give the name of a person who was willing to take the shares from the plaintiff. Now the name that he gave is that of Dr. Smith. What is the history of this Dr. Smith, and of his liability to take the transfer? It is this. In the month of April he had given authority to a broker of the name of Morgan to purchase a thousand shares for the account day of the 15th May, and it seems that he was unable to take them up; and on the 14th May, Pater and Co., who handed his name to the present plaintiff, were informed, first of all, that Smith was without any means of taking up or carrying over the contracts for the shares. A previous paragraph (No. 15) to that which my brother Channell has read shows that there was no express authority by him to have these shares carried over from the 14th May until the day in question, the 14th June, or the intermediate settling-day, the 30th May; and, secondly, it appears that, so far from there being any implied authority to carry them over, he, instead of being on the 14th June a purchaser, was, what I think we may rather call, according to paragraphs 16 and 17, a defaulter of at least a month's standing with regard to the shares which he had, a month before that time, authorised to be purchased in his name. No doubt paragraph 17 contains an authority from his broker to Pater and Co. to do as they pleased or thought best; yet that cannot be said to be an authority by him, because Morgan was giving it on his own account, and it was given for 880 shares, and did not in any way emanate from Smith. But it appears to me that the express authority to carry these shares over is negatived. Implied authority there is none; the evidence goes on to negative the implied authority also. Then what is there to show that Smith was the name a person who was accepted by the plaintiff, and so exonerated the defendant from liability? I can find nothing in the way of ratification, except that the plaintiff, no doubt, executed the transfer; but it was in ignorance of all these facts, and under a mistake of facts with reference to Smith being a voluntary purchaser. Further, Mr. Mellish has urged that Smith's bankruptcy, and the non-repudiation of the proof by the plaintiff were some evidence that Smith authorised, or ratified rather, the giving in his name, as being properly given. It seems to me that it is nothing more, when you look at it, than a bankruptcy, and the bankrupt taking no part, doing nothing as far as we know, and not being aware of this proof being entered against the estate. It would be impossible, upon such facts as these, to eke out a ratification which would bind the present plaintiff. Whatever effect it might have had as regards Smith, it cannot bind the plaintiff, who was ignorant of all these circumstances which I have alluded to, nor the parties who signed the transfer in ignorance of them. It seems to me that the defendant has not gotten rid of the liability which devolved upon him from the purchase, and he has not paid these calls, nor found a name, and therefore that he is liable to pay.

CLEASBY, B.—I am of the same opinion. The contract for these shares was made on the 14th June. At that time, it is true, no order had been made by the Court of Chancery for the winding-up of the Overend and Gurney estate, but it is pretty obvious that it had been pending, and one cannot help looking at the real nature and effect of such a contract. It is not a contract by which it is intended that any property in shares should pass by way of transfer, which could not take place after the order, which was on the 22nd June; but, substantially it was a mere contract of indemnity, thus: "You give me 30*s.* per share, and I will indemnify you from the calls, and I am to be entitled to any benefit that may result from the shares when the whole of the account is taken by the Court of Chancery." That would have been the necessary effect of it after the 22nd June. Previous to that time it had not exactly that effect; but, substantially, it was that sort of contract which was contemplated. Therefore it was a contract peculiarly of a personal nature, as regards the person agreeing to indemnify, because, as the name upon the register could not be transferred after the winding-up, without the consent of the Court of Chancery, the plaintiff would necessarily remain liable for all calls. He would have to look to the personal responsibility of the person with whom he made the contract. That being so, one cannot help being a little startled at finding, upon a personal contract of this nature, on the 14th June, a man who on the 14th May had been declared to be "a swindler." The whole transaction as regards Smith had, on the 14th May been declared to be "a swindle," yet on the 14th June it is proposed that his name should be given by way of substitution for the name of Morris, the defendant. That however is not the question in the present case. The question here is this, was the condition performed which, according to the rules of the Stock Exchange, absolved the defendant from the performance of his contract? There is no doubt that he entered into the contract to accept the shares and indemnify the plaintiff. Did he absolve himself from it? That depends upon this: There is a transfer tendered purporting to be made to a man of the name of Smith. That transfer is at one-eighth, and it was executed by the plaintiff; and, according to the decisions, if he executed a transfer to Smith at one-eighth with the assent, and by the authority of Smith, and Smith having agreed to be bound by a contract to buy at one-eighth, then,

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subject of course to any objection being taken, the jobber Morris would be absolved. But that is just where this case fails altogether. It is only where a contract is executed by which the transferee is bound by law that that result follows. Therefore it is on the defendant to show that Smith was under an obligation, from what had occurred, to execute this transfer and to get it registered,—at that time a registry being possible. But upon this point the evidence fails entirely. It appears that Smith had entered into a contract to buy for the account day on the 15th May. It is true that, in this case, the difference in price between the two periods is small, but that makes no real difference. It might have been very large indeed; ten times as great as it is, or even much more, and might have involved the whole amount between the parties. Therefore, unless it can be shown that the authority to buy for the account on the 15th May involved an authority to carry over to subsequent account days, and then involved an authority to give in the name of Smith as a purchaser, not at the price at which he had bought, but at the price upon the third account day, the condition, it appears clear to me, has not been performed. The evidence upon that subject has been fully referred to by my Lord, and therefore I will not futher advert to it. Suffice it to say that, in my opinion, it negatives that authority; and as regards any ratification by Smith, the case states that the transfer never was executed by him, nor sent to him, nor was he even aware that any transfer to him had ever been executed. Unless, therefore, he had given authority—which, as he never knew of the transfer, he could not have done—he cannot be said to have ratified it. That seems to me to dispose, with the assistance of *Maxsted v. Paine*, No. 1 (*ubi sup.*), of that part of the case. But then it is said by Mr. Mellish that something has taken place since, in this case, which prevents the plaintiff from relying upon the decision in that case. Now the plaintiff tendered a proof against Smith. The proof was not admitted, except conditionally. That really carries the case no further. It is the same thing over again as to the execution of the transfer. Then, as regards what Pater did afterwards, that can have no effect upon the right of the present plaintiff. It has nothing to do with it. We are left very much in the dark as to the proper effect to be given to that proof. I cannot but think that there has been some mistake, when it is said that Pater proved for the price of the whole of the shares. But nothing turns upon the question as to the proof with respect to the 1000 shares. Whatever Pater proved for it can really make no difference as regards the plaintiff. When it is said that the defendant Morris cannot have the benefit of these shares in consequence of what has taken place with Smith, I dissent from that altogether. I have no doubt that if Morris's name were entered on the transfer, and presented to the Court of Chancery, with a request to be allowed to have his name placed there in lieu of that of the present plaintiff, the court would, upon his being shown to be a responsible man, allow his name to be so placed. We must go back, therefore, to see who was the proper person to be placed on the register as to these shares. If the name is to be changed, it may, under the circumstances, be the name of Morris. I feel, therefore, fully justified in agreeing with the rest of the court in the opinion which they have formed and expressed.

Judgment for the plaintiff. (a)

Attorneys: *Freshfields; G. B. Lefroy.*

(a) See a recent case of *Sheppard v. Murphy*, before the Lord Chancellor of Ireland and the Lord Justice of Appeal, 2 Ir. Ch. Rep. (May and Woodlock's edition) 544.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 13.

(Before KELLY, C. B., MARTIN, B., BLACKBURN, LUSH, and BRETT, JJ.)

REG. v. MACGRATH.

Larceny—Obtaining money under influence of a threat —Mock auction.

A woman went into a mock auction room, where the prisoner pretended to act as auctioneer. Some cloth was put up by auction, for which a person in the room bid 25s. A man standing between the woman and the door said to the prisoner that she had bid 26s. for it, upon which the prisoner knocked it down to the woman. She said she had not bid for it, and would not pay for it, and turned to go out. The prisoner said she must pay for it before she would be allowed to go out, and she was prevented from going out. She then paid 26s. to the prisoner because she was afraid, and left with the cloth:

Held, that these facts were sufficient to sustain a conviction for larceny.

Case reserved for the opinion of the Court for the Consideration of Crown Cases Reserved.

At the Court of Quarter Sessions for the borough of Liverpool on the 30th Aug. 1869 Peter Mac Grath was tried upon an indictment which charged him with feloniously stealing twenty six shillings of the moneys and property of Peter Powell.

It was proved at the trial that on the 26th Aug. 1869 Jane Powell, the wife of the prosecutor Peter Powell, between three and four o'clock in the afternoon, passed a sale room, and upon being invited to enter, did so. There were about one dozen persons in the sale room, and the prisoner was acting as auctioneer, and selling table cloths and other articles.

After two tablecloths had been sold and purchased by two women who were present a piece of cloth was put up for sale by auction, the prisoner acting as auctioneer. A man bid 25s. for it, when another man standing between Jane Powell and the door said to the prisoner that she had bid 26s. for it, upon which the prisoner knocked it down to her.

The witness, Jane Powell, said:

I had not bid for it, nor made any sign. I told the prisoner I had not bid; he said I did. I said I did not and would not pay for it. I said this several times. I went to go out. The prisoner said I had bid for it and must pay before I would be allowed to go out. I was then prevented going out by the man who had said I had bid for it. He stood between me and the door, and said I must pay for it. I wanted to go out and the man prevented me. I then paid 26s. to the prisoner. I paid the money because I was afraid. The piece of cloth was then given to me and I took it away.

In about an hour after she returned and saw the prisoner, and told him she could not keep the cloth as she had not bid for it. He told her he could not give the money back, but if she came the following week he would exchange it.

The next day the place was closed when Peter Powell and his wife went to call there about the cloth; but close by in the street the prisoner and the man who said she had bid, and another man by whom Jane Powell had been invited on the first occasion into the sale-room, were seen together and immediately separate and go different ways.

Peter Powell followed the prisoner, and said to him, "I believe you are the man who forced my wife to pay for a piece of cloth she never bid for." Upon which he replied, "I told her to come to the house on Monday." After some little struggle and endeavour to escape on the part of the prisoner, he was given into custody.

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When charged, he said to the policeman, "She cannot lock me up, she paid me the money."

Mr. Commins, counsel for the prisoner, objected that the facts did not prove a larceny.

I directed the jury, that if the prisoner had the intention to deprive her of her money, and in order to obtain it was guilty of a trick and artifice, by fraudulently asserting that she had made a bid, when she had not, as he well knew, and that he obtained the money by such means, he was guilty of the offence charged.

The jury found that no bid had been made by Jane Powell, which the prisoner knew, and that he obtained the money from her by a trick and artifice mentioned above.

A verdict of guilty was then entered.

I postponed passing sentence, and remanded the prisoner back to gaol, and reserved the question, Whether the facts proved a larceny? and also the question, Whether I rightly directed the jury, for the decision and opinion of the Court of Criminal Appeal. Leofric Temple,

Assistant Barrister to the Recorder of Liverpool.

Commins for the prisoner.—This was not larceny, but a robbery if anything. It is similar to the case of *Rex* v. *Woods*, 2 Leach, 721, where the prosecutrix was threatened by some persons at a mock auction to be sent to Bow-street, and from thence to Newgate, unless she paid for an article they pretended was knocked down to her, although she never bid for it; and they accordingly called in a pretended constable, who told her that, unless she gave him a shilling she must go with him; and thereupon she gave him a shilling, not from apprehension of personal danger, but from fear of being taken to prison, and it was held that this was not sufficient to constitute the offence of robbery, and that it was only a simple duress. So here all that the prosecutrix was told was that she must pay for the cloth before she would be allowed to go out. [Blackburn, J.—Robbery is larceny and something more. Brett, J.—In *Wood's* case the prisoner was indicted for robbery.] Secondly. The property must be obtained by a trick or artifice which the prosecutrix believed. [Blackburn, J.—That would be so upon an indictment for false pretences, but not for larceny.] Thirdly. This was not larceny, because the prosecutrix intended to part with her money. She accepted the piece of cloth, paid her money for it, and took it away. *Rex* v. *Wilson*, 8 C. & P. 111, was like this: there the prisoner pretended to pick up a purse containing, as he said, a gold chain and seals, and induced the prosecutor to buy the chain and seals for 7*l.*, which were worth a few shillings only, and it was held not to be larceny, because the prosecutor intended to part with his money. Lastly, judge misdirected the jury; he should have told them to find whether the woman parted with her money in consequence of the threat or voluntarily.

McConnell, for the prosecution.—This was larceny. The prisoner's intention at the time of obtaining the money is material. Where the prosecutor was decoyed into a public-house, and the play of cutting cards was introduced, and he did not play on his own account, but was prevailed upon to cut the cards for one of the prisoners, and then, under pretence that the prosecutor had cut the cards for himself and had lost, his money was swept off the table and carried away, it was held that it was for the jury to say *quo animo* the money was obtained, and that it would be larceny if there was a preconcerted plan to steal it: (*R* x v. *Homer*, 1 Leach, 270.) In this case the money was not voluntarily parted with, there was no intention to buy the cloth, and the trick and threat both operated on the prosecutrix's mind, and induced her to part with her money. Where the prisoners got the prosecutrix to open her hand and let them have some money, and, having obtained it, they refused to give up a dress they had promised on that condition, it was held to be larceny: (*Reg* v. *Morgan*, Dears C. C. 395.) Money may be obtained in such a way as to amount to larceny, although it may be obtained with force and menaces:

Reg. v. *Walton*, 9 Cox C. C. 268; L. & C. 483.

Kelly, C. B.—I am of opinion that this conviction should be affirmed. It appears that the prisoner pretended to act as an auctioneer, and to sell table cloths and other things by auction, that a piece of cloth was put up for sale by auction, and that a man bid 20s. for it, when another man standing near the prosecutrix said to the prisoner that the prosecutrix had bid 26s. for it, upon which the prisoner knocked it down to the prosecutrix. An altercation then took place, and the prosecutrix said she had not bid for it. The prisoner said she did. She said she did not, and would not pay for it, and then went to go out of the room. The prisoner said she must pay for it before she would be allowed to leave, and stood between her and the door, and prevented her leaving. She then paid 26s. to the prisoner as she said, because she was afraid, and took the piece of cloth away with her. The jury found that she paid the money against her will. The prisoner, in fact, obtained the money by a subterfuge, and also by what amounted to a threat of personal violence, and under these influences the prosecutrix parted with her money against her will. The case falls within the definition of larceny given by Bracton "Furtum est secundum leges contractatio rei alienæ fraudulenta cum animo furandi, invito illo domino cujus res illa fuerit." Mr. East, P. C. 553, defines larceny to be the wrongful or fraudulent taking of another's goods with a felonious intent to convert them to the taker's own use and make them his own property. That definition has been adopted by Parke, B., Eyre, C. J., and other judges. The present case comes within that definition. And I find the following definition given by the Criminal Law Commissioners, who were men of great learning: "The taking and carrying away are felonious where the goods are taken against the will of the owner, either in his absence or in a clandestine manner, or when possession is obtained either by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods, and where the taker intends in any such case fraudulently to deprive the owner of the entire interest in the property against his will": (Roscoe Crim. Ev. 569.) The money was taken in this case against the will of the owner, for it cannot be contended for a moment that she paid with it voluntarily. And it was also obtained by a trick, device, or false expedient, not so much a false pretence as a false expedient of another kind, the prisoner pretending that something had taken place which he knew had not. And he also operated on her fears by threats. It was further argued that the learned deputy recorder had misdirected the jury. It may be that it would have been better if he had directed them to consider whether the money was not obtained by threats, which the prosecutrix might construe into threats of personal violence; but that is not the question reserved for us. For the above reasons I think a larceny was proved, and that the conviction must be affirmed.

Martin, B.—I am of opinion that a larceny was proved, but I think that the facts would have proved a robbery also.

Blackburn, J.—I also think the conviction

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must be affirmed. What we are to see is whether the direction to the jury was right. To constitute larceny there must be the *animus furandi*, and the property must be taken against the will of the person from whom it is taken. The ingredients that act on the will of the party must be to a certain extent the same both in the case of robbery and larceny, and in both the property must be taken against the will of the person. It would be a great scandal if taking money out of a person's pocket were to be larceny, but not to be so if the person was frightened into giving up her money against her will. No point was reserved as to whether or not the money was obtained from the prosecutrix against her will, but the evidence shows a preconcerted intention to take the money from her against her will, and there was abundant evidence of the *animus furandi* in the conduct of the parties.

LUSH, J.—I doubted at first whether there was a sufficient fraudulent taking to constitute larceny, but upon consideration I think there was, and that the money was demanded by the prisoner *animo furandi*, and obtained from her against her will.

BRETT, J.—I also have had doubts whether there was sufficient evidence to support a conviction in this case. If the case had rested on the principle of the money having been obtained by a trick, I should have thought that there was not. The case, if so put, would have failed in this, that if the woman by the trick was induced to part with her money she did so willingly, and in this case with intent that it should be taken away by the prisoner. But, upon consideration, I think that this conviction may be supported on the ground that the woman parted with her money against her will, by reason of unlawful violence used and threatened by the prisoner. I had doubts whether the threat of imprisonment was sufficient; but upon consideration I think that a threat of immediate personal restraint made by a person present, and having power to carry such threat into execution may reasonably be said to cause a person to do what this woman did against her will, and that is sufficient to make the giving up of property such a taking of property by a prisoner as to constitute the crime of larceny.

Conviction affirmed.

Equity Courts.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Thursday, Nov. 18.

Re POTTERIES RAILWAY COMPANY.

Injunction—Railway Companies' Act 1867—*Scheme—Judgment by mortgagee and execution—Costs.*

A mortgagee of a railway company obtained judgment and issued execution with a return of nulla bona. A scheme was arranged and confirmed, the mortgagee dissenting and subsequently levying execution and seizing plant, &c.

Held, that the mortgagee was bound by the scheme, and the sheriff must be restrained from selling and continuing in possession, but that the company must pay the creditor's costs at law up to the issuing execution, and their own, the sheriff's to be paid by the creditor.

Osborne, Q. C., and *Dryden* moved in this matter on behalf of the Potteries Railway Company for an injunction to restrain the Sheriff of Chester from continuing in possession of and selling certain plant and property of the company which he had taken under a writ of *ca. sa.* under these circumstances. A gentleman named Minor was a mortgagee, and obtained a judgment against the company in February 1867, and at once levied execution on such judgment; but there was a return of *nulla bona*. A scheme of arrangement was then entered into under the Railway Companies Act 1867 (30 & 31 Vict. c. 127) with their creditors, which was assented to by the requisite number and confirmed by the Vice-Chancellor in May, and in July Mr. Minor challenged it as not binding upon him, he never having assented to it, and under that scheme the mortgages were exchanged for debenture stock. Matters went on under the scheme, and Mr Minor had recently (in the Long Vacation) caused another execution to issue under his judgment, and the sheriff had seized certain plant and property of the company and was proceeding to sell it. Upon this an application was made *ex parte* to the vacation judge (James, V.C.) for an injunction to restrain the sheriff from continuing in possession and from selling under the suit, and James, V.C. made an order to restrain the sheriff from selling, but not from continuing in possession, and put the company on an undertaking to give notice of motion. Mr. Minor on having this notice served upon him caused a cross notice of motion to be served upon the company for leave to make his judgment available, and the motion for the injunction against the sheriff was now made.

The VICE-CHANCELLOR stopped counsel for the company, and called on those appearing for the judgment-creditor.

Glasse, Q. C., and *C. Locock Webb* for Mr. Minor opposed the motion on the ground that judgment having been obtained and execution issued before the date of the scheme, and Mr. Minor being a judgment-creditor who had not assented to it, the Act of 1867 did not apply to this case. The judgment-creditor, because he happened to be a mortgagee, ought not to be placed in a worse position than a judgment-creditor who was not a mortgagee. It had been held in the case of *The Cambrian Railways*, L. Rep. 3, Ch App. 278, that a scheme did not bind general creditors. He was not now seeking to enforce his claim as mortgagee, but rested solely on his judgment, and he ought not to be prejudiced and his legal right affected except under an express provision of the statute; and there was nothing in the Act of 1867 which could be said to meet his case. Mr. Minor also now moved for leave to make his judgment available.

Railway Companies Act 1817, ss. 4, 10, and 18;
Bowen v. *Brecon Railway Company*, L. Rep. 3 Eq 541;
East and West Junction Railway Companies, L. Rep. 8 Eq. 99.

The VICE-CHANCELLOR.—The question is, whether a person who has obtained judgment, and who holds a mortgage, is anything more than a mortgagee? When he obtained judgment, I do not think that he lost any of his rights as mortgagee. The 10th article of the scheme provides that mortgagees of the company should be bound by the scheme, and, as far as he is a mortgagee, of course he must take the provision made for him by the scheme; the 4th article providing that mortgages shall be exchanged for debenture stock, this creditor has elected to treat himself as a mortgagee, and, so far, properly proceeded to sue out execution on his judgment. The directing the sheriff to enter and levy is, in fact, making his judgment available, and the issuing execution is putting the company to great inconvenience and damage. I am of opinion, that the judgment-creditor was wrong the moment he directed the sheriff to enter and levy, and from that time he must pay the costs. There must be an injunction

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to restrain the sheriff from selling and continuing in possession; and so far as the present question is concerned, I consider that Mr. Minor is bound by the scheme, it having been assented to by the requisite number of mortgagees. But I must put the company on an undertaking to pay the costs of the judgment-creditor at law, up to the time of issuing execution; and I shall give no costs on either side otherwise.

Bedwell, for the sheriff, asked for an order to give up possession, and for his costs.

The VICE-CHANCELLOR.—The company must not pay the sheriff's costs, but bear their own. The sheriff must have his from the person who put him in motion.

Solicitor for the company: *D. Noyes.*

For the creditor: *D. Aston.*

For the sheriff: *Francis* and *Bazalgette.*

Thursday, Dec. 9.

LEE *v.* HALEY.

Injunction—Trade mark—Use of name with reputed addition—Deception of customers—False statement in circular—Title to relief.

L. and Co., coal merchants, established a branch business, and carried it on in Pall Mall as the "Guinea Coal Company." H. was their manager, known personally and by his peculiar handwriting to their customers. He left their service, and set up as "The Pall Mall Guinea Coal Company" in the Strand, and on being remonstrated with added "N.B. No connection with L. and Co." Subsequently H. removed to Pall Mall, with "Pall Mall Guinea Coal Company" on his blind, and numerous instances were in evidence of persons giving orders at his office for that of L. and Co. H. claimed the right to use the name "Pall Mall Guinea Coal Company."

On motion to restrain the use of the name "Pall Mall Guinea Coal Company," injunction granted.

G. O. Morgan, Q.C., and *Cadman Jones* moved in this case to restrain the defendant from using the name "Pall Mall Guinea Coal Company," and from exhibiting and using any other name being a colourable imitation of the name "Guinea Coal Company," or using it so as to deceive the public, and lead them to believe that the business of the plaintiffs was carried on by the defendant. It appeared that the plaintiffs had carried on the business of coal merchants under the firm of "Lee and Jerdein" for some years, and in 1858 they commenced a branch business in Catherine-street, in the Strand, as "The Guinea Coal Company" for the supply of Wallsend coals at the uniform rate of one guinea per ton throughout the year. In 1863 they removed to 22, Pall-mall, and were known, as they alleged, to their customers as the "Pall Mall Guinea Coal Company," although they only used the title of "Guinea Coal Company," and letters addressed "The Guinea Coal Company, London," found their way to their office. The defendant was their manager in Pall-mall, and was well known to their customers, not only by name and person, but from his peculiar handwriting. On the 18th January 1869, the defendant voluntarily left the plaintiffs' service, writing to say that he should leave, and giving no other notice. In March the plaintiffs saw an advertisement of the defendant's, who had taken an office at 11, Beaufort-buildings, Strand, calling himself "The Pall Mall Guinea Coal Company." On remonstrating with him, he added "N.B. That his company had no connection with the Guinea Coal Company in Pall-mall, which was carried on by Messrs. Lee and Jerdein." Upon this the plaintiffs were satisfied, and matters went on until the 30th of August, when the N.B. was discontinued in the circulars, and defendant removed to No. 46, Pall-mall, twenty-four doors from the plaintiffs' office, and on a wire blind, in gilt letters, were the words, "Pall Mall Guinea Coal Company." It was in evidence not only that the man who made this blind, brought it by mistake first to the plaintiffs' office, and insisted on leaving it, but that in twenty-four other instances customers of the plaintiffs, persons of rank and others, had been actually deceived; and having gone to the defendants' instead of the plaintiffs' office, and seen him, and remarked that he had removed, he simply answered "Yes," without stating that he had left the plaintiffs' service. *Glenny* v. *Smith*, 2 Dr. & Sm. 476, 13 L. T. Rep. N. S. 11, was a case where the defendant had used the names of his former employers, in prominent letters so as to induce persons to believe that they had removed to the place where he carried on business, and the court interfered. The defendant had made a long affidavit in which he charged the plaintiffs with supplying bad coal and short weight, stating that he had constantly remonstrated with them and referred to the complaints of customers, and that it caused him to leave. He also disclaimed any wrong intention. Upon these grounds it was contended that the case came within the well-known doctrine of this court, that wherever advantage was taken unfairly of the name of another person, or of a particular firm or business, so as to deceive the public and cause them to mistake one for the other, this court would interfere. The object here was palpable; and it had eminently succeeded, and the defendant had added to his offence by setting up a contention of the basest kind, charging the plaintiffs with dishonesty.

Glasse, Q.C., and *Nalder*, for the defendant, contended that the plaintiffs being perfectly aware of what had occurred, and of the defendant's intention in February, acquiesced from March last until they filed the bill in November, without any notice. The defendant had as much right to use the title as the plaintiffs, and if he had been asked would have changed it. Advertisements of the plaintiffs' and defendant's companies had appeared in the public prints side by side. There were many other companies with a like, and two with the same simple title, "The Guinea Coal Company." The defendant's affidavit went to this, that the plaintiffs' business had fallen off, which led to his leaving; he had remonstrated with the plaintiffs as to the complaints of customers. The word "Pall-mall" was objected to, but there was no trade mark in that. The plaintiffs did not use the name "Pall Mall Guinea Coal Company," but the defendant did. The reason why the advertisement in question did not contain the disclaimer was that the editor refused to insert it. The colour and appearance of the circulars were different. The court could not restrain going into the same street. Assuming a right to the name as a trade mark, any misrepresentation in selling a thing which was not what it was represented to be disentitled a party to relief. The plaintiffs purported to sell Wallsend coal, and did not do so, but Derbyshire, and short weight. [The VICE-CHANCELLOR.—That charge is totally irrelevant.] The misrepresentation disentitled the plaintiffs to relief, because it was done systematically, and when complained of the order was not to supply that customer again. The defendant had taken every means to let the public know that his was a separate business, continuing to this time. The defendant had offered 1000*l.* for the purchase of the plaintiffs' office, and had, moreover, when he left given them notice that he intended to set up in the same trade.

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Croft v. *Day*, 7 Beav., 84.
Marshall v. *Ross*, W. N. 1869, p. 217.
Kerr on Injunctions, 481.
Morgan v. *M'Adam*, 15 L. T. Rep. N. S. 340.
Perry v. *Truefitt*, 6 Beav., 16.
Piddy v. *Howe*, 2 Sim., 477.

Chitty, as *amicus curiæ*.—Vice-Chancellor James yesterday restrained a man from using his own name.

Shapter, Q.C.—Because, having sold his business, which bore his name, he set up with the same name close by.

There were affidavits of the plaintiffs in reply, denying the charges made by the defendant.

G. O. Morgan Q. C. replied on the question of delay, but was stopped by the court.

The VICE-CHANCELLOR.—The plaintiffs have been partners for some years as coal merchants, and in a branch business as "The Guinea Coal Company," a title adopted to designate the nature of their trade, for supplying the public with good coal, as they say, at an uniform price. The defendant from 1860 till January, 1869, was their manager, and as such became acquainted with the secrets of their trade and the names of their customers, and on the 18th of that month, without assigning any reason, gave notice that he should quit their service on the 20th, and he did so. So far there is nothing to complain of. He immediately set up business in Beaufort Buildings, Strand, and for some reason, of which I have vainly asked an explanation, called his business "The Pall-mall Guinea Coal Company." In truth it was, because the plaintiffs being successful he desired to supplant them by using the name designating their branch business, and availed himself of it to take the chance of getting some of their regular customers, a most dishonest purpose. Aware also that he might not be successful in Beaufort Buildings, he removed to Pall-mall, and the plaintiffs being "The Guinea Coal Company," called himself "The Pall-mall Guinea Coal Company," and the plaintiffs being known to their customers as "The Guinea Coal Company," and to carry on business in Pall-mall, they, as the most intelligent portion of the public, who would not look very minutely into these matters, were most likely to be deceived. The defendant thought it a great stroke of business to get into Pall-mall, and the only fair part of his conduct was that he offered the plaintiffs 1000*l.* for their office, which was, however refused, for being well placed, and carrying on a good business, it was an insignificant sum. Finding he could not purchase the business, he adopted the plan of setting up close by, and although in his original circular he added the "N. B." that does not do away with the improper object. I am satisfied that he did not omit to send a circular to all the plaintiffs' customers, and also solicited them personally. The mistake as to the blind shows the consequence of what he did, and there are numerous instances proved of the same kind. Indeed, with two firms so placed, they must occur. Whether it be the case of a shop or hotel with a name so similar, mistakes must arise. With so many other streets where the rents are so much lower, why did he choose Pall Mall, paying between £200 and £300 a year? I cannot hesitate in coming to the conclusion that one object was because his former employers were there already, who, although they did not call themselves "The Pall Mall Guinea Coal Company," the fact of his doing so created great confusion, and a person walking down St. James's-street, and seeing "The Pall Mall Guinea Coal Company," would search no further, not probably knowing the number; and twenty-five instances are given of such deceptions having taken place. Thus the orders were given, and the plaintiffs deprived of their business. When all other streets were open to him, was this a fair and honest mode of carrying on trade? It is contended that there was no property in the name "Pall Mall," and that the plaintiffs had not used it, and therefore it follows that the defendant is at liberty to adopt it, and that I cannot interfere. Is that the true doctrine? Put the case of a well-established shop or inn, or of a publication; directly the name is established so as to constitute a reputation, no person can adopt the same name (which, although not a copyright, is in the nature of a trade mark), because by doing so, he leads the public to believe that they are dealing with the party who has established the name, when, in truth, they are dealing with another person. Has this defendant done so? This doctrine is not a mere technical rule, but founded on this principle—that persons must not conduct business in a manner calculated to deceive, and avail themselves of the property of another person. In *Croft* v. *Day* (*sup.*), in 1843, Lord Langdale very succinctly and distinctly laid down the doctrine of this court. No doubt that was a case of pure trade mark, but it embraces the general principle. He says: "My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the names Day and Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself to which he is not in fair, honest dealing entitled," and he granted the injunction. The same doctrine was recognised by the same judge in *Perry* v. *Truefitt* (*sup.*); I had the same question as to the "property" in a name in *Bradbury* v. *Beeton* (*ante* p. 323) with regard to *Punch* and *Punch and Judy*, and it was also considered in *Kelly* v. *Hutton*, 20 L. T. Rep. N. S. 201; L. Rep. 3 Ch. App. p. 703, where the present Lord Chancellor held that the proprietor of a newspaper had a right to prevent any other person from adopting its name. It does not depend on any particular act; the court must look at the whole case, and if it sees that the party has done acts leading to an inevitable consequence it will interfere. The case cannot be explained otherwise than on an intention by the defendant to avail himself of the plaintiffs' business, selecting a name which implies that he is selling the coal of the plaintiffs, when he is selling his own, and has gone to Pall-mall in order that their customers may, by the confusion of the two offices so near together, and so alike in title, be deceived. The confusion, and the deception are proved to have arisen. Several defences have been set up; he says he did not intend to deceive; but, *Millington* v. *Fox*, 3 M. & Cr. 338, and *Clement* v. *Maddick*, 1 Giff. 98, decide that to be immaterial if the effect is deception and injury. I disbelieve that assertion, and also the charges he has brought against the plaintiffs of bad coals and short weight. Such an affidavit ought never to have been allowed to be made, or, if made, put upon the file. It is a statement totally inconsistent with his remaining in the employ of persons he so stigmatizes, as an honest man. As to the delay, no doubt in many cases it is fatal, where the case is otherwise proved; but the circumstances must be considered, and there certainly being no delay chargeable up to the end of August from that time, the plaintiffs not being eager to rush into Chancery, the defendant rather got the benefit of their forbearance, and therefore the injunction must be granted.

Solicitors for the plaintiffs, *Jones* and *Starling*.
Solicitor for the defendant, *H. B. Clarke*.

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Tuesday, Dec. 21.

COX v. LAND AND WATER COMPANY (LIMITED).

Newspaper—Copyright — Infringement — Interlocutory injunction—Costs.

Newspapers, although not registered at Stationers' Hall in pursuance of the provisions of the Copyright Acts, have a copyright in their contents.

A newspaper is not "a book" within the 2nd section, nor is it a "periodical work," or a work published in parts, within the 24th section of the Copyright Act.

The defendants had copied from the plaintiff's journal, the Field, *a "List of Hounds" obtained by the plaintiff, and compiled at considerable cost. The defendants had copied even the literal errors of the printer:*

Held, that inasmuch as the information was procurable by the defendants, who might, if they pleased, compile a similar list, the Court would not grant an interlocutory injunction, but leave the plaintiff to his remedy in damages.

But in such case the bill for an injunction dismissed without costs.

This was a motion on behalf of Mr. Irwin E. B. Cox, proprietor of the *Field* newspaper, for an injunction to restrain the defendants from printing, publishing, selling, or otherwise disposing of any copies of the *Land and Water* newspaper containing the list called "The Hunting Field of 1870," or any part of such list, copied or colourably altered from the "List of Hounds" contained in the *Field* newspaper. The list contained particulars relating to the various packs of hounds in the United Kingdom, the name of each hunt, the nearest town convenient for strangers, the number of couples in the pack, the hunting days, the names of the masters, huntsmen, and whips, the address of the kennel, &c. The plaintiff alleged that this list, which appeared in the *Field* of Nov. 6, containing some slight errors, abbreviations, annotations, and omissions, was copied almost exactly in respect of these things in the *Land and Water* journal of Nov. 13.

Glasse, Q. C. and *Brooksbank*, for the plaintiff; *Pearson*, Q. C. and *Loudon*, for the defendants.

Glasse, in moving, said he should show as distinct and deliberate a piracy as was ever brought to the notice of a court.

Pearson.—Allow me to present an objection to this motion. I say, first of all, it never was copied as alleged; and secondly, if it was, that the *Field* newspaper, not being registered at Stationers' Hall, the plaintiff could not sue.

Glasse would satisfy his Honour that the *Field* was not a document requiring registration, and for that reason it was not necessary. He should prove that it was not the custom to register a newspaper at Stationers' Hall; and there was no means of registering a newspaper there for the purposes of copyright. The thing complained of was that the "List of Hounds," a table of very great interest, was printed in the *Field* newspaper of Nov. 6, and on Nov. 13 the defendants published an exact reprint of it in their paper as "The Hunting Field of 1870." They had copied it in the most servile manner, every little error and abbreviation being used, which clearly showed that they had made it a matter of simple copying. The learned counsel then read the affidavits of Mr. Cox and two other gentlemen. He said that there was no necessity for registering a newspaper, the *Times*, for instance, not being registered. [The VICE-CHANCELLOR.—Would it be lawful for any newspaper to copy the leading articles of the *Times*?] I should think not.

Pearson.—All the country papers do it, and the London evening papers also.

Glasse.—But they always put at the end where it comes from.

Pearson.—The *Times* newspaper never made an application of this kind.

The VICE-CHANCELLOR.—They are supposed to be quoted as a compliment.

Pearson.—We went through the same labour that they did.

Glasse.—It is very remarkable if that be true, for in every instance of error in the *Field*, precisely the same error has been reprinted in the defendants' journal. The plaintiff charges that the list contained in defendants' newspaper was not the result of original information obtained by the defendants' company, or of independent inquiry; and in almost every instance where errors were the result of mere misprint or omission, and abbreviations were properly used for the convenience of the columns of the *Field* it was absolutely reprinted and copied into the *Land and Water* newspaper. For instance, out of seventeen cases where replies to the *Field* circular contained alterations in the names of hunts, the alterations were made in ten cases, and in the other seven it was not thought necessary to make any change; and in all these instances the exact reprint appeared in *Land and Water*. Again, the names of towns convenient to hunts were inserted, from information partly supplied at the *Field* office, and partly by masters of the hunts; and in almost every instance they were printed in *Land and Water*, and where such convenient town was by oversight omitted in the *Field*, no such town is mentioned in *Land and Water*. In the *Field* of Nov. 6 there were finger points [☞] to indicate that no answers had been received from those masters of hounds; but after the *Field* had been printed nearly twenty replies were received, rendering alterations necessary; yet in the subsequent week *Land and Water* published them without any such alterations. In two instances where the wrong symbols of annotation were printed in the *Field* the same two errors appeared in *Land and Water*. Where "Marquis" was printed in the *Field* "Marqs.," on account of the narrower column, the name was printed with the same abbreviation in *Land and Water*, although, from the greater breadth of column, there was ample space to have printed "Marquis" in full; and no similar abbreviation is printed elsewhere in the *Land and Water* list. In the same manner, the name of "Macdonld," the master of the Westmeath Foxhounds, was printed without the "a," and *Land and Water* had printed it also without the "a," though in their case there was ample space to have inserted it. [The VICE-CHAMCELLOR.—These are very curious omissions.] There are others just as curious. Captain Trench Nugent's name appeared in the *Field* as Capt. "T." Trench Nugent, because the printer had understood a "T" placed above Trench—to prevent its being printed "French"—as indicating that he was to insert another "T" before Trench, which he accordingly did, and *Land and Water* printed it in exactly the same way. Under the head of Beagles the Cockermouth pack are described as belonging to Col. Green Thompson, M.P., whereas since the last election he has ceased to be a member of Parliament; and that same error is followed by *Land and Water*. There was but one pack of staghounds omitted from the *Field* list, viz., the Surrey, and, in consequence of being without information as to several packs of harriers, they were altogether omitted from the *Field*, and not one of them was

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inserted in *Land and Water*. [The VICE-CHANCELLOR. — These are wonderful coincidences.] It is miraculous that the printer's devil, unless he were a devil indeed, could have committed the same mistakes. One does not understand it. And to say that it is the result of information obtained honestly and fairly from the same sources is to say that which I am utterly unable to credit. But I am told that your Honour is not to hear this motion because the *Field* newspaper is not registered.

Pearson.—I say there is no copyright in a newspaper. [The VICE-CHANCELLOR.—Now, for instance, I saw in this morning's *Times* a review extending over two or three columns of Miss Mitford's "Lytham Letters." Can anybody take that out and re-publish it?] Certainly.

Glasse.—I say, no. [The VICE-CHANCELLOR.—Practically there are a great many difficulties in the way of my disposing of this case, because, supposing I grant the injunction against the defendants publishing the list, and they get a perfectly accurate list, what would occur?] If they get it at their own expense, as in the Directory case, they can do the same thing; but they must not avail themselves of my exertions. Supposing next year they choose to go through the same labour as the *Field*, they can do it; but if the paper cannot afford the expense of doing it by reason of its circulation, that is no reason why they should take it from me. The learned counsel then quoted the second section of the Copyright Act, which explained that the term "book" meant "every volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." The *Field* newspaper did not answer any of those descriptions. Looking at the 11th section of the Copyright Act, it said that "a book of registration shall be kept wherein may be registered"—and here he might say that registering did not affect the copyright, but it only gave the right to sue upon it—"any book," and so on. There there was only the word "book." The 24th section, on which his friend relied, enacted "that no proprietor of copyright in any book shall bring an action at law or equity unless he shall, before commencing such action, have caused an entry to be made." [The VICE-CHANCELLOR.—The word "newspaper" is never mentioned in the Copyright Act.] No. If you can bring "newspaper" into the definition of the word "book," then the Act will apply to prevent me suing until I have registered. [The VICE-CHANCELLOR.—If Mr. Pearson is right in his objection that there is no copyright in a newspaper unless it is registered, then it follows that there is no copyright in any article that is inserted in such newspaper. If that is so, you may take a copy of the whole of the contents of the *Times* of to-day and reprint it, calling it by some other name; and there would be nothing to prevent your doing so if there is no copyright.] Certainly it is a startling proposition. [The VICE-CHANCELLOR.—Has it never been determined?]

Pearson.—No; because no newspaper yet has ever filed such a bill as this. [The VICE-CHANCELLOR.—I am not speaking of this. I am speaking of the abstract principle, whether there is an absolute right to reprint any article from a newspaper without the proprietor's consent.]

Glasse.—If this objection holds, it is the undoubted right of any person so to do. I do not like to retort "that no other newspaper has thought it worth its while to do so;" but I do say that it was answered by this, that no other newspaper than *Land and Water* thought it consistent with its position and character to publish such a deliberate and plain piracy. But we are not to regard the rights and interests of the two papers at present; for the simple and plain question is, whether it is within the Copyright Act or not. [The VICE-CHANCELLOR.—Mr. Pearson's objection raises that. He says there is no copyright in a newspaper, or anything in a newspaper. Then if there is no copyright, it may be pirated.] If your Honour thinks there is not anything in it, it would be idle for me to go into the question generally. [The VICE-CHANCELLOR.—I think I had better hear Mr. Pearson upon that.]

The VICE-CHANCELLOR.—I am now upon the question whether you can maintain a bill—whether, in fact, you may have copyright in any article published in a newspaper; and therefore you may assume that the piracy is established beyond all doubt.

Brooksbank reviewed the cases where the copyright question had arisen in connection with directories, Lillywhite's Cricketers' List, &c.; but there was no case to be found where the copyright in a newspaper had ever been before the courts of law or equity. [The VICE-CHANCELLOR.—The point is whether the proprietor of a newspaper has sufficient property without registration in an article, or anything written for him at his expense, to prevent another person using it.]

Pearson.—Without registration. We are registered under the Act. [The VICE-CHANCELLOR: If you take the register of the *Field* newspaper, it gives no information of anything in particular. Suppose the *Field* had been registered fifteen years ago, what information would that give about this particular article?] Your Honour should know that this is not the first time we have printed a list of this kind. I wish to go into the merits. [The VICE-CHANCELLOR: You are upon the preliminary objection you have taken; and for this purpose you must assume that the merits are against you, and you must take objection that they cannot sue because there is no copyright in the article whatever.] I say, no copyright; and secondly, if there was a copyright, they cannot sue until it is registered. There being no copyright there could be no right to sue in this court, except such right was given by the Copyright Act; the question was whether or not the plaintiff had shown on his bill that he had any right to sue for what he called a piracy of his copyright. After citing the cases, he came to the construction to be put upon the word newspaper; and he argued that it came within the Copyright Act, the words in the interpretation clause, "sheets of letterpress," being in his opinion the best description that could be found for a newspaper. That being so, there could be no right of action by the present plaintiff against the defendants, the plaintiff not having registered in compliance with the Act of Parliament. [The VICE-CHANCELLOR: The article in question here is not "separately published" as "sheets of letter-press" are required to be.] You cannot have a copyright in an article unless you have a copyright in the paper in which it is published. [The VICE-CHANCELLOR.—A newspaper can never have any copyright. That is your proposition.] I venture to say that is thoroughly good sense and good law. [The VICE-CHANCELLOR.—If it be so, it is certainly inconsistent with the rights of property.] I think not. [The VICE-CHANCELLOR.—Suppose the *Field* were to engage Anthony Trollope to write a novel occupying two columns every week, according to your argument neither the *Field* nor Anthony Trollope would have any remedy. To say that is the law, is utterly inconsistent with the rights of property.] I venture to say that Anthony Trollope, if he thought fit, might register the *Field* and save his article. We have registered at Stationers' Hall, and we have registered it purposely to claim a copyright; but if newspapers have a copy-

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right at all, then it must be a copyright under the meaning of the word "book" in the 24th section then the proprietor of a newspaper, to obtain copy; right, must register that "book." On the question, whether the Legislature intended a newspaper to have a copyright, he quoted the preamble of the Act, which set out, "Whereas it is expedient to amend the law of copyright, and to encourage the production of literary works of lasting benefit to the world." He contended that, according to this, it was never intended to have copyright in a newspaper; and if it was, it must include the whole of the paper; but when they considered how ephemeral were the contents of a newspaper, it would be clear that there could be no copyright.

Glasse, in reply, was stopped.

The Vice-Chancellor—I do not think I need trouble you further. There is a preliminary objection taken in this case, which raises a point of vast importance to the proprietors of newspapers, and I think I may say to the public at large. It is so important, that it seems almost incredible, that the point should never have arisen—viz, whether the proprietor of a newspaper has or has not such a property in articles published in that newspaper and paid for by the proprietor, as entitles him to prohibit the publication by any other newspaper in any other form whatever. The point arises thus: This is a bill filed by Mr. Irwin Cox, who is the proprietor of a well-known weekly newspaper called the *Field*. He files the bill against the defendants, the *Land and Water* Journal Company, charging that they have improperly published in their paper an article which was composed for his. The merits of that I do not now enter into, because for the purposes of the argument it has been and must be assumed that the article complained of was a copy of the article of the plaintiff; and upon that ground the defendant, by Mr. Pearson, takes the objection that there can be no copyright in any article published in this newspaper, because it is not registered under the Act 5 & 6 Vict. c. 45, commonly called the Copyright Act. Now, upon principle, one would say that if a proprietor of a newspaper employs a correspondent abroad (which we know is done to a great extent in this country by the proprietors of newspapers published here), and that correspondent being employed, sent abroad at great expense—paid very amply for his labours—makes communications to a newspaper which are highly appreciated by the public, and the paper is sought for the purpose of reading those communications as soon as published—Dr. Russell's communications, for instance, during the Crimean war, communications which have been obtained by the *Times* newspaper at vast expense—if it be the law that the publisher of another newspaper published in the evening of the same day may take the *Times* newspaper and publish them *in extenso*, with or without acknowledgment, and if the proprietor of the *Times* complains, he may say, "But they are common property; true it is, I admit, that you have paid for them; I admit you have given a great deal of money for them, and they are so very valuable that I desire to turn them to account by publishing them in my newspaper; but you have no property in them, although you pay for them; you cannot sue for your newspaper as a book—for then the copyright must be registered—and as you have not registered the book nothing in the newspaper is protected:" if that is the law, it is a monstrous state of law, repugnant to common sense and common honesty, because that there is a property in those articles there can be no shadow of doubt whatever. Still, however clear the right of property may be, if the case falls within the Act of Parliament, I must follow the same course as in the Brighton Directory case (*Kelly* v. *Morris*, L. Rep 1 Eq. 697; 14 L. T. Rep. N. S. 222), where, that being a book, and clearly being admitted within the Copyright Act, it had been registered at Stationers' Hall, but, instead, according to the requisition of the Act, of citing the day of publication, the month only was entered; and I considered, as other judges had done before, that the object of registration was to ascertain at what time the publication did take place, in order that the public might know when the copyright expired, and when they would be at liberty to publish it in a separate form; therefore, though everything else was complied with except the day of the month, I held that omission was fatal, and the bill was dismissed with costs. So in this case, however clearly I am of opinion that this is a property that ought to be protected, if a newspaper is a book within the 2nd section of the Copyright Act, and it is admitted that the *Field* was not registered, that would be equally fatal to the plaintiff's suit. Now I have put the case of letters from correspondents abroad. With foreign papers, we all know, it is the practice to publish novels; and in some English newspapers it is also done. Supposing a newspaper proprietor were to engage the first novelist of the day to write for him a novel to be published in his newspaper, part every day, and pay him highly: is this proprietor of a newspaper, who had paid highly, to lose all property because the paper was not rgistered? What information would it give if it were registered? Would the registration of a paper called the *Field*, registered twenty years ago, give information as to where the copyright would commence and end? Not the slightest; and therefore it is not within the policy of the Act; and I am of opinion that it is not within the words of the Act. Now, the question depends first upon the second section, What is a book? because every book within the 24th section must be registered. We find that "book" under the 2nd section "shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, or dramatic piece," and so forth. Now, certainly "newspaper" does not fall within any one of those descriptions; and if it was intended that this Act should be applied to newspapers, it would have been inserted, as the word "newspaper" is well understood; and the word "newspaper" not being inserted, I must take it as advisedly omitted because it was not the intention of the Legislature that newspapers should be included within the Act; for if it had been intended to include them, what would have been more simple than to introduce the word? Then comes the section which prescribes what is to be done with regard to periodical publications. Sect. 19 provides: "That the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall under this Act, on entering in the said book of registry the title of such encyclopædia, review, periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first number or volume first published after the passing of this Act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, when such publisher shall not be the proprietor thereof." That, again, does not mention newspapers; and I must come to the same conclusion, a newspaper not being mentioned because it was not intended to be included. Well, then, can a person have any copy-

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right or property in that which is not registered under the Act? This depends, I apprehend, upon the construction of the 18th section, which enacts that when any publisher or other person shall have projected, conducted, and carried on any enclyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, or shall have employed any person to compose the same, or any volumes, parts, essays, articles, or portions thereof for publication, in or as part of the same, and such works, &c. shall be composed on the terms that the copyright shall belong to such proprietor, and be paid for by him, then the proprietor of such work shall be entitled to copyright (except that after the term of twenty-eight years the copyright shall revert to the author), and shall be entitled to sue upon registering the same at Stationers' Hall. Now must every right in this be registered under the Act? The present Lord Chancellor decided that in *Mayhew* v. *Maxwell*, 1 J. & H. 312; 3 L. T. Rep. N. S. 847. Mr. Mayhew wrote a certain article or series of articles in a periodical called the *Welcome Guest;* and the proprietor proceeded to publish them in a separate form. The plaintiff filed his bill to restrain him from publishing them in any other form than in that for which he wrote the work. The same point arose in *Strahan* v. *Graham*, 16 L. T. Rep. N. S. 87; on appeal, 17 *Id.* 457, where Mr. Graham had sold the right of publishing photographs of the Holy Land in a publication called *Good Words*, where Dr. M'Leod was publishing a work with regard to the Holy Land, and the proprietors of *Good Words* had given him permission to use the photographs; but Mr. Graham contended that Mr. Strahan had no right to give it to Dr. M'Leod. I decided in that case, and my decision was confirmed by Lord Chancellor Chelmsford, that there was no right to publish in a separate form that which he had authority to use only in *Good Words*, and that Mr. Graham had a good right of action. But these cases are distinct authorities to show that there is a property in a publication, although it is not registered. That is the ground upon which Vice-Chancellor Wood commented upon the 24th section. He says, "The plaintiff has not registered under the 24th section." Now Mr. Glasse has referred me to the case of *Sweet* v. *Benning*, and the case was between Mr. Sweet, the proprietor of a well-known publication in the law called the *Jurist*, and Mr. Benning, a well-known bookseller.

Glasse.—I think he wanted to publish reports in Sweet's Leading Cases.

The VICE-CHANCELLOR.—Sweet brings an action against Benning for things appearing in a separate publication. This was the subject of the action. I suppose the *Jurist* had been published before this Act of the 5 & 6 Vict., and therefore it was not registered at all; and therefore the question whether these reports published in the *Jurist* were subject to the provisions of the Act did not arise. Now, in deciding that case, Jervis, C. J. said: "I think that, under the circumstances stated, there is an implied condition, understanding, or arrangement between the proprietor of the *Jurist* and the gentlemen who furnished him with reports, that the former should acquire a copyright for the articles so written." Now, therefore, it does seem to me, on solid principles of justice, that a newspaper, not being within the provisions of this Act, does not fall within the provisions of any one of the sections referred to, and I must infer that the term "newspaper" being the best possible and only description of such a publication as that now before me, the *Field* newspaper—and since, if it had been the intention of the Legislature to apply this Act to newspapers, it was absolutely impossible that the word could have missed insertion in some of the sections, the circumstance of no registration throws no difficulty in the way of the plaintiff maintaining his right in law or equity; and I am further of opinion that upon the most solid principles of justice (though it is seldom worth the while of proprietors of newspapers to assert the copyright in a newspaper), my opinion is most decided, and I desire it to be so understood, and in order that there may be no mistaking my opinion, I say—that, whether it be the letters of a correspondent abroad, or the publication of a tale, or a treatise, or the review of a book, which the proprietor of a newspaper thinks proper to treat, I will not say as copyright, but as property (a property which the proprietor of a newspaper has in every article in the newspaper, and every line for which he pays), under the 18th section, or by the general rules of property—he acquires such a property in that article as entitles him, if he thinks it worth while, to prohibit other persons from publishing the same thing in another newspaper or in any other form. Therefore I am of opinion that the preliminary objection of the defendants must be overruled.

Glasse.—I would allow it to stand over if the defendants would undertake not to print the list in a separate form.

Pearson said his clients desired to state that they intended to publish the "Hunting List for 1870" in a separate form.

Glasse said he was instructed to say that this was not a small matter to the plaintiff, who published the list in the *Rural Almanac*. He asked the court to restrain the defendants from reprinting the article in question.

The VICE-CHANCELLOR.—I think it is much more a question for damages than an injunction. I think the better plan would be if you, Mr. Glasse, assume that you have established your case, and that you have, at considerable expense and labour obtained this information; and that, from the circumstance of errors being copied in such a manner that they could not have obtained their information independent of you, I must come to the conclusion that they have used a copy; still you must show me that it is a case for the interference of the court by injunction. I am assuming all that to be proved.

Glasse.—*Kelly* v. *Morris*, the Post-office Directory case. [The VICE-CHANCELLOR.—This is a thing that can be correct only for a short time, because, if the masters don't change, the hunts are given up; and certainly whips are continually changing.] I don't think many changes take place during the hunting season, after November; but there were masters, whips, huntsmen, hounds, and other things in the list not so much subject to change. [The VICE-CHANCELLOR.—I don't know how you are to keep 300 or 400 masters of hounds without change.] There are not 300 or 400; but it is a rare thing for the master of hounds to die. He cited the cases of *Kelly* v. *Morris*, L. Rep. 1 Eq. 697; 14 L. T. Rep. N. S. 222; and *Morris* v. *Ashbee*, 19 L. T. Rep. N. S. 550, to show that a person, to entitle himself to information of this kind, must work out the information for himself. [The VICE-CHANCELLOR said there was not the shadow of a doubt about it; but he looked upon this list as a mere ephemeral publication, not calling for the interference of the Court of Chancery.] But it is in the *Rural Almanac*, which is registered. He should assume, as his Honour had assumed, that, as they had not disproved the piracy, the informa-

tion had been taken from the *Field.* Now his Honour would hardly think it fair and legitimate competition in trade that this list should be taken wholly by a rival newspaper, intended to circulate amongst the same classes of readers, and for the purpose of taking credit to themselves for the information which they knew to be so valuable, so highly appreciated, and so useful amongst sportsmen in every county in the kingdom. His Honour would hardly think it fair that they were to be at liberty to take that information, which had been acquired at infinite labour and very great expense, and from which they expected to derive, if not interfered with, a very large profit—far more profit than that usually obtained from what is called a "book." A book, where an edition of 500 is published, his Honour would have no difficulty in restraining, but the circulation of this is from 15,000 to 20,000, and was much more important than any book published; and, therefore, he asked for an injunction. [The VICE-CHANCELLOR said, supposing he granted the injunction, the defendants could send out their circulars and get all the information they wanted; so that Mr. Glasse's client would be no worse off than without any injunction.] Your Honour must have great faith in the business habits of masters of hounds to suppose that they would at once write to a sporting newspaper. The court is not to consider the difficulties of carrying out its order; it is simply to interfere when sufficient cause is shown, which your Honour has allowed me to assume here. The value of the *Rural Almanac* is worth half a dozen of the volumes which the court would interfere upon. It is sold at every railway station, and is taken in by every sportsman; and, instead of its circulation being reckoned by hundreds, it is counted by thousands.

The VICE-CHANCELLOR.—This is an application for an injunction by the proprietors of the *Field* newspaper to restrain the proprietors of another paper, called *Land and Water*, from publishing a certain list which is called "The Hunting Field of 1870." The list in question contains a list of all the staghounds—all the hunts, that is, staghounds, foxhounds, and harriers—in the United Kingdom. It contains the names of hunts, the number of couples of which each hunt consists, the names of masters, the names of huntsmen, the names of whips, places of kennels, the nearest towns, and the hunt days. Now with regard to the hunting days—I believe I am right in saying that in every newspaper (certainly the *Times* newspaper of every Saturday) there will be found a list of every hunt in the kingdom, with the days and places of their meeting. The names of every hunt in the kingdom are given in the *Times* newspaper; and it is a matter of public notoriety that many persons can draw up the list of hunts. Then with regard to the master's name, amongst sporting men that also is notorious; and I believe there are plenty of persons—and I know some myself—who would sit down and write the name of every one in the kingdom. The name of the huntsman is pretty nearly as well known; but the whips, being numerous, and obscure persons, they would not be so well known, though even they are pretty well known too. It is admitted on both sides that the mode of obtaining this information is by issuing a circular, as is done by the *Court Guide* and other publications, and every gentleman who now hears me and occupies a house has lately received a circular containing the name, if they have occupied the house for some time, or if a new occupier, asking him to give the names and it is filled up in a form. And all that is required here is that they issue a circular, requesting the master of the hunt, the name of the hunt, the towns or stations convenient to visitors, the number of couples, the whips, and the hunting days. The case made by the plaintiff is that they have obtained this information. I suppose it may be assumed that, theirs being the old publication—and I believe it is a favourite one in the sporting world—the *Field*, having that sort of influence which arises from the fact of being a leading favourite, readily obtains this information that a newer publication would have difficulty in obtaining, from the disinclination to answer them rather than the old publication. Therefore, they say they have got the information accurately, while the defendants, without putting themselves to any trouble, make up their list from the plaintiff's, and they have taken the plaintiff's list and copied it completely, even down to the minutest errors; and certainly, as far as I think at present, it seems in the highest degree probable, and I thoroughly believe, that an unfair use has been made of the plaintiff's list to that extent. That they have done so, take for one instance Capt. T. Trench Nugent in the defendants' paper, the "T" having been inserted in the plaintiff's list in the manner described in the affidavit. It is almost impossible that the same error should have occurred in precisely the same way to the defendants; and, therefore, I can only account for the defendants calling Capt. Trench Nugent "Capt. T. Trench Nugent" by the fact of their having copied it from the plaintiff's list. So there are omissions from the plaintiff's list, and there are the same omissions in the defendants' list; so there are other similar omissions, as the word "Marquis" not being printed in full, and various things which lead me to the conclusion that the defendants, having experienced some difficulty in getting the information, actually copied the plaintiff's list; and for the purpose of the present decision I assume that to be so. I also assume the law to be perfectly clear and settled, as laid down by the present Lord Chancellor in *Kelly* v. *Morris;* as also by that other case of *Morris* v. *Ashbee.* I think in this case of getting the names of masters of hunts, the numbers of couples, the huntsmen and whips, and so forth, it is information open to all those who seek to obtain it; but it is information they must get at their own expense as the result of their own labour, and they are not to be entitled to the labours undergone by others. And this is the case which falls within the principle of *Kelly* v. *Morris.* But in this case, as in many others, the question arises—Is it a case for the interference of the Court of Chancery at all? and if it is a case for interference, is it a case for interference on an interlocutory application? Now I do not think it is a case to decide on an interlocutory application, and my reason is this. This list must be corrected from week to week; it would not do to go on publishing the list from the 1st Nov. until April, or the end of the hunting season. Changes must take place; and masters don't all live—though Mr. Glasse says they never die; they are subject to accidents, and family convenience, and other causes which lead to changes in the names; the huntsmen change, and so on, so that this list can hardly last for a week; and therefore the Act cannot be applied. Now suppose I were to grant an injunction, how can I act upon it? The defendants have only to issue a fresh circular, make an urgent appeal for answers, or send a person by rail and get him to go before the master of the hunt; and next week comes out a very correct list, without errors, and how am I to know how they got their information? The plaintiff says it is incorrect. At present I do not see that I can grant an interlocutory injunction, and I am clearly of opinion that I could not interfere by an interlocutory injunction. Whether the plaintiff is entitled to any remedy I do not at

present decide; but I do not think it a case for an injunction, though the defendants are not entitled to avail themselves of the plaintiff's labours. It is scarcely worth the while of the proprietors of this respectable paper the *Field* (and I assume that the defendants are equally respectable) to come into court with such an insignificant matter. But, as they have done so there is a material question which will have to be decided, which after all is the most material question—viz., the costs in the suit. I would suggest to the parties that the wisest thing would be to let the bill be dismissed without costs. But if they don't agree, then I simply refuse the motion, leaving the real cause to be decided at the hearing. It may be a question for damages when the cause is brought to a hearing; but I shall certainly not grant an injunction. Probably I should refer it to chambers to ascertain what damages the plaintiff has sustained. For the present I refuse the motion, and say nothing about the costs.

Solicitor for plaintiff, *William Jacquet*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

Wednesday, Nov. 3.

WILSON v. FURNESS RAILWAY COMPANY.

Practice—Demurrer—Specific performance—Ultra vires—Parties.

In a suit for specific performance, a demurrer that the Statute of Limitations would apply to the facts of the case will not be allowed, but the question must be decided at the hearing.

An agreement on the part of a railway company to make a road and wharf is not ultra vires the directors of the company.

Part of the agreement by the company was that it was on behalf of themselves (the railway company) and the inhabitants of A., M., and K., and places adjoining.

Held, that the Attorney-General was not a necessary party to a suit for specific performance of such agreement.

Demurrer.

This was a suit for specific performance of an agreement after mentioned.

The bill was filed by G. E. Wilson and others against the Furness Railway Company.

The facts stated by the bill were as follow: By an Act of Parliament, passed in Aug. 1851, it was enacted, and power was granted to certain parties, to make a railroad from the Furness Railway, at Ulverstone, to the Lancaster and Carlisle Railway, at Camforth (to be called the Ulverstone and Lancaster Railway); and it was also enacted that, subject to any alteration which might be approved of by the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral, by writing under the hand of the Secretary of the Admiralty, the two several viaducts for carrying the said railway across the estuary of the Severn and the Kent estuary should be so constructed by the company as to afford in each of the said viaducts a clear breadth of water of not less than 1400ft. for the free flux and reflux and scour of the tides, and that the spans or ways of each of the two several viaducts should be openings of not less than 20ft. each, and a headway under the same of not less than 10ft. between its soffit and the high water mark of ordinary spring tides, and in such part of each of the said viaducts, and in such a manner as should be approved and directed by the said Lord High Admiral or commissioners, by writing under the hand of the Secretary of the Admiralty, and subject to any waiver or alteration to be allowed and approved as thereinbefore mentioned, the said company should construct an opening swing or draw-bridge of not less than 36ft. clear width, and the site of such two viaducts, and the mode of constructing the same, and also the said two several opening swing or draw bridges, should be only in accordance with such approval and direction.

The company before mentioned, called the Furness Railway Company, was incorporated in 1835.

By an Act passed in 1858, called the Ulverstone and Lancaster Railway Act, it was provided *inter alia* that the Ulverstone and Lancaster Railway Company and the Furness Railway Company might enter into and carry into effect any agreements for the leasing or selling to the Furness Company of all or any part of the property or the powers of the company, upon such conditions as the two companies should mutually agree upon, and if any such lease or sale comprised the railway of the company, it should comprise the whole thereof, and that from and after the transfer the Furness Railway Company should, according to the extent of the transfer, but subject to the provisions of the Act, be subject to all contracts and liabilities with respect to the premises transferred to which the company, if the transfer had not happened, should be subject, and should indemnify the company from the same, and all costs, charges, and expenses with respect to the same.

By an agreement dated the 25th June 1862, between George Edward Wilson (the plaintiff), the Hon. George Frederick Upton, Moses Rodich, John Wakefield, John Jowitt Wilson, John Whitwell, John Wilson, and John Foster, of the first part, and the Ulverstone and Lancaster Railway Company of the second part, after reciting the provisions of the Ulverstone and Lancaster Railway Act of 1851, bearing upon the subject of the proposed agreement, and that the viaduct had by the partial exercise of the Lords Commissioners of the Admiralty of their power of waiver been constructed without an opening bridge, but with preparations for making the opening at a future time, and that the parties thereto of that part on their own behalf and as representing the inhabitants of Arnside, Milnthorpe, Kendal and places adjoining or near to the viaduct, had hitherto objected to the waiver of the said opening bridge, and that in order to obviate all further differences the company and the parties thereto of the first part, on behalf of themselves and the said inhabitants had agreed together as follows: "That if the Lords Commissioners of the Admiralty shall in such manner as to be effectual for the purpose within twelve months from the date hereof, and for ever thereafter, waive the construction of and the right to require any opening, swing, or draw bridge in the viaduct, and if the said George Edward Wilson shall without any pecuniary consideration convey at the cost of the company to the said John Wakefield and James Ramsden, Esq., the secretary of the company, the land required for so much of the road hereinafter agreed to be made as will pass through his estate, and if Mrs. Green and all other persons through whose estate or estates the said road will pass, will also convey to the said John Wakefield and James Ramsden, at the cost of the said company, the land already purchased of them by Alexander Brogden and John Holme, and which, if required for that part of such road which will pass through their respective estates, the purchase-money for the last-mentioned lands not exceeding £ to be paid by the said company, and also in consideration of the sum of 200*l.* to be contributed and

paid to the company through the said John Wakefield and John Jowett Wilson towards the expense of the works hereinafter mentioned, then the company will, at their own cost, and within six months from the date of the waiver aforesaid, and the delivery to them of the land for the purpose, unless prevented by damage done by the tide to the works, and in that case as soon after six months as can be, make upon the land obtained, or to be so obtained for the purpose, a carriage road of the width of 16ft. in the clear from Duke's Inn at Milnthorpe aforesaid to the wharf hereinafter mentioned in the route or direction shown by a red colour in the plan hereunto annexed (and parts whereof are already used as a road), and which shall not be constructed in any part at any lower level than 8in. above a beach mark made by Messrs. Crayston, and Webster, of Kendal, and John Bailton, of Ulverstone, near the house of the said Mrs. Green, to denote the height of a 19ft. 4in. tide on the 19th Aug. 1860, and which road shall be constructed as an embankment according to the cross section A. on the section and specification hereunto annexed, and where it is on the surface, according to the cross section B on the said section and specification hereunto annexed, and to be a public road or highway, and will make good the fences, drains, and watercourses of any enclosed lands, the fences, drains, or watercourses of which will be interfered with by the said road, and will also, whenever any occupation or accommodation road crosses the line to be made, make road approaches as good as they are now, or as near thereto as circumstances will permit, and will also yearly, and at the end of every year after the completion of the said road pay to the Corporation of Kendal (who shall be bound to show the application thereof from time to time) the sum of 5*l.*, to be applied partly in repairing or improving that portion of the said road lying within the division of Hazlestock and Storth, but if, and as often as at the end of any one year, there shall be remaining in the hands of the said corporation a sum of 5*l.* unexpended, the said company shall not be required to pay the sum of 5*l.* or any part thereof in the then next succeeding year, and will also at the cost of the company within the same time as is herein provided for the making of the said road, make, and at all times maintain, upon the sea shore or beach a wharf at or near the place shown on the plan hereunto annexed, with proper mooring ports, to be at all times used as a public wharf for loading and discharging of vessels, and which wharf shall be sixty feet in length, and a suitable and convenient height."

By subsequent clauses it was by the agreement provided that a reference to arbitration should be made in case of any difference between the parties as to the sufficiency of the road or the wharf, or respecting the construction of any clause in the agreement, or any matter agreed to be done by the company.

It was also *inter alia* provided that "if any award upon a difference as to the sufficiency of the road or wharf should find the road or wharf insufficient, it should state in what respect it was so, and should direct what should be done to make it sufficient."

"Upon completion of the said road and wharf said John Wakefield and J. J. Wilson, or one of them their or his executors, administrators, or assigns, should pay to the company the sum of 200*l.*"

By another clause said G. E. Wilson, &c., on behalf of themselves and the inhabitants aforesaid, were forthwith at the expense of the company to join and concur and use their best endeavours to procure all other necessary parties to join and concur with the company in making the necessary applications to the Lords of the Admiralty for obtaining such entire and perpetual waiver of the opening swing and drawbridge, and were at the like expense to use their best endeavours to procure such waiver.

This waiver by the Lords of the Admiralty was subsequently obtained.

The Ulverstone and Lancaster Railway Company also subsequently obtained and took possession of the land mentioned in the agreement. Under the terms of their Act of Parliament, that railway company, by deed of transfer of the 4th Aug. 1863, conveyed their works, lands, property and effects, to the Furness Railway Company. This latter company then commenced making the road mentioned in the agreement of the 25th June 1862, but such road, when the bill was filed, was in a very incomplete condition, and the defendants had not commenced the wharf.

These things the railway company had been requested to do, but, although admitting their liability, they had neglected to complete.

The demurrers put in by the defendants, the railway company, were on these grounds: (1) that the liability entered into by the company was *ultra vires*; (2) that the nature of the agreement was not one which could be made the ground of a bill for specific performance; (3) the lapse of time between the deed of transfer and the filing of the plaintiff's bill; (4) that the Attorney-General, as representing the inhabitants of Arnside, Milnthorpe, Kendal, &c., ought to have been made a party; and (5) that there was a want of mutuality in the agreement.

E. Fry, Q. C. and *F. Currey*, in support of the demurrer, contended on all the points mentioned therein, that the bill should be dismissed. The cases cited by them were: (1) as to the agreement being *ultra vires*, and (2) that the bill was to compel the construction of works, and could not, therefore, be sustained,

Flint v. *Brandon*, 8 Ves. 159;
South Wales Railway Company v. *Wythes*, 1 Kay & J. 186; on appeal, 5 De G. M. & G. 880;
Blackett v. *Bates*, L. Rep. 1 Ch. App. 117; 13 L. T. Rep. N. S. 656;
Gervais v. *Edwards*, 1 Dru. & W. 80;
Shrewsbury and Birmingham Railway Company v. *Stour Valley Company*, 2 De G. M. & G. 866;

As to the lapse of time:

Rolfe v. *Gregory*, 31 L. J. 710, Ch.; 7 L. T. Rep. N. S. 19; 9 L. T. Rep. N. S. 750;
Wilson v. *West Hartlepool Railway Company*, 2 De G. J. & Sm. 475.

E. E. Kay, Q. C. and *Nalder*, for the plaintiff, were not called upon.

The VICE-CHANCELLOR said the demurrer must be overruled. The company have in fact got the benefit of the agreement. They have got the land conveyed to them, and it is vested in them. The case of *Storer* v. *The Great Western Railway Company*, 2 Y. & Coll. C. C. 48, concluded the points raised by this demurrer. The company have taken the land for the purposes of the road, and the court will, if possible, prevent such an injustice as would be the case if the company succeeded in their present contention. If I did not compel the company to make the road and wharf, I might say to them, "Then you must allow the plaintiffs to do it." As to the question of *ultra vires*, it is said that the company is created for the purpose of making a railway, and not for making the road and wharf; but being under an onerous obligation to give a certain easement to the public, the company agree to do something else which is more convenient to both parties. This is not *ultra vires*. As to length of time; the answer to that is that the company themselves have

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been in possession of the land. I do not think the Attorney-General a necessary party.

Demurrer overruled.

Solicitors: *Scott* and *Jermain*; *Sharpe* and *Ullithorne*.

Friday, Nov. 19.

THE QUEEN OF SPAIN v. PARR AND OTHERS.

Commission on goods sold—Principal and agent—Countermand of agency—Subordinate Government.

The ordinary commission receivable by an agent on goods sold by him was 2½ per cent. Before actual sale by the agent, the goods were removed out of his hands by order of the principal:

Held, that the agent was entitled to one-half of the ordinary commission, being 1¼ per cent.

The defendants, merchants at Manilla, had received instructions from the Government there to undertake the transport and shipment of a quantity of tobacco to merchants in London, to effect the insuraace, and to pay all the necessary charges and expenses in relation thereto. The merchants at Manilla were to be entitled to charge 2½ per cent. on the amount, valued at about 47,000l.

The Supreme Government of Spain thinking the officer at Manilla had acted incautiously in this respect, refused to allow the amount of the ordinary commission in the account, having directed the tobacco to be sold by their own agents here:

Held, the consignees were entitled to a moiety of the amount of the ordinary commission, being 1¼ per cent. instead of 2½ per cent.

An agent, employed to effect an insurance on goods transmitted from abroad, must account for any discount allowed by the insurance offices on the premiums paid.

This was a bill filed on behalf of the Supreme Government of Spain against the members of a firm of merchants at Manilla, and others, for an account and damages, under the following circumstances.

The Government of Spain possessed the colony of Manilla, and the tobacco grown in large quantities in that country.

On the 18th April 1867 a quantity of Government tobacco was shipped on board a British vessel called *Her Majesty*. She sailed from Manilla with this cargo on board, and in due time arrived in the port of London. This tobacco was forwarded by Messrs. Tilson, Herman, and Co., the merchants at Manilla. They had been commissioned to do this under instructions from the *Intendante* of the Spanish Government, being the proper officer in that behalf to undertake the transport and shipment of said tobacco, to effect the insurance upon its value, and the expenses of bonding and warehousing and sale thereof; and to satisfy all the charges and expenses necessary in that respect.

Tilson, Herman, and Co., on the shipment being effected, drew bills in favour of the Spanish Government for three-fourths of the value at Manilla, being to the amount of about 35,000l., which sum at the time of the filing of the plaintiff's bill had been paid into the treasury of the Spanish Government. The remaining one-fourth remained to be settled and liquidated.

The commission upon this transaction which Tilson, Herman, and Co., were entitled to receive, was at the rate of 2½ per cent. on the amount of the value of the tobacco, about 47,000l. sterling. It was consigned by them to their correspondents in London, Parr, Herman, and Co., to whom the bills of lading had been transmitted. Mr. Parr was the only member of the firm of Tilson, and Co., residing in England. It appeared that the Spanish Government considered that the Intendante at Manilla had acted incautiously in the transaction, and in order, as they conceived, to prevent the tobacco being sacrificed, they instructed Don Juan Garvaron, the Consul-General of the Spanish Government in this country, to ascertain the price at which Messrs. Parr, Herman, and Co., proposed to sell this tobacco, to ascertain the market price of similar tobacco, and advise the Spanish Government upon the subject. He was also instructed that should an opportunity occur of selling the tobacco at a higher price than that mentioned by Messrs. Parr, Herman, and Co., he was authorised to pay off the advances made upon it, take possession of the tobacco, and sell it as he should consider most advantageously.

A treaty and correspondence thereupon ensued between Don Juan and Messrs. Parr, Herman, and Co. The result was that Messrs. Parr and Co. refused to recognise Don Juan Garvaron as the representative of the Spanish Government, and declined to give him any information as to the sale of the tobacco. M. Garvaron had heard that the tobacco was about to be disposed of by the firm of Grant, Hodgson, and Co. of London, but could obtain no specific information from that firm.

A formal notification in writing was given by M. Garvaron to Messrs. Parr, Herman, and Co. not to proceed with the sale of the tobacco.

This was admitted by the parties to the cause.

A portion of the tobacco having been offered for sale by Messrs. Grant, Hodgson, and Co., M. Garvaron wrote to Messrs. Parr, Herman, and Co. refusing to authorise or recognise any such sale. In the whole of these transactions Messrs Parr, Herman, and Co. refused to recognise any persons as their principals, except Tilson, Herman, and Co., of Manilla, through whom they had received their original instructions.

Subsequently a portion of the tobacco was sold under an order of this court, and a sum of 2553l. and upwards was transferred into court, to abide the result of the suit.

The defendants claimed 1638l. as commission at 2½ per cent. on the sale of the tobacco. They also claimed to deduct from the amount payable to the Spanish Government a sum of 2999l., which the defendant Parr alleged had been paid by his London firm for the insurance of the tobacco which had been then valued at 57,000l. From the above sum of 2999l., a discount had been allowed by the insurance office.

The whole of the tobacco was actually sold in this country for 65,549l. and upwards, and on this amount a commission after the rate of 1¼ per cent. had been paid by the Spanish Government to the consignees of the tobacco.

The questions raised in this cause were. What was the commission to which the consignees were entitled? and 2nd, as to their right to deduct the discount on the insurance money allowed by the insurance offices.

A good deal of evidence was entered into as to the custom of merchants regulating the payment of commission, and deduction of discount in cases of similar occurrence.

Kay, Q. C., *Mathew* (Common Law Bar), and *A. G. Marten*, for the plaintiffs, relied upon

Smith's Mercantile Law, edit. 1859, pp. 124 and 127; and

Turnbull v. *Garden*, 20 L. T. Rep. N. S. 218; and 38 L. J. 331, Ch.

Amphlett, Q. C. and *Waller*, for the defendants, contended that they were clearly entitled to some commission—and that as to the claim for the dis-

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count allowed by the offices, the Spanish Government could not have got the insurance effected upon any other terms.

The Vice-Chancellor, after stating the general facts of the case, said:—In this case the Government of Spain contends that the conduct of the defendants rendered this suit necessary. No doubt the defendants were bound to pay attention to the instructions of the Manilla Government through whom they received their instructions. They were their principals. Let us suppose a consignment by the governing powers at Calcutta to France, and some agent of the Treasury says to the consignee, "We are the Supreme Government. We ask you not to obey the instructions you have received from Calcutta. I am the Consul-General." Would not the consignee be justified in rejecting and repudiating any such interference? In my opinion the defendants were right in saying, "We cannot recognise your authority in any way." And I think the consignees were entitled to a fair amount of commission. The advances were made by the firm at Manilla to the Government established there, by bills drawn on their London house, and duly accepted and paid by them. The ordinary commission on similar transactions is 2½ per cent. on the amount of the goods sold, which is reduced to half of that amount where the goods are taken out of the agents' hands before actual sale. The defendants therefore were clearly entitled to 1¼ per cent. in this transaction. As regards the policy of assurance: If a man intends to charge a commission, he must say so, and it must be agreed to by the consignor. The case of *Turnbull* v. *Garden* is conclusive on this point. A man cannot be entitled to say, "I charge you as cash paid on the day, and I retain the 10 per cent. discount for paying it on that day." The suit was originally informal, and the defendants are entitled to their costs, except the costs occasioned by the evidence taken in the suit. As to this, no costs on either side.

Decree accordingly.

Solicitors: *Walton* and *Bubb*; *Stevenson, Williamson*, and *Co.*

Monday, Dec. 20.

Re Young's Trusts.

Practice—Service on infant parties.

Service of a petition for the appointment of a new trustee on infant cestui que trusts dispensed with.

A petition for the appointment of another trustee in the room of one who declined to act further in the trusts of a testator's will, on the ground of the amount of professional duties, had been presented to this branch of the court, and an order made according to the prayer of the petition. It subsequently was discovered that infant parties were interested under testator's will, and the registrar declined to complete the order made on the hearing of the petition as the infants were not properly represented, although counsel had appeared for them on that hearing. No guardian *ad litem* had been appointed. The common petition for that appointment at the Rolls had been left, but it was stated that although formerly the order would have been a matter of course, a practice had grown up that a special application to the court to dispense with service of the petition on infants was now necessary.

W. Heath Bennet now applied that such service on the infants in this case might be dispensed with. He referred to Morgan's Orders, 3rd edit., p. 178.

The Vice-Chancellor made the order, requiring that the order appointing the substituted trustee should bear date after the order for the appointment of guardian *ad litem* at the Rolls.

Solicitor: *Geo. W. Chinery*, Essex-street, Strand.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. Saunders and J. Shortt, Esqrs., Barristers-at-Law.

Wednesday, Nov. 10.

Reg. *v.* The Inhabitants of Odell.

Highway—Repair of—Denial by waywarden—Jurisdiction of justices—25 & 26 Vict. c. 61.

The justices have no jurisdiction under sect. 18 of the 25 & 26 Vict. c. 61 to order a highway board to repair a highway if the waywarden of the parish deny the fact that such road is a highway; and although the denial, if not made bona fide, will not oust their jurisdiction if they are satisfied that the road is really a highway, yet their decision that the denial is not made bona fide is not conclusive, and may be reviewed by this court.

This was a rule to quash an order of justices, whereby the highway board of the district of Bletsoe, in the county of Beds, were ordered to repair a certain road. The said order had been removed into this court by *certiorari*.

It appeared that at a petty sessions held on the 2nd Feb. 1868 for the division of Bletsoe an information was heard that a certain highway called Yetnow Lane was then out of repair, and that the said highway board were chargeable with its repair. At the hearing a considerable amount of evidence was given to prove both that the lane was a highway, and that the parish were liable to repair it.

It was stated in the affidavits made in opposition to the rule, that upon the waywarden of the parish being called upon to make his defence, he, by his attorney, alleged that the said road, called Yetnow-lane, was not a highway, and cited the case of *Reg.* v. *Farrer*, 14 L. T. Rep. N. S. 115; 1 L. Rep. Q. B., and argued that the justices had no jurisdiction to proceed further by reason of the said waywarden (through him), having denied the road to be a highway, inasmuch as the Highway Acts giving such jurisdiction applied only to highways admitted to be such; that neither the said waywarden nor his attorney denied the liability of the parish of Odell aforesaid to repair the said road; that the justices, therefore, directed the said board to appear at a subsequent petty sessions, and appointed a surveyor to view the said highway, and to report on its state to the justices at such petty sessions; that at such subsequent petty sessions the said surveyor made his report; that the attorney of the said waywarden was in court and stated that he should take proceedings to quash any order the said justices might make in the matter, as the said waywarden denied that Yetnow-lane aforesaid was a highway, and also denied the liability of the parish to repair it; but he did not offer any evidence in support of either of such denials; that neither the said waywarden nor his attorney had previously denied the liability of the parish of Odell to repair the said highway, and that, thereupon, the justices made an order on the said board, limiting a time for the complete and effectual repair of the said highway. The justices, in their affidavit, stated that the evidence offered fully satisfied them that the road was a highway, and that they believed that the denial of the said waywarden that the said road was a highway was

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not made *bona fide*, but was colourable only and a bare assertion made without any reasonable ground to support it.

In support of the rule the waywarden of the parish made affidavit in which he stated that upon being summoned he convened a parish meeting and was instructed by the parishioners to appear on behalf of the parish and deny the liability of the parish to repair the said road; that he attended with his attorney, and at the hearing his said attorney objected that the said road was not a highway, and that the inhabitants were not bound to repair it, and that he himself stated at the hearing that the said inhabitants always had denied their liability to repair the said road, and that they had been summoned eleven years previously and had been advised by counsel that they were not liable to repair the said road, and the said last-mentioned summons had been abandoned, but that notwithstanding the said objection the parties appointed a surveyor to view the said road and report to them; that at the next petty session the said attorney again objected that the said road was not a highway, and that the inhabitants were not bound to repair it, but that the justices made an order upon the board to repair it. The attorney for the waywarden in his affidavit stated that after evidence had been given that the road was a highway and was out of repair, he stated to the justices that the liability to repair the said road was demised by the said waywarden on behalf of the inhabitants of the said parish, and he also contended on the part of the waywarden that the said road was not a highway and was not admitted to be a highway by the said waywarden on behalf of the inhabitants of the said parish, and therefore the said justices had no jurisdiction to make any order whatever on the said summonses; that the justices made an order appointing a surveyor to inspect the road, and report to them on the 2nd March; that he thereupon objected that the order was unnecessary and improper, as the liability of the parish to repair the road was denied; that he attended the petty sessions on the 2nd March when the surveyor made his report, and the attorney for the complainant asked the justices to make an order upon the highway board for the repair of the road, whereupon he, the said attorney for the waywarden, objected that the said justices had no jurisdiction on the ground that the said road was not a highway, and was not admitted to be a highway by the said waywarden, and that the liability to repair the said road was denied by the said waywarden on behalf of the said inhabitants of the parish, and he thereupon gave the said justices a written notice under the hand of the said waywarden, containing such denial, but that the said justices made an order upon the highway board to repair the said road.

By sect. 18 of the 25 & 26 Vict. c. 61 (the Highways Act) it is enacted that where complaint is made to any justice of the peace that any highway is out of repair he shall issue two summonses, one addressed to the highway board, and the other to the waywarden of the parish liable to the repair of such highway, requiring such board and waywarden to appear before the justices at some petty sessions in the summons mentioned:

And at such petty sessions, unless the board undertake to repair the road to the satisfaction of the justices, or unless the waywarden deny the liability of the parish to repair, the justices shall direct the board to appear at some subsequent petty sessions to be then named, and shall either appoint some competent person to view the highway, and report to them on its state at such other petty sessions, or fix a day previous to such petty sessions, at which two or more of such justices will themselves attend to view the highway. At such last-mentioned petty sessions, if the justices are satisfied either by the report of the person so appointed, or by such view as aforesaid, that the highway complained of is not in a state of complete repair, it shall be their duty to make an order on the board limiting a time for the repair of the highway complained of, &c.

By sect. 19, it is enacted that:

When on the hearing of any such summons respecting the repair of any highway, the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein the highway is situate against the inhabitants of the parish, or the party charged therewith for suffering and permitting the said highway to be out of repair, &c.

Jelf now appeared to show cause against the rule.—The justices had jurisdiction to hear and decide the question, and as they have found that the evidence offered fully satisfied them that the road was a highway, and that they believed that the denial of the waywarden that it was a highway was not made *bona fide*, but was colourable only, and a bare assertion only without any reasonable ground to support it, this court will not interfere with their decision. [MELLOR, J.—You know that it has been held in *Reg.* v. *Farrer*, 35 L. J. 210, M. C.; 14 L. T. Rep. N. S. 515, the jurisdiction of the justices attaches only where the road is an admitted highway.] The denial must not be colourable, and must consist of something more than a bare denial, otherwise it would be in the power of the parish in the clearest and most notorious cases of a highway to deny its being such, and so prevent the beneficial operation of the statute. In *Reg.* v. *Farrer*, the Chief Justice says, "If the denial were not made *bona fide*, I do not think the jurisdiction would be ousted." In *Reg* v. *Johnson*, 34 L. J. 85, M. C., it was held that when, on the hearing of a summons against the surveyors of a parish for the nonrepair of a highway, the surveyors deny the duty of the parish to repair on the ground that the alleged highway is not a highway, the justices cannot proceed to make an order under the 5 & 6 Will. 4, c. 50, s. 95, that an indictment be preferred without making any inquiry as to whether the road be a highway. [MELLOR, J.—If the waywarden appears and denies, why go into the evidence? The only person who can make the denial is the waywarden.] BLACKBURN, J.—Suppose upon the hearing the justices should come to the conclusion that it is a highway when it is not, how then?] Their finding would be binding. [BLACKBURN, J.—But surely in this case there was ample evidence the other way, that it was not a highway, and that the parish were not bound to repair it. It seems that there had been a dispute upon the very point eleven years ago, and that the parish were advised by counsel that they were not liable to repair.] It does not clearly appear what was the result of that application. But it is certainly for the justices to determine whether or not the objection was made *bonâ fide*, and this court will not reverse their decision upon that point. [BLACKBURN, J.—I do not see why this court should not reverse the decision of justices on such a point as upon any other.]

Keane, Q. C. and *W. Graham*, in support of the rule, were not called upon.

COCKBURN, C. J.—I am of opinion that the rule should be made absolute. As to the question, whether if the highway is not admitted the justices can do anything, I think the case of *R.* v. *Farrer* is conclusive. The only point left open is whether this court can review the finding of the justices that it was not a *bona fide* denial on the part of the waywarden of the road being a highway? I think it is established by a series of cases that it is

competent to this court to review the finding of the justices upon this point. I do not mean to say that if there is evidence both *pro* and *con*, and if the justices as judges of matters of fact decide one way, that this court will not give great weight to their finding, inasmuch as they have the advantage of seeing the witnesses, yet when this court sees plainly that the justices have gone wrong upon their view of the facts, it is not only competent, but it is the duty of this court to review their decision. Applying that rule to the facts here, I think when a representation was made to the justices by the waywarden of the parish, a public officer acting in the course of his duty, that this road was not a highway, and the parish was not liable to repair it, the justices ought to have respected that statement. It is true that if the other evidence showed that the waywarden was acting *mala fide*, it ought not to bind them. Still as it appeared that eleven years ago an attempt had been made to compel the parish to repair this road, and the opinion of counsel was taken, and was favourable to the parish, that was strong evidence to corrobate the waywarden's statement. All the facts of the case showed that the point was raised *bona fide*, and in that event the justices could not order an indictment. It never was intended that justices should have jurisdiction to do anything except where it was admitted by the parties that the road was a highway, and the parish admitted or denied its liability to repair it. I think, therefore, the justices were wrong, and that the rule should be made absolute.

BLACKBURN, MELLOR, and LUSH, JJ. concurred.

Rule absolute.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

June 22, and Nov. 15.

WHITEHOUSE AND ANOTHER *v.* THE WOLVERHAMPTON AND WALSALL RAILWAY COMPANY.

Railway company and mine owner—Severance of lands by railway—Mine owner's claim for compensation—Reference to arbitration—Expenses not yet actually incurred — Future necessary expenses — Amount of ascertainable at once with reasonable certainty— What may be included in award—Railways Clauses Consolidation Act 1845 (8 *Vict. c.* 20), *s.* 81—"*From time to time*"—*Construction of.*

By sect. 81 *of the Railways Clauses Consolidation Act* 1845 (8 *Vict. c.* 2), "*the company shall* from time to time, *pay to the owner, lessee, or occupier, of any mines extending so as to be on both sides of the railway, all such expenses and losses as shall be incurred by such owner, &c., by reason of the severance of the lands lying over such mines by the railway,*" . . . *and the amount of such losses or expenses shall, in case of dispute, be settled by arbitration.*

The plaintiffs, as lessees and occupiers, exclusively for mining purposes, of certain lands, which, during their occupation, had been severed by the defendants' railway, claimed compensation from the defendants for the damage thereby caused; and the parties, being unable to agree upon the amount of compensation to be paid by the defendants to the plaintiffs, for the damage accruing to the latter, by reason of the before-mentioned severance and the execution of the defendants' works, the matter was referred to an arbitrator appointed under the Lands Clauses Consolidation Act, who, by his award, assessed the amount of such compensation at 1500*l.*, *which he accordingly awarded to the plaintiffs, apportioning it under various heads of damage. By his award the arbitrator stated that the defendants, having objected that the damage, in respect of which the plaintiffs claimed compensation, was of such a description that the plaintiffs were not* at present *entitled to recover or receive compensation for the same, but must wait until the losses and expenses in respect of which compensation was claimed* had been actually sustained and incurred, *he had thereupon stated a case for the opinion of the court. The case then set forth the nature of the several items of expense, in respect of which compensation had been awarded, and stated that, although such expenses had not as yet been actually incurred, the time was fast approaching when, by reason of the defendants' works, the same must necessarily be incurred by the plaintiffs in working their mines, and that, in the arbitrator's opinion, as a matter of fact, they were all matters then "apparent, and capable of being ascertained and estimated," and he had "accordingly awarded compensation in respect of all of them."*

Held, by the Court of Exchequer (Kelly, C.B., and Pigott and Cleasby, BB.), looking at the facts stated in the special case, and without laying down any general rule, that, inasmuch as the "expenses and losses," in respect of which the arbitrator had awarded compensation, were imminent, and capable of being ascertained and assessed at once with reasonable certainty, and the whole of them were incidental and due to the severance of the lands by the railway, they came clearly within sect. 81 *of the Railways Clauses Consolidation Act* 1845 *as "additional expenses and losses," for which the plaintiffs were entitled to present compensation.*

This was a special case stated by an arbitrator appointed under the Lands Clauses Consolidation Act 1845, which raised the question whether, in the amount of compensation awarded by him to the plaintiffs, in respect of damage caused to them as lessees and occupiers, exclusively for mining purposes, of certain lands lying over certain mines, by reason of the severance of such lands by the defendants' railway, he was at liberty to include certain sums of money for "expenses and losses," which at the time of making his award had not actually been incurred or sustained by the plaintiffs, but which, in the arbitrator's judgment upon the facts and evidence before him, were imminent and necessary shortly to be incurred by the plaintiffs in order to enable them to continue the working of their mines, and which expenses and losses were, in his opinion, capable of being at once ascertained and assessed with reasonable certainty. By his award dated 8th Jan. 1869, after reciting that by virtue of the Wolverhampton and Walsall Railway Acts 1855 and 1866 and the public Acts incorporated therewith, the defendants' company was incorporated and authorised to make a railway from Wolverhampton to Walsall, and to purchase and take in lands for the purposes of the said undertaking, and particularly the lands thereinafter mentioned, and that Henry Bickerton Whitehouse and Benjamin Whitehouse, the plaintiffs, were entitled, or claimed to be entitled, to sell and convey the said last-mentioned lands, or some interest therein, to the said company; and that on the 21st April 1867, notice was duly given to the plaintiffs by the company, that the company required to purchase or take the said lands, and that they were willing to treat for the purchase of the lands so required, and as to the compensation to be made for the damage sustained by the plaintiffs, by reason of the execution of the company's works, and the company thereby demanded the particulars of the estate and interest of the plaintiffs in the said lands, and of the claims made by them in respect thereof; and the said lands were delineated in a plan, and specified and described in a schedule to the said notice,

as being situate in Wednesfield, in the parish of Wolverhampton, in the county of Stafford, and as being part of field and other lands numbered &c., in the plan and book of reference deposited with the clerk of the peace for the county of Stafford; and reciting that in pursuance of the notice the said plaintiffs afterwards, by statements under their hands, informed the said company of the particulars of their estate and interest in the said lands, and of the claims made by them in respect thereof, and from such statement it appeared, and the fact was, that part of the said fields and lands out of which the company took 2 roods and 32 perches, were lands belonging to one Edward Orme Machell, who had, in the year 1858, granted to the plaintiffs the right to get certain ironstone mines thereunder, and deposit the spoil on the surface; that other portions of the said lands were held by the plaintiffs under one Jonathan Scarth, for an unexpired term of years; that another portion of the said lands was held by the said plaintiffs under Richard Fryer Merson; another portion of the said land was held by the said plaintiffs under the Duke of Cleveland for an unexpired term of years, and that the residue of the said lands were held by them under a lease or agreement for a lease from the said R. F. Merson and others for an unexpired term of years. And reciting that the said plaintiffs and the said company could not agree as to the amount of compensation and damage to be paid as aforesaid, neither did the said company offer any sum of money to the said plaintiffs as and for such compensation. And reciting that the said plaintiffs by a notice bearing date the 12th Feb. 1868, signified to the said company their desire to have the question of compensation settled by arbitration. And that by another notice, dated the 12th Feb. 1868, the plaintiffs nominated John Yardley, mining surveyor, as the arbitrator on their behalf concerning the premises, whereupon the said company nominated in writing, under the hands of their joint secretaries, Joseph Cooksley, mining surveyor, as the other arbitrator in the premises. And that the said arbitrators before entering into the consideration of the matters referred to them duly nominated an umpire in the said question of disputed compensation. And reciting that the said arbitrators differed and failed to make their award in due time, and no extended time was appointed, whereby the matters so referred duly came before the said umpire. And reciting also that the said umpire proceeded in the said umpirage and heard the parties and their advocates, witnesses, and other evidence, and was ready to make his award, when it was discovered that the time, limited by the Lands Clauses Consolidation Act for that purpose, had expired before the proceedings in the reference before the said umpire were completed; and thereupon, by agreement under the hands of the plaintiffs and the seal of the said company, dated the 12th Dec. 1868, after reciting the reference to arbitration and the appointment of the said arbitrators and the said umpire, and that the latter was ready to make his award, as before mentioned, but that neither the said arbitrators nor the said umpire had, before proceeding with the arbitration, or since, made the declaration before a justice of the peace required by the 33rd section of the Lands Clauses Consolidation Act, and that the time limited by the said Act, for the umpire's making his award had expired as before mentioned, but that the plaintiffs and the said company were desirous that he should proceed to make it, and were willing to be bound thereby, notwithstanding the matters aforesaid. It was agreed between the said parties that the umpire should proceed to make his award accordingly, and that they should be bound by such award as if made on a general reference, and that neither of them should or would set up either of the above objections, or any objection on any matter of form not touching the substance of the matters referred, so as the said umpire should make and publish such award on or before the 1st Feb. then next. The said umpire therefore proceeded to make his award concerning the premises, and did thereby find, award, order, and determine that the said company should pay to the said plaintiffs for and in respect of the said lands and their interests therein, and for and in respect of all damage sustained by them by reason of severance and otherwise, and by reason of the execution of the works authorised by the said Acts, and for and in respect of all damage and compensation to which they were entitled under the said reference, the sum of 1500*l*; and reciting that it had been objected before the said umpire, on behalf of the said company, that the damage or injury in respect of which compensation was claimed was of such a description that the said plaintiffs were not *at present* entitled to recover or receive compensation for the same, or for some part thereof, but must wait until the losses and expenses, in respect of which compensation was claimed, *had been actually sustained and incurred*, and on the part of the said company, the said umpire was requested to raise the said question on the face of his award, which he did by stating the facts found by him in the following

CASE.

The lands of the claimants, the said H. B. Whitehouse and B. Whitehouse, part of which was taken by the railway company, were held by them under the four different landlords before mentioned, and were in the possession of the claimants; they lay contiguous one to another, and the land taken for the railway was a strip which crossed over them all in a straight line, and was made up of part of each. The lands had been taken by the claimants for the purpose only of mining, and in all of them the mines had been partly got, and the process of mining was going on at the time the company gave their notice to take the land, but a large portion of the mines was still ungotten in places where the workings had not reached. The five holdings (lying contiguous as before mentioned), taken as a whole, were cut into two parts by the railway, one part lying to the north of the railway and another to the south. The railway crosses upon an embankment which had been formed before the case came before me. The workings were progressing from south to north, and those which had taken place were all in the part to the south of the railway, "but were approaching, and in one place were very near to the railway, and, in the ordinary course, if the railway had not interfered, would have soon reached and passed to the north of the land taken by the railway; although the workings had not reached the parts to the north of the railway there is no reason to suppose that, in course of time, and before the expiration of the interest of the claimants they will not do so, and the minerals be worked out to the northern boundary; and, at the time the railway gave their notice, the time was approaching when it would be necessary to sink two pits for the purpose of getting the minerals in the north part, and in fact the spot where one of those pits was to be sunk had been considered, and was determined on and marked on the land by the claimants when the railway company took the land for their railway." The site of the proposed pit, which had been marked, lay in the centre of the line, and was included, and it therefore *became necessary that the pit should be sunk elsewhere*, and the only proper place for sinking it is in the part to the north of the railway. The claimants have an engine on the land to the south of the railway by which if

the railway had not come, and the pit marked out had been made, that pit could have been worked; "but the pit which is to be made instead of it to the north of the railway cannot be worked by that engine on account of the railway intervening, and there must be a new engine and plant erected in the north part to work that pit, and the expense of working that engine must be incurred." The other engine will still be necessary for the workings on the south side of the railway.

Besides the substituted pit on the north side of the railway, the railway company taking the site of the pit which had been marked out, will involve the necessity of sinking another pit on the south side of the railway for the purpose of depositing spoil, which there will be no room to deposit on the north side, the space left for the railway on that side being insufficient, but that pit can be worked by the engine on the south, and no other engine will be necessary to work it. "This pit would not have been necessary but for the railway coming where it does," because the whole of the surface would have been in one piece, so that the necessity for the pit is caused by the railway coming over the claimants' land.

With respect to mines and surface land held under the said Edward Orme Machell, the use of the surface was to deposit the spoil, which, of necessity, must be brought to the surface, when the mine is worked, and unless there is surface land on which that spoil can be deposited, the mine cannot be worked. The claimants had no right to deposit spoil from Machell's on any of their other takings, and had no other land than the surface of Machell's available for the purpose. That surface was already insufficient to contain all the spoil from the mine in Machell's land, and the railway crossing the land, and taking part of that surface, contracted it still more; and if the claimants could get no other land on which to deposit the spoil which the railway prevented from being deposited on Machell's, a quantity of the minerals must be abandoned and lost, which, otherwise would have been gotten; the claimants proved the value of that quantity before me, and claimed that value as part of the compensation; but I find that although the claimants have at present no other land on which they have a right to deposit the spoil in question, they will be able to obtain other surface land for that purpose when they require it, and, therefore, the amount I have included in respect of this claim is in respect of the extra expense the claimants will be put to in acquiring such other surface land, and depositing their spoil upon it, instead of upon their now surface, and I have not included anything for mine, because I find that the claimants will be able to get the mine as effectually as if they had the whole surface land on Machell's.

In consequence of the railway coming where it does, and dividing the surface of the land into two parts, there will necessarily be incurred an extra expense when the proposed pit on the north of the railway comes to be worked, partly from its being necessary to raise the pit frames higher than would otherwise have been necessary, and partly from the necessity of carrying the spoil a greater distance to deposit than would otherwise have been necessary, and the latter head of expense will also apply to another pit at some distance from the former, to the north of the railway.

The sum of 1500*l.*, which I have awarded is made up as follows:—

For the claimants' interest in the land, the sum of 10*l.*

In respect of the engine and plant, 270*l.*

In respect of the expense of working the same for the time during which it will be an extra expense, 840*l.*

In respect of the new pit to the south of the railway, 180*l.*

For the extra expenses in raising pit frames and depositing spoil, 120*l.*

For the expense of acquiring fresh spoil land, and depositing the spoil from Machell's land thereon, 80*l.*

At the time the railway company gave their notice to take the land, no part of the money awarded by me, so far as it is in respect of *expense*, had been actually expended, nor had the expenses been incurred; but "the necessity for it was foreseen, and the amount, and how far it would diminish the value of the property, was capable of being ascertained with reasonable certainty;" and in ascertaining it, just allowances are to be taken to have been made "in respect of a present receipt of compensation for an expense to be incurred at a future time, and of all other considerations bearing on it."

The railway company had taken possession of the land by virtue of the 85th section of the Lands Clauses Consolidation Act, and had, under that section, deposited in the bank the sum of 321*l.*, and had also given a bond in respect of that sum pursuant to the same section.

The company contended that the matters in respect of which I have awarded the sums amounting to 1490*l.* were not, nor were either of them, matters in respect of which the claimants were *at present entitled to be compensated*, and that they must hereafter claim their compensation in respect of these matters under the 81st section of the Railways Clauses Consolidation Act. "I have held, as matter of fact, if such a finding be admissible and material, that they are all matters now apparent and capable of being ascertained and estimated;" and I have accordingly awarded compensation in respect of all of them, but, if the court is of opinion that I ought not to award compensation in respect of all or any of them, then my award is for such a sum as will remain after deducting what the court decides ought to be deducted.

The above case came on to be argued in Trinity Term last, and by rule of court dated 22nd June 1869, it was referred back to the umpire to be restated, and the award to be amended if he thought fit, and for him to state whether the sum allowed in respect of working the engine was assessed upon the assumption that the claimants would or might work the whole of the mine, or upon the assumption that the railway company would purchase all the land within forty yards of the railway.

In pursuance of that rule, the umpire, on the 4th Nov. last, proceeded to restate the case as follows; and first, the facts already stated in his said award were to be taken as repeated in the restatement of the case, and the said umpire stated the additional facts following:

Upon the hearing before me the claimants, by their evidence, made out a *primâ fide* case for compensation under each of the heads as to which the special case is stated, to much larger amounts than those I have awarded, and to a much greater amount in the aggregate than the 1500*l.*

After the claimant's case was closed, and the company's case had been so far opened by their advocate as to disclose the question I have raised by my award, and before the time came for the company calling evidence, the parties retired, and on their return informed me that they had agreed that I should make my award for 1500*l.*, but that I should state a case raising the aforesaid question. On my suggesting that there might be other matters on which they ought to agree, and in particular that, as the facts on each of the heads of claim were not identical, they should agree as to

what portion of the 1500*l.* should be allotted to each head of claim, they both declined to attempt arriving at any further agreement, and authorised me, if I chose, to distribute it in any way I thought fit, so that the amount of compensation was 1500*l.*, and the aforesaid question was raised by the award; that was what they required, and would be sufficient—the parties did not contemplate that any such division would be necessary, and I have only made such division because the facts as to each head of compensation are not perfectly identical, and not on any supposition that all such facts did not raise substantially the same question. Under these circumstances, I thought it unnecessary for me to enter into the question whether anything from under the railway, or forty yards on each side of it, was or was not to be raised by the engine on the north side of the railway, because, whatever might be the case as to that matter, I was not at liberty to alter the agreed amount of damages, or to give more or less than the 1500*l.*; but in the sum of 840*l.* I did not intend to include the expense of working the engine for the purpose of getting the same under the railway and the adjoining forty yards, which I did not suppose would be got by that engine, but otherwise, as after mentioned.

But, if a specific finding by me on that subject be necessary, I find that the sum of 840*l.* assessed by my said award does not include the expense of working by the engine any part of what was under the railway or within forty yards of it.

The mine was not a flat mine, but one cropping up from the south towards the north, and according to the usual mode of working such a mine no mineral is got out of the seam by means of any pit, if such mineral lies at a lower level than where the pit cuts into the seam, and the pit in question being to the north of the railway, the mineral from under the railway and within the forty yards, if got, would not in the ordinary course of working, nor in the way the plans in evidence before mentioned showed the mines in question to have been worked, be got by means of it, but would be got by means of the old pits to the south of the railway, and consequently not by the engine in question, nor at any additional expense.

The claimants' witnesses stated that so many acres of mine would have to be gotten by the new pit to the north, and consequently by the engine in question, that it would take such a length of time to get that quantity, and working the engine for that length of time would cost so much. I did not understand that the witnesses in stating the quantity of mine to be gotten, were including any part of what lay under the railway, or the adjoining space of forty yards, and that question was not alluded to nor raised by any cross-examination or otherwise, and the evidence of the quantity that would have to be raised by the engine stood uncontradicted.

Except by stating the aforesaid additional facts, I do not think fit to make any amendment in my said award.

The following are the points to be urged in argument on the part of the said claimants:—First, that they were entitled to claim and have assessed by the arbitrator, not only the value of the land usually taken by the railway companies, but also the amount of compensation to which they were entitled for the injuriously affecting their other lands by the taking of the land actually taken; secondly, that all the various heads of damage awarded are properly the subject-matter of compensation within the meaning of the Acts; thirdly, that those heads of damage are necessarily incident to the rating of the lands in question, and naturally arise from it, and are properly the subject of compensation; fourthly, that although the expenses awarded for had not been incurred, the necessity for their being incurred could be foreseen, and they arise from the taking of the lands actually taken, and could be fairly valued; fifthly, the taking of the land actually taken naturally diminished the value of the other lands to the extent of the amount awarded; sixthly, that the claimants are entitled to be paid the full amount awarded.

Points for argument on behalf of the company:—First, that the claimants are at present entitled to compensation only in respect of their interest in the land for which the umpire has awarded the sum of 10*l.*; secondly, that they are not at present entitled to compensation in respect of the additional expense which they may or will thereafter incur in working the mines mentioned in the said award, and for which the umpire has awarded the sum of 1490*l.*; thirdly, that the claimants are not at present entitled to compensation in respect of the said mines or the working thereof being hereafter injuriously affected by the execution of the works of the company; fourthly, that by the 81st section of the Railway Clauses Consolidation Act 1845 (incorporated with the special Acts of the said company) the company are liable to make compensation in respect of the said mines and the works thereof only from time to time as and when the additional expense is incurred, or the injury occasioned by the execution of the works of the company.

The following sect. 81 of the Railways Clauses Consolidation Act (8 Vict. c. 20), being one of the group of clauses (77 to 85 inclusive) relating exclusively to mines lying under or near the railway, and coming under the heading in the Act, "And with respect to mines lying under or near the railway, be it enacted as follows" is the section on the construction of which this case depends.

Sect. 81:

The company shall, *from time to time*, pay to the owner, lessee, or occupier of any such mines, extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner, lessee, or occupiers, by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such manner, and under such restrictions, as not to prejudice or injure the railway; and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway; and if any dispute or question shall arise between the company and such owner, lessee, or occupier as aforesaid, touching the amount of such losses or expenses, the same shall be settled by arbitration.

H. Matthews, Q. C. (with him was *J. O. Griffits*), for the plaintiffs, submitted that they were entitled to be paid at once the full amount awarded them by the umpire as compensation. There was, he contended, no distinction in the various sums awarded; all came under the same principle, and all the heads of compensation awarded on came within the wide terms of sect. 81 of the Railways Clauses Consolidation Act. No doubt the defendants will rely on the words "*from time to time*" in that section; but the question will be, Is the mine owner bound to wait till the expenses are actually incurred, or are the expenses capable of assessment; and is the arbitrator competent to assess them at the present moment? The current of the decisions has been that, where the expenses are capable of being foreseen and calculated, the mine owner is bound to recover them at once, and not to vex the company with oft-recurring claims and actions, and that any sort of damage which could have been so foreseen and calculated is barred by award. No doubt there are conflicting dicta on the construction and application of sect. 68 of the Lands Clauses Consolidation Act (8 Vict. c. 18), and as to whether a second claim can be entertained for subsequent damage not foreseen at the time of the first inquiry. In *Ware* v. *The Regent's Canal Company*, 9 Ex. 395,

23 L. J. 145, Ex., this court laid it down that compensation could not be awarded for contingent damages *in futuro*, but that it might be done in a case where it appeared clear that such damage must necessarily accrue. In *Croft* v. *The London and North-Western Railway Company*, 7 L. T. Rep. N. S. 741; 32 L. J. 113, Q. B.; 3 B. & S. 436, the Court of Queen's Bench held that, under the Lands Clauses Consolidation Act 1845, damage likely to ensue from subsequent subsidence and vibration of surface land, by reason of defendants' tunnel, and which might have been foreseen, was matter which should have been assessed prospectively by the arbitrator, and could not afterwards be recovered by action or otherwise; and Cockburn, C. J. there was of opinion that even damage which could not have been foreseen, could not, subsequently, be the subject of compensation. But, in the present case, the damage could have been both clearly foreseen and easily calculated. This very question arose in *Rex* v. *The Leeds and Selby Railway Company*, 8 A. & E. 633. Sect. 32 of the defendants' local Act there contained the words "from time to time," and its words were stronger than those of sect. 81 here, yet it was held that the Act there did not contemplate a future inconvenience of the kind there complained of, and Littledale, J. there said, "it would be very inconvenient if a party could be continually claiming fresh compensation from time to time." Here, in the very language of Willes, J., in delivering judgment of the Exchequer Chamber in *Bagnall and another* v. *London and North-Western Railway Company*, 9 L. T. Rep. N. S. 419; 31 L. J. 480, Ex.; 1 H. & C. 544, "the damage can be calculated with reasonable certainty," and his Lordship there expressly distinguishes the case of an "*unopened* mine." Were the facts here that the plaintiff might never open or work the mine it would be a different case. So, to the same effect is the decision of the House of Lords in the *Caledonian Railway Company* v. *Lockhart*, 3 Macq. H. of L. Cas. 808; *The Great Western Railway Company* v. *Bennett*, in the House of Lords; 16 L. T. Rep. N. S. 186; 36 L. J. 133, Q. B.; L. Rep. 2 H. of L. E. & I. App. 27, is negatively in the plaintiffs' favour, the point taken by the defendants here not having been raised in that case either below or above. The statute, it is contended, does not prohibit the plaintiffs from getting compensation now, and the inconvenience of laying down a rule that every item of the expenses and losses must have been incurred before compensation can be awarded, would be expensive, and lead in some cases, easily to be suggested, to the bringing a fresh action every day. Even in cases where the past tense is used, it has been held a matter of present assessment; *a fortiori* that will be so here where the words are, "shall be incurred." There was here an actual present necessity for expenditure in respect of future necessary works, the costs of which were capable of being at once ascertained with reasonable certainty, and therefore the plaintiffs were entitled to present compensation, and consequently to the judgment of the court. He cited also

Reg v. *The Navigation Aire and Calder*, 30 L. J. Q. B.; and

Lee and others v. *Milner and others*, 2 M. & W. 824; 6 L. J., N. S., 206, Ex.

Macnamara (with him was *Holl*), contra, for the defendants.—The expenses and losses in respect of which compensation has been awarded not having yet been incurred, the plaintiffs are not entitled to receive it. No doubt the general rule is that, under sect. 68 of the Lands Clauses Act, compensation for land taken or injuriously affected must be assessed *once for all*, there being in that section no words *from time to time*, as there are in sect. 81 of the Act in question in the present case. With respect to mines, however, it seems a different rule prevails for which it may be assumed the Legislature had good reason, as, for instance, what Pigott, B. called the "speculative character" of mines in general—thus, there may be no minerals under the land required by the railway; or, being there, they may never be worked; or, if begun to be worked, may come to a sudden stop by reason of some unseen "fault," and so the additional expense expected to be incurred by a certain working may never be incurred at all. Therefore it is that in the group of clauses 77 to 85 in the Railway Clauses Consolidation Act exclusively relating to mines "lying under or near the railway," the words "from time to time" are found in sect. 81, which provides for payment of compensation by the railway company to the mine owner. The company are here called on to pay a large sum for expenses which may never be incurred. No injury to the mine owner can accrue by his waiting till he has incurred the expense or loss; it is not a question of putting him to costs or depriving him of his rights, for he may claim compensation "*from time to time*," as the need arises, whereas serious injury and injustice may be done to the company by holding them liable to pay this compensation at once. The arbitrator no doubt found that "although the workings had not reached the parts to the north of the railway, there was no reason to suppose that in time, and before the expiration of the plaintiffs' interest, they would not do so, and that the time was approaching when it would be necessary to sink two pits," &c., yet he nowhere finds that there was *any actual existing necessity* for doing these things, nor was there a *present necessity* for the expenditure. It is assumed by the plaintiffs' case that the coal will be worked out to the extreme limit of the northern boundary; but that may never happen. The inconvenience to the mine owner, from his having to make repeated claims is not to be weighed in the balance against the great injury to the company if they are called on to pay a large sum for a possible damage to the mine owner, which, had he waited, it may be, he would never have suffered. The cases cited and relied on by the plaintiffs are distinguishable. In *Rex* v. *Leeds and Selby Railway Company* the mine owner was bound by the Act of Parliament not to work so as to injure the railway, and the court decided he was not entitled to compensation for that part of the mine which he could not have worked without being liable to make compensation to them. *Croft's* case was not the case of a mine, and the words "from time to time" did not occur there, and the judgment of Cockburn, C. J. is in our favour, where he expressly says that if it had been intended that unforeseen damage subsequently accruing should be the subject of future compensation, the words would have been introduced in sect. 68 of the Lands Clauses Consolidation Act. In the *Caledonian Railway Company* v. *Lockhart*, Lord Wensleydale, in 3 Macq. p. 825, draws a distinction between ordinary cases where damages are assessed *once for all*, and exceptional cases where the words "*from time to time*" occur. The judgment of Willes, J., in *Bagnall's* case, in the Exchequer Chamber, is in favour of the present defendants. His Lordship says: "There are practical obstacles of an insuperable character against saying that there arises, upon the making of a railway, an immediate right to compensation in respect of possible future injury to *unopened* mines. At that time it does not appear that the mine will ever be worked." I submit that the part of the mine here, to the north of the railway, is the same as an *unopened* mine. *Lee* v. *Milner* is distinguishable on the same ground as *The Leeds and Selby Railway* case; *The Great Western Railway* v. *Bennett* also differs from the present case. Should the mines be

sold, as suggested just now by Cleasby, B., the amount of compensation would be taken into consideration in the price, and no difficulty would arise in recovering it from the owner or the company. The company are substantially right, it is submitted on all the heads of claim; but certainly on all save the last item, namely, the 80*l.* for acquiring new ground for deposit of spoil.

H. Matthews, Q. C. was not called on to reply.

KELLY, C. B.—This case presents to our view a very complicated state of facts with which, in the absence of inferences to assist us, we must deal in the best way we can. No case has been cited to us at the bar, nor, as far as I am aware, has any been decided, on sect. 81 of the Railways Clauses Consolidation Act 1845 (8 Vict. c. 20), which is the section presented for our consideration in the present instance. Being, therefore, called upon to do so, we must, in the absence of any authority bearing directly upon it, construe and interpret that section for ourselves, and decide this case accordingly. Premising, therefore, that every case of this nature must be taken and considered upon its own merits, and in conjunction with its own facts and circumstances, the only conclusion, I think, to which we can safely arrive in the present case, viewing the whole of the facts together as stated in the special case, is that the total amount of the sum which the arbitrator has here awarded as compensation to the plaintiffs, with the exception of a very small part of it, for their interest in the lands taken by the defendants for their line of railway, was for expenses which either had been, or would in all human probability very shortly be, incurred by the plaintiffs. The question for the court to solve is, whether or not the plaintiffs were entitled to immediate compensation, that is to be paid *at once*, in respect of those items of expense which, though they might be shortly about to be, had not, in fact, as yet been incurred by them. Now the Act of Parliament (8 Vict. c. 20), s. 81, says that "the company shall *from time to time* pay to the owner, lessee, or occupier of any such mine extending so as to be on both sides of the railway, all such additional expenses and losses as *shall be* incurred by such owner, lessee, or occupier, by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid. . . . and if any dispute or question shall arise between the company and such owner, &c., touching the amount of such losses or expenses, the sum shall be settled by arbitration." Now, it is said, and has been contended in argument before us, on the part of the defendants, that the compensation is not in this case payable *at present*, the expenditure not having been actually incurred, and that, wherever such expenditure has not actually been incurred, the party claiming compensation must wait to make his claim until he can call on the railway company for compensation, and on this very plain and obvious ground that some portion, if not the whole, of such expense, may never be incurred at all. Now, I quite agree that, in cases where it is clear that the expenses sought to be compensated can or will never be incurred at all, or where, as in the case of a mine not yet opened or actually at work, it is very uncertain whether such expenses will ever be incurred, or any losses ever be sustained on the part of the mine owner, then compensation cannot be claimed or allowed under sect. 81, or otherwise. But that is not the state of things here. Let us see what are the circumstances here, as stated in the special case. Without doubt, there is no uncertainty as to this mine being worked, for we find it stated in the case that it was being worked at the very time when the notices on the part of the company of their desire to take the land in question were given, and that the time was approaching when, in the ordinary course of working it, that portion of the mine lying to the north of the defendants' line of railway would presently be reached, and the minerals be worked out to the northern boundary before the expiration of the plaintiffs' lease or interest in the lands, and that in consequence of the severance of the lands it would be necessary to sink two pits, one on the north side of the railway, for the purpose of getting the minerals in the north part, and the other on the south side of the railway for the purpose of depositing spoil. It is then stated that, in consequence of the severance of the land caused by the railway, it would be necessary to erect a new engine and plant in the northern part of the land to work one of the said pits, which, by reason of such severance and the intervention of the railway, could not be worked by the plaintiffs' engine at present erected and working on the south side of the line of the railway, and that the expenses in respect of the new engine and plant, and of working the same, and of the new pits, must be incurred. It is obvious then that the working of the mine at this very point was intercepted by the defendants' railway, and that it was necessary, in order that the plaintiffs should be enabled to go on with their working of it, which but for the railway would have proceeded in regular course, that they should presently incur the costs and expenses which are found by the arbitrator as being expenses "about to be incurred." Are we then to hold, under this state of facts, that the plaintiffs are not entitled to receive at once the compensation which has been so assessed and awarded to them by the umpire, or are we to say that they must wait for it until these various items of expense have been actually incurred and expended by them? And then, if we were to hold that this latter alternative was the proper principle on which to construe this section of the Act, this further question would arise, namely, when and how often are the mine owners to bring forward their claims? Must it be every day, or every week, every month, or every quarter; every half year or every year; or must they wait until the end of their term and the expiration of their interest in the premises? In my judgment, looking at all the facts stated in the case, and taking the words of the Act of Parliament (sect. 81) into consideration, I think the court will be justified in holding that these are expenses and losses capable of being ascertained and assessed at once, with reasonable and sufficient certainty; that the whole of them are incidental and due to one and the same cause, the severance of the land by the intervention of the defendants' railway; and that they come, therefore, clearly within the 81st section of the Act as "additional expenses and losses," and that, without desiring to lay down any general rule on the subject, we may say that the plaintiffs are entitled to judgment.

PIGOTT, B.—I am of the same opinion, although at first I entertained some doubt as to the proper construction of the 81st section of this Act of Parliament. That doubt, however, has been removed from my mind in the course of the argument, and I am now clearly of opinion that our judgment should be given in favour of the plaintiffs. The case, as stated with great care by the arbitrator, finds that the plaintiffs are entitled to this amount of compensation (1500*l.*) in respect of certain expenses rendered necessary to be incurred by the defendants' line of railway crossing and cutting in two the plaintiffs' land. The questions then are, were these expenses imminent? were they ascertainable? I think they were. Are they such as are within

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the statute, and were they capable of being assessed before they were actually incurred or paid by the plaintiffs? It seems to me that they were. The 81st section says this, "the company shall *from time to time* pay to the owner, lessee, or occupier of any such mine extending so as to be on both sides of the railway all such additional expenses and losses as *shall be incurred* by such owner, &c., by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being intercepted as aforesaid," &c. Now it seems to me that, giving a reasonable latitude to the words used in this section of the Act, we ought not to construe them as meaning that the mine owner must of necessity actually expend and lay out the money before he can be compensated. If it were so, the exceeding annoyance and inconvenience pointed out by Mr. Matthews would arise, of the company being vexed by daily claims and actions for compensation. That cannot, I think, have been intended by the Legislature. I think, though the words used are not perhaps the most apt, that our construction of the section is far more reasonable, convenient, and just towards both parties. It is not either quite immaterial to observe that the words of the section are not in the past tense, "which *shall have been* incurred," but in the present tense, "which *shall be* incurred."

Cleasby, B. concurred with the Lord Chief Baron and Pigott, B. in the foregoing judgments pronounced by them, and referred to the case of *The Cromford Canal Company* v. *Cutts*, in Chancery, before Lord Cottenham, L. C., reversing the decision of the Vice Chancellor of England, 5 R. Cas. (O. B. & L.) 442.

Channell, B., who had not been present during the argument, took no part in the judgment.

Judgment for the plaintiffs.

Attorney for the plaintiffs, *J. Needham*, 1, New-inn, Strand, W.C., agent for *Brown* and *Fellows*, Bilston, Staffordshire.

Attorneys for the defendants, *Underhill* and *Field*, 10, New-inn, Strand, W.C., agents for *H.* and *J. E. Underhill*, Wolverhampton.

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Tuesday, Nov. 23.

(Before Kelly, C. B., Martin, B., Byles, Blackburn, and Lush, JJ.)

Reg. v. Hodgkiss.

Perjury—False oath at common law—Affidavit under Bills of Sale Act (17 & 18 *Vict. c.* 36.)

A false oath, sworn in an affidavit for the purpose of procuring the registration of a bill of sale, is a misdemeanor at common law, of which a person may be found guilty upon an indictment for setting out the facts, and concluding with the usual averment of "wilful and corrupt perjury," which concluding words may be rejected as surplusage.

Case reserved by Pigott, B. for the opinion of the Court for the Consideration of Crown Cases Reserved.

The prisoner was tried before me at the last Summer Assizes for the county of Worcester, upon an indictment which charged that he committed wilful and corrupt perjury in an affidavit sworn by him before a commissioner for taking affidavits in the Court of Queen's Bench.

The affidavit was sworn before the Commissioner at Stourbridge, and was made for the purpose of getting a bill of sale filed.

It was material, in the affidavit, to state the date when the bill of sale was made, which the prisoner swore was on the 18th Dec. 1868, whereas it was, in fact, made on the 4th Jan. 1869.

The counsel for the prisoner objected that such an affidavit could not be the subject of an indictment for perjury, not being, as he contended, sworn in a judicial proceeding.

I overruled the objection, and left the case to the jury, who found the prisoner guilty. But I reserved the case for this court upon the above objection, being pressed by the counsel so to do, and the prisoner was admitted to bail.

The Bills of Sale Acts are the 17 & 18 Vict. c. 36; and 29 & 30 Vict. c. 96. G. Pigott.

No counsel appeared on either side.

Kelly, C. B.—The prisoner was convicted on an indictment which charged him with having committed wilful and corrupt perjury in an affidavit required by the Bills of Sale Act, which was sworn by him before a commissioner for taking affidavits in the Court of Queen's Bench, and the question for our decision is, whether he was properly convicted or not. The offence was not wilful and corrupt perjury in the strict sense of that term, and, therefore, the prisoner would not be liable to the more severe punishment which can only be imposed in cases of perjury; but it is quite clear that the taking of a false oath in a matter which is required by an Act of Parliament, in order to obtain the registration of a bill of sale, is a misdemeanor at common law, subjecting the person taking the false oath to punishment. It is true that the indictment in this case, after setting out the facts, proceeds, "and so committed wilful and corrupt perjury," but I think that those words may be treated and rejected as surplusage, and then what remains upon the indictment would show a sufficient case of misdemeanor at common law upon which the prisoner might properly be convicted. I therefore think the conviction should be affirmed.

Martin, B.—I am of the same opinion. That this case may be treated as pointed out by the Lord Chief Baron is shown by *Rex* v. *Foster*, R. & R. 459, where the prisoner was indicted for perjury in taking a false oath for the purpose of procuring a marriage licence. In that case the facts stated were not sufficient to show a misdemeanor, but here they are.

The rest of the Court concurred.

Conviction affirmed.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. Leycester, Esq., Barrister-at-Law.

Tuesday, Dec. 7.

(Before Lord Penzance.)

Kelly v. Kelly.

Suit for judicial separation—Moral cruelty considered—Wife's health—Decree.

A husband in the exercise of his marital power harassed his wife by reproaches, debarring her from the society of her friends, opening her correspondence, putting her under the surveillance of servants and the like acts, until her health broke down, and she was on the verge of paralysis. The medical testimony was that a return to such cohabitation would be dangerous to her life. The acts of personal violence were very slight, but the court

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Held that the moral coercion amounted to legal cruelty, and granted a decree for judicial separation.

This was a wife's suit for judicial separation on the ground of her husband's cruelty. The case, which occupied several days, was tried by the court without a jury, and the facts, which disclosed a case of moral coercion, accompanied by a few acts of very slight personal violence, will be found stated with sufficient fulness in the judgment.

Dr. *Deane*, Q. C. (*Inderwick* with him) for the petitioner.

The respondent appeared in person.

Cur. adv. vult.

Lord PENZANCE.—The peculiar and distinguishing feature of this case is the adoption by the respondent of a deliberate system of conduct towards his wife, with the view of bending her to his authority. A man who sets about to achieve this end by purposely rendering a woman's daily life unhappy is in danger of overstepping his rights, as he is pretty sure to fall short of his duties. The respondent in this case has, in my judgment, done both. Without disparaging the just and paramount authority of a husband, it may be safely asserted that a wife is not a domestic slave, to be driven at all cost, short of personal violence, into compliance with her husband's demands. And if force, whether physical or moral, is systematically exerted for this purpose in such manner, to such a degree, and during such length of time as to break down her health and render serious malady imminent, the interference of the law cannot be justly withheld by any court which affects to have charge of the wife's personal safety. In cases of this kind everything depends on degree. Many acts, which are venial in themselves, become reprehensible when they take their places as parts of a system. Others, justifiable on occasions, lose their justification when continuously and purposely repeated. In considering a charge of cruelty, therefore, the conduct of the parties inculpated can only be justified, or the reverse, as a whole; and if, upon a general review, the Matrimonial Court is of deliberate opinion that cohabitation could not be resumed with safety to the wife, it is bound by the dictates of common sense, as well as upon principles repeatedly avowed and acted upon in a long series of decisions, to step in and forbid its resumption. No doubt, in cases such as the present, where the personal violence used is of a trifling character, it behoves the court to be sedulous in inquiry and slow in conviction. It should be entirely satisfied that the conclusion of the wife's danger is clearly reached, and on reliable evidence. Moreover, the decisions of my predecessors have imported this further proposition as a condition of the court's interference, that the troubles of the wife are not owing to her own misconduct. "If," said the court, in *Dysart* v. *Dysart*, 1 Rob. 108, "a wife can insure her own safety by lawful obedience and by proper self-command, she has no right to come here, for this court affords its aid only when the necessity of its interference is absolutely proved." I do not stop to inquire how far this last proposition would stand the test of cases that might possibly arise in which the safety of a weak, misguided, infirm woman, incapable of self-command, might be gravely imperilled by continued cohabitation. For the decision of this case I fully adopt this condition, and setting out on the above principles, I proceed to inquire, what has Mrs. Kelly suffered, from what cause, and with what result upon her health? There is little variance or dispute about the leading facts. Towards the close of the year 1867, Mr. Kelly informed his wife that a sum of 5000*l.* which had been bequeathed to her by her sister had been in great part lost by the investments he had made of it. Unable to obtain from her husband a clear idea of her rights and those of her son under her sister's will, she wrote to her brother-in-law, Col. Thornbury, to see the will for her and explain it. This he did, and wrote her the result, telling her that the money was in law at the entire command of her husband, and that her son had no rights in the matter. Some further correspondence passed between the petitioner and Col. Thornbury, and between the petitioner and her brother. These letters falling into the hands of the respondent were extremely resented by him, and were directly or indirectly the cause of much, if not most, that followed. About the same time the petitioner's son quarrelled with his father, and was obliged to quit the house. The petitioner, to some extent, took the son's part, which increased the resentment of the respondent. From these circumstances the respondent took up the idea, which he afterwards allowed to fill his whole mind, that his wife was plotting and conspiring against him. He commenced opening her letters, and calling her a vile traitor and apostate. He told her that "no modest woman would associate with her more than a prostitute," "that she had given her confidence to another man," &c. He refused to sit at meals with her, he insisted on occupying a separate bedroom, he told the servants to take orders from him, and not from his wife, he forbade her to visit the poor in the district to which she had been accustomed, and desired her not to attend the ministration of the sacrament. Some months passed in this way. The respondent kept apart from his wife all day except at family prayers, and even then he appears to have had little or no communication with her except in the way of rebuke and reproach. At length, in the month of May 1868 the petitioner became ill, her appetite wholly failed, she lost the senses of taste and smell, and towards the end of the month felt a sensation of numbness in her arm, which gave reason to fear paralysis. She consulted Dr. Drysdale. He advised her to leave home. Her husband refused, and on the 29th June, having become worse, she left her home without his consent. I am satisfied from the medical testimony that at this time the occurrences which had taken place, and the isolation and reproaches to which she had been subjected, had so preyed upon her nervous system and general health that serious consequences were to be feared, if she were not for a time withdrawn from the life she was leading. Mrs. Kelly stayed away nearly four months, which she passed with her relations. The respondent wrote her many letters, in which he enlarged upon her sin. He expressed no care for her health, and none that she should return. In October she returned. Between that time and the January following, when she finally left home, she was purposely submitted to the following treatment. She was entirely deposed from her natural position as mistress of her husband's house. She was debarred the use of money entirely; not only were the household expenses withdrawn from her control, but she was not permitted to disburse anything for her own necessary expenses; every article of dress, every trifle that she required, had to be put down on paper, and her husband provided it if he thought proper. Having refused on one occasion of going into the town to tell her husband everywhere that she had been, an interdict was placed on her going out at all. At one time the doors were locked to keep her in, at another a man servant was deputed to follow her; at another the respondent insisted on accompanying her himself whenever she wished to go abroad. On these occasions he appears to have occupied the short time they were together in what he called putting

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her sin before her in strong, coarse, and abusive terms, applying to her the same epithets and language as would be applicable to a woman who had been guilty of adultery. He took no meals with her; he occupied a separate bedroom; he passed no portion of the day, however small, in her society. They met, as before, only at family prayers, and if he spoke to her at all it was only to give some directions or to reproach her. Save on one or two occasions she saw no one. Those whom she desired to see were forbidden the house. She was absolutely prohibited from writing any letters unless the husband saw them before they were posted. She was thus, as far as the respondent could achieve it, practically isolated from her friends. Meanwhile, the care of the household was confided to a woman, hired for the purpose, who was directed not to obey Mrs. Kelly's orders without the respondent's directions. In short, she was treated like a child or a lunatic, and in this light she was actually regarded by the woman just mentioned, when she first came to her place; and this, be it remembered, though she had passed the mature age of sixty and had been married to the respondent for twenty-seven years. With no occupation, debarred the society of her husband and her son at home, and that of her friends abroad, withheld from the performance of her household duties, subordinated to servants, penniless, and, so far as her husband could effect it, friendless, the daily life of this lady was little better than an imprisonment, the solitary silence of which was broken only by the language of harsh rebuke, foul words, and epithets of insult, indignity, and shame. What wonder that, under so grievous an oppression, her health again gave way? She could not eat, she hardly slept at all, she was subject to constant trembling and fainting, she woke involuntarily screaming at night, and her nervous system was so shattered that the medical witnesses declared paralysis or even madness to be imminent. Now, upon this testimony, it is important to observe that there was no contradiction. The respondent did not, even upon his own oath, deny or qualify the petitioner's evidence as to her state of health. On this head (the most important in the whole case) the respondent confined himself to the suggestion that her miserable condition was brought about, not by his treatment, but by vexation at the discovery of her own treachery. Her actual condition and danger he did not call in question, and yet it is to a repetition of this treatment, with its almost inevitable results, that the respondent expects this court to order Mrs. Kelly's return. That it should be asked to break in upon his rights as a husband by depriving him of his wife's society, or, I should rather say, of her presence under his roof, is to him a matter of surprise and indignation, for, as he truly says, he has not beaten her. He has, indeed, on two or three occasions, made her feel that his superior physical strength was always ready to be exerted to constrain her movements, but he has inflicted no bruises and done no visible bodily hurt. Such a view of the law, if correct, would be little to its credit, and to coincide with it would be to abrogate the first duty in these matters of the Matrimonial Court—the protection of the wife's health and safety. These, then, are the things which Mr. Kelly did, and these the results upon his wife's health. The remaining question is, why did he do them? His answer, I believe, would be, to bring his wife to penitence and submission. But penitence for what? and submission to what? Although he has never in his numerous letters, so far as I can discover, stated with great clearness what it was that he wished her to do, it is, I think, to be sufficiently gathered from them that he desired her to admit that she had suspected him of fraud, and had traitorously conspired with others to fasten that charge upon him. For this he would have her express remorse and contrition, suing for his pardon and humbly confessing her guilt. Mrs. Kelly refused to do so, because she says she never did in fact suspect him of anything false and dishonourable, and never did take counsel with others to bring the charge of it against him. Writing on the 1st Aug. 1868, she says, "I could not tell a lie in this matter. I did not design any treachery, and will never say I did." And further on, "I am sorry I did not ask your leave to see the will. I had a right to do so, but had I at all thought of its vexing you I would not have acted as I did. Surely, now, as what has taken place cannot be recalled, it would be better to bury the past in oblivion; let bygones be bygones; forgive and forget mutually, and seek to spend the little time that remains of this life on earth together in peace. . . . I promise on my part to do all in my power towards this object, but my position must be such as not to cause a scandal. If you will not do this, will you tell me what you do wish, and what is to be the end of it?" Writing again on the 14th Sept. 1868, she said, "I never thought you had done anything dishonourable, and certainly I never tried to prove it. . . . You are under a complete delusion as to my conduct. My desire is to act towards you with the submission, obedience, and even affection of a wife." It would be difficult for a wife to play her part in so critical and painful a situation in a more becoming manner. Surely such language as this should have satisfied any reasonable man. It did not satisfy Mr. Kelly, because, as it appears to me, he had suffered his mind to become filled and mastered by notions utterly extravagant, both as to the authority of a husband and the legitimate means of enforcing it. He invokes the theory of the law, that the wife should be subject to the husband, but he forgets to add this qualification—"in all things reasonable." He asserts that he is within the law if, refraining from physical violence, he only puts such pressure on his wife as shall force her to obey him. But, again, he should add—"provided the means used to exert moral pressure be reasonable." But what if reasonable means are insufficient, and a wife still holds out against her husband's lawful will? The answer is that the law can neither do nor sanction more. The law, no doubt, recognises the husband as the ruler, protector, and guide of his wife. It makes him master of her pecuniary resources; it gives him, within legal limits, the control of her person; it withdraws civil rights and remedies from her save in his name. Conversely, the law places on the husband the duty of maintaining his wife, relieves her from all civil responsibilities, and excuses her even in the commission of great crimes when acting under her husband's orders. By these incidental means it has fenced about and fostered the reasonable supremacy of the man in the institution of marriage. In so doing it is thought by some that the law is acting in conformity with the dictates of nature and the natural characteristics of the sexes. Be that as it may, the subordination of the wife is doubtless in conformity with the established habits and customs of mankind. With all these advantages, then, in his favour, the law leaves the husband, by his own conduct and bearing, to secure and retain in his wife the only submission which is worth having—that which is willingly and cheerfully rendered. And if he fail, this court cannot recognise his failure as a justification for a system of treatment by which he places his wife's permanent health in jeopardy and sets at naught, not only his own obligations in matrimony, but the very ends of matrimony itself, by rendering impossible the offices of domestic intercourse, and the mutual duties of

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married life. The cruelty of the respondent is established, and the court decrees a judicial separation with costs.

Solicitors: *Copephane; W. H. Gregory.*

Irish Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

LIMERICK (CITY) PETITION.

Monday, Jan. 25.

(Before FITZGERALD, B.)

Canvassing by the clergy—Responsibility of candidate—Hiring of mobs—Intimidation—Treating—"Corrupt."

In the city of L. the influence of the Roman Catholic clergy is very great, there being either two or three clergymen in each parish.

Semble, that had they made the cause of a candidate their own, giving him the benefit of what might be equivalent in its effect upon the election to a committee room in every parish conducted by themselves, they being the canvassers; and had the candidate identified his cause with that of the clergy, he would have been responsible for their acts.

In the first part of the 2nd section of the Act of 1854 reference is made to offers and promises antecedently to the vote:

Held, that the Legislature clearly intended the court to draw a primâ facie reasonable inference from the act done as to the purpose for which it was done, leaving it to the other side to rebut that inference if they could. But further that it is for the court to judge of the nature of the suspicious circumstances from which the inference is drawn, and to act upon it or not according to the conclusion at which it arrives.

The law relating to murder and corrupt practices compared.

One side hired and gave large quantities of drink (to the extent of 300l. to 400l. in two nights) to a number of men and boys to operate against anticipated mob intimidation on the other side, but no evidence was given to prove that this organisation was directed against electors or formed for the purpose of being so directed. Nor was it proved that any elector was prevented from recording his vote:

Held, to be neither treating nor intimidation.

A clergyman went direct from the polling booth in company with the personation agent, and was a party to giving a voter an order upon a publican to supply him with drink. The clergyman denied, however, that he had any corrupt intention in causing this order to be so given:

Held that it was not treating.

In order to make treating corrupt it must operate to change the mode in which the voter would have voted.

This was a petition against the return of Messrs. Gavin and Russell, the grounds alleged being bribery, treating, and intimidation.

Coffey, Q. C., supported the petition, and *O'Hagan*, Q. C., the defence.

The points of argument and the evidence sufficiently appear in the judgment.

FITZGERALD, B.—The petition seeks to avoid the last election for this city upon the grounds of bribery, of treating, and of undue influence upon the part of the sitting members; and those corrupt practices are charged in the proper statutable words in the petition in the case of each of the three corrupt practices. With reference to the cases of direct bribery, I think the counsel upon both sides have, in their able arguments, properly confined themselves to the three cases of Keane, Ahern, and and Skeehan, and I shall confine myself, in the few observations which I shall make, to those three. In Keane's case I have first considered what must be taken to be the admitted facts of the case. It is clear that two days before the election he had himself joined the canvassing party of Tait, who was contesting the election with the sitting members, and he had actually called upon Macdonogh, a person in the employment of Tait, to join with him and them in that canvass; that was two days before the election, and that could not, according to the facts proved before me, have been earlier than the Monday. The day before the polling he had an interview with the Rev. Mr. Malone, who was one of the clergymen of the parish in which he lived; and, in the course of that conversation, a promise was made to him with reference to an old claim, which it also conceded that he had, or alleged that he had, against Mr. Russell and his agents for several years antecedently. In the course of that conversation a promise was made that if the debt were a proper one it should be paid, or it should be "right," or at all events a conversation took place from which the legitimate inference would be, that a promise was made that it should be paid. He, who had two days before canvassed, and who had admittedly this antecedent existing claim, upon the polling day votes for Messrs. Gavin and Russell, and against the party for whom on the two previous days he had been canvassing. Now, those are facts proved wholly independently of his testimony, and by proper legal evidence, excluding the question of agency, which the statutes desire me to exclude. Well, then, it is proved also by the evidence of three men (if they can be credited), that upon two occasions, one almost contemporaneous with the giving of the vote, he had told Macdonogh, Fife, and Barry, that he would not have voted as he did vote unless the promise had been made, that is, unless his claim should be satisfied: or, at least, according to the evidence of Barry, that it would not be safe for him to vote against Russell, having regard to the old claim which existed. And, upon the second occasion, he said, in the presence both of Gardiner and Macdonogh, that he had the promise, and that he had actually been shown the money by which the old claim was to be paid. Those are conceded facts in the case. Now I agree with Mr. O'Hagan in his argument, that the mere statement of an elector or a voter that he had been bribed at an election which is passed ought not, and could not, under the late statute, be relied upon as evidence against the sitting members that a bribe had been given to the man who so alleged it. But I cannot agree that that argument applies to a case like this, in which what the man says is produced, not for the purpose of proving the fact of the promise made to him at all (which is proved independently of his evidence, by the evidence of Mr. Malone himself), but for a purpose for which it is properly receivable as evidence against all the world, although it rests more or less upon what was passing in the man's own mind, which can only be known by inference. Those were the facts: and I cannot but think that that was a case calling upon and requiring an explanation upon the part of the sitting members, supposing the question of agency were established against the Rev. Mr. Malone. It is evidence of a corrupt act, but it is evidence of a corrupt act which may admit of explanation. And, before I enter at all into the question of agency, it is necessary for me to see whether, upon the evidence given before me, it is made out to my satisfaction as an act of bribery. The reasonable inference from

those facts, and it appears to me the only reasonable inference, would be, that there was bribery within the meaning of the statute. But what are the facts established besides that, which I am bound to consider before I can come to the conclusion that the promise was made to this man in order to induce him to give his vote? I need not enter into the case of abstaining from voting. The first evidence I must consider is this, that antecedently to the election, antecedent as far as I see, and as far as the recollection of Mr. Cronin goes, to the Monday, an application had been made to him by this man. Mr. Cronin says, that at the time when this application was made to him his own mind was wholly undecided as to the part which he would take in the election. That is Cronin's own evidence; but it does not stop there, because the fact of his mind not being made up, he says, was actually communicated by him to the party who was applying to him. He says that, more than that, it was he who asked Cronin for whom he intended to vote, and that Cronin told him, in answer to that, that his own mind was decided. Now, what does Cronin say (if I can believe it), when he was informed that the man was so undecided as to his vote? It is (if Mr. Cronin is to be believed) that his own mind was made up to vote for the sitting members, Gavin and Russell, though he had a cause of complaint against them. That is the evidence that Cronin gave of the transaction; he says, that his mind being still undecided up to that moment as to how he would vote, he was satisfied that Mr. Tait would not show his colours; he communicaied with Father Malone, and stated the case to him, and that Father Malone seemed to think that it was a fair thing for the man to be paid, but he expressed some doubt as to whether the demand was a genuine demand or not, and that he, upon that, communicated again with the man Keane, and a person of the name of Manahan, who had been clerk of the solicitor for Mr. Russell at the previous election. He was communicated with, and Cronin and Manahan attended together upon Father Malone; and upon that conversation, after satisfying himself as far as he could of the justice of the demand, Father Malone said, that if it was so, it would be fair for him to be paid, or he might rest assured that he would be paid. Well, that being the state of the facts, if I believe Cronin, or pay any attention to the evidence of Father Malone, he thought that the election might be a more favourable time for making a claim than another. I disregard the fact which Father Malone positively deposes to, that in this he had no reference to the vote. He tells me that never throughout the whole course of the proceedings had he entertained a doubt as to the mode in which Keane would himself vote, Keane having actually told Cronin twice antecedently, that though he felt an injury had been done to him in respect to this demand, still his determination was to vote for Gavin and Russell. Now, this is the question which I have to consider upon the whole of the evidence taken with the facts which I have stated shortly; am I, or ought I to be satisfied beyond reasonable doubt in a case like this, that that promise was made by Father Malone in order to induce him to give his vote; for unless I am satisfied of that, the inquiry into the question of agency becomes immaterial. With reference to what after all is material as showing that the man's own mind might have been influenced to some extent or acted upon by the promise, that does appear to me important in all these questions, but it never can be conclusive—what I have to consider is, the purpose and intention with which the promise is given, and what was the actual effect produced upon the man's mind. All I can say is that, regarding this as a suspicious transaction, particularly with reference to the time at which it occurred, and to each and all of the circumstances of the case, satisfaction has not been produced on my mind that this was an act of bribery. The next case is the case of Skeehan. That, too, in many respects, is a most remarkable case. This man is a publican residing in this town; it appears that he had been antecedently asked for his vote by a person of the name of O'Brien, and that he informed O'Brien that he had not made up his mind. It appears that one of the clergymen of this parish (I think Mr. Leahy) had, upon one occasion at least, actually communicated with him upon the subject of his vote, and that either he, or some other clergyman of the parish, had called upon him. His answer to Father Leahy was certainly a most remarkable one, and has been properly and ably commented upon by Mr. Murphy, and I indeed never listened to a more able argument than Mr. Murphy's in any case. The question was, "Are you tightened?" and that, coupled with the fact that he had intimated to O'Brien, when he canvassed him before, that his mind was not made up, is no doubt a very material matter in considering this case. Father Leahy subsequently goes into the polling room, and in the polling room, at the time, is the same O'Brien who had antecedently canvassed him for his vote, and Scanlan, the personation agent on the side of Tait and Pigott. He gives his vote, and either at the time of giving his vote, or some very short time after, the Rev. Mr. Scott is also in the booth. I am now speaking again, as in the other case, about facts as to which there is no controversy or dispute. The next thing is, that O'Brien accompanied by the Rev. Mr. Scott, the clergyman of his parish, and the personation agent, Scanlan, go together to the house of this man, almost direct from the polling booth. In the house, and while they are still in the shop, the man asks whether he ought not to get an order as well as other people. Mr. Scott's answer is a singular one with reference to the knowledge which several of the other clergymen seemed to have had of its being the usual practice in elections and matters of this kind to give those orders. He said that he had no authority to give an order. The next thing that happened was, that he is asked by the man Skeehan to go into the office which was off the shop, an office with a door to it; but as I understood the Rev. Mr. Scott's evidence, it was not wholly shut off from the shop, because it communicated from the counter behind. All that the Rev. Mr. Scott could remember of the conversation which then took place was, that he said he had some old brandy. What answer he gave to that or anything further that occurred, Mr. Scott does not remember. It is hard, one would say, to resist the species of inference that this intimation had some connection with a request for an order before. However, nothing, so far as it appears, passed between them in the office; and with that mysterious intimation they come out, and then some other conversation, the nature of which does not appear, took place with reference to the order, and it ends, according to Mr. Scott's evidence, by O'Brien and the person who had accompanied him and Skehan and Scanlan from the booth asking him if he would be safe in giving an order. The answer which Mr. Scott gave was that he thought he would be safe. He says that in giving his answer what he had reference to was, the usual practice at elections of giving those orders, and, I presume, taking the chance of their being honoured. It is singular that this answer should come from Mr. Scott, who himself had refused to give the order because he had no authority; yet he so far encouraged O'Brien, at all events, to give an order, though he told me at the

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same time, when I asked the question, that he had not the slightest reason to believe that O'Brien had any authority, and he therefore, in his view, must have had precisely and identically the same reasons for refusing to give it. However, what follows after that is that they again retire from the room in which Mr. Scott is, who had declined to give the order because he had not authority, but who had told O'Brien whom he did not know to have any authority, that he would be safe. They leave Father Scott, and go into the office, and the order is drawn up in the office. Now, unquestionably, this differs from the former case; and I must say, that though it is a case which, upon the face of it, does appear to me to require explanation, it differs from the other case in one important respect, that is, upon the law as to bribery. Here there is no evidence of an antecedent promise; in the other case there was evidence of an antecedent promise; that is, a promise given before the vote was given. Here the order is given afterwards, there being no evidence of any antecedent promise, or at least none that I can find in the case; besides which it is positively denied. Now, that is one of the first cases in which the word "corrupt" enters into consideration. I shall have to say more about the word "corrupt" when I come to the cases of treating. As to this I am satisfied, that while in the former part of the 2nd section of the Act reference is made to offers and promises so called, antecedently to the vote, the Legislature clearly intended the court to draw a *primâ facie* reasonable inference from the act done as to the purpose for which it was done, leaving it to the other side to rebut that inference if they could. I think they intended something further than this, and that though a favour or promise bestowed after the vote was given might raise suspicion, if there were even a reasonable inference, of some such corrupt purpose as has been indicated by the enactment of the 2nd section, yet if the inference was not so strong as to authorise the court to act upon that inference alone, without further evidence, whether direct or circumstantial, from which the purpose for which the thing was done could be drawn it was not to be acted upon. In my view of the matter, every forbidden act done for the purpose mentioned in the Act is to be regarded as done for a corrupt purpose; and once show that a forbidden act is done for the purpose mentioned in the Act, which, without reference to the act being forbidden is a purely innocent act, then it becomes a corrupt act the moment that it is shown to be done for the purpose indicated. But in some cases the act itself affords ground for reasonable inference of the intention with which the act is done, and there the Legislature has not introduced the word "corrupt." If the act be proved to be done, the court is allowed to draw from it the ordinary reasonable inference, *primâ facie*, that it was done for the purpose which it indicates; and then corruption is made out. But there are other cases which, for some reason or another, as it appears to me, the Legislature thought the inference of intention or purpose was not so strong, and in those cases it introduces the word "corruptly," for the purpose of showing that it did not intend the ordinary inference of intention to be relied upon. This can easily and perfectly be illustrated. At law the malicious purpose is what constitutes murder, but homicide of itself raises the law of inference. Was there any such purpose? The moment homicide alone is proved the jury may infer from the homicide alone the malicious purpose. But if the Legislature had said that there must be express malice to constitude murder, the fact of homicide would be left still, as raising the presumption of malice at law, and would therefore be evidence materially bearing upon the question; but, unless the facts and circumstances made something out in addition, the crime of murder would not be committed. So here, where the Legislature has not introduced the word "corruptly," and the natural and reasonable inference from the act is that it was an act done for the purpose contemplated, the Legislature has treated it as corrupt, without mentioning anything more about it. In those cases in which it seems to have been intended that the court should not infer the purpose simply and solely from the act, it has introduced the word "corruptly." But the whole proof of corruption, as it appears to me, consists in showing that the forbidden act is done for a purpose not innocent according to the Act of Parliament. The Legislature shows there may be the giving of entertainment to voters on account of their voting; and, though that be in itself a forbidden act, it is not forbidden by the section as to corrupt practices; therefore, I think, it was in that case that they introduced the word "corruptly" for the purpose of showing that, beyond proving the fact of entertainment being given to voters, you must give evidence of the purpose. Therefore I am not at liberty to treat it as being sufficient evidence of itself to put the other party upon explanation. Now, that being so, I am bound to construe this Act, in reference to the last line of the second section of the Act of Parliament, where the Legislature has introduced the word "corruptly." It appears to me that I must be satisfied, having reference to the antecedent sections, that this gift given after the election can, from the circumstances of the case, be shown to be the price of the vote. Here, again, the circumstances are strong evidence, and are very suspicious; but I cannot reject the evidence of the parties to it. O'Brien and Scanlan most positively denied it. One of the most suspicious circumstances is going immediately from the man's house to the polling booth. They say it was not for the purpose of accompanying him, but they went (and they are borne out in this by the testimony of Mr. Scott himself) for a wholly different purpose, in that direction; that is, they went to look for the two other voters who lived there. Am I to reject that? Can I treat that as evidence which I can entirely disregard? Now I concur entirely in the observations made by Mr. Murphy, that if a gentleman having influence with the Roman Catholic clergy gave those orders, or authorised or told persons that it was safe to give them, and the orders were given, not one half-hour, not one quarter of an hour, elapses before it is known through the whole town in which it is recognised; and whether for the purpose of profit, or for the purpose of gain, or for any other purpose, the system of orders will most assuredly follow. Therefore, what I have to deal with is this: is it for the corrupt purpose? The Rev. Mr. Scott swears positively that he never did give it for that purpose, that he never thought of such a thing; and Mr. Skehan says that he had voted; that he had not interested himself particularly about his vote at all; and that his asking for the order had merely reference to this acknowledged practice at elections. I confess I am unable to resist positive evidence upon oath of that kind coming from a quarter more particularly bound than any other (if one can be more bound than another) to speak what is the solemn truth. I cannot upon mere inference decide this to be bribery. With reference to Ahern's case, the story, I think, is improbable in itself, and it is not satisfactorily contradicted; although, to a certain extent, it is contradicted. The mere fact that a man going up to poll at that time should in the interval of a few minutes be met, almost in the same place, by three persons, one of whom offered 5*l.*, the other 10*l.*, and the third 15*l.*, would immediately suggest the inference that each of these three persons must

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have communicated with the others. But I think that is most improbable; and when I add to that the fact that one of these men had been an agent upon the opposite side and was present in the booth on that occasion, and when I couple that with the man's mode of giving his evidence upon the table, I could not satisfactorily to my own mind conclude that there was bribery in this case. Now, coming to the conclusion to which I have come, that these acts of bribery have not been established, of course it renders unnecessary the consideration of the question of agency; but, considering the manner in which it has been discussed in this case, I think it right to guard myself as well as I can (not however attempting to decide anything upon the matter) against its being supposed that circumstances were not proved in this case deserving of the most serious consideration upon this question of agency, as it is called, under the statute. And if, as Mr. Coffey said, this be essentially a Roman Catholic city, and if the influence of the Roman Catholic clergy be enormous; if, more than that, from the position of the great majority of the electors in the city, they naturally look to better educated men than themselves for the management of their temporal as well as spiritual affairs—if that be so, bearing in mind the organised condition of the Roman Catholic clergy, and the fact that in every parish in the town there are, at least, two or three clergymen so connected with the poorer class of voters, a question arises in which, as a body, the clergy are interested. If they make the cause of the candidate their own, and give him the benefit of having what may be equivalent in its effect upon the election to a committee-room conducted by themselves in every parish, they being the canvassers; and if it then turns out at the time of the election that the candidate represents his cause as identical with that of the clergy, and publicly gives out that the question between him and his adversaries is whether the clergy shall be put down or raised up, and is accompanied by them through the streets canvassing; if that be so, though the particular clergyman of the parish be not the party who accompanied the candidate in canvassing, I, for my part, will doubt long before I say that the candidate is not, so far as his sitting in Parliament is concerned, responsible for the acts of those parties in their several districts and parishes. I can determine nothing, but I say that is a matter upon which my mind is by no means satisfied; and if I were called upon to decide it at this moment, my impression would be decidedly different from that which is alleged by Mr. Coffey. I now come to the cases of treating, and, for the purpose for which I view them they seem to me to be divisible into three distinct classes, each requiring a somewhat different consideration. No doubt Mr. Murphy (of whose argument I really can hardly say more than I have already said) has, for the interest of his client argued that they could be mixed together, but it appears to me that, considering the case, I am bound to separate them. I come first to what I should consider as the class which is relied upon, namely, cases of mixed bribery and treating; and those are, I believe, the greater number of orders given by Lynch, and the two orders given by Punch. I leave out of consideration the order for Skehan; that belongs more properly to the order of bribery; for it was an order by which the man might be satisfied by taking the goods to himself and giving money. The second class is what I should call the class of pure treating; those are the cases of Moloney and Manahan. It is impossible for me to regard either of those as cases of mixed bribery and treating in the way in which it has been propounded to me here; because, unless I entirely reject the evidence of Father Moloney and Mr. Manahan, it is utterly impossible to consider the orders as given for the benefit of the public, and it is that way, as far as I understand it, that these cases were urged as cases of bribery; I mean bribery as distinct from treating. I therefore treat them by themselves. Then comes the last, and, in my mind, the most serious class of cases, that is the cases of mixed bribery and intimidation (as they are called, and properly called I think) the hiring of mobs upon the part of persons in the interest of Mr. Russell, for the alleged purpose of putting down mobs upon the other side. Well now, with regard to the orders, the argument used is this; that except the two orders of Punch, all the orders which have been given are the orders of Lynch. I think there were twenty-one orders altogether spoken to in the course of the evidence. Taking out of those the three which again, if any reliance at all is to be placed on the evidence of Mr. Leahy, must be taken out of this class and put into those of mixed treating and intimidation, there would remain about eighteen, including those of Punch's, involving a sum of about 30*l.* in the whole. If these seventeen or eighteen orders were really given for the corrupt practices mentioned in the Act, namely, that of influencing votes and inducing men to vote, and for compensation for votes given, I find the greatest difficulty in understanding how they could be treated as satisfactory evidence of the purpose of bribing the public. I dwell more upon the number of them, because the sums, with the exception of those two of Punch's, were positively small, and were not given till after the poll had closed altogether, and all of them were given by Lynch. They were distributed, two of them to persons who had no wives and families; and one of them at all events, to an unmarried female. There were seven publicans to whom they were given altogether; and one, at least, was given to a man who had no vote at all. I find the greatest difficulty in coming to the conclusion that these orders were given to bribe the public. I cannot act upon mere suspicion or tricks of the election. I must consider these cases with reference to the evidence. It did strike me unquestionably, from the first, from matters which Mr. Murphy has urged, that the beginning of the giving of these orders was the act of Mr. Leahy, who gave them, for the purpose of drinking, to this mob, hired by him, and under his directions. But he did give them. He could not, as it appears to me, have given them to such a man as Lynch or to such a man as Crow, knowing that orders of this kind are ordinarily given at an election, without the certain anticipation of that fact being known to the clergymen. The publicans have given credit for every order afterwards given; but if I am to believe Father Leahy's evidence, that this is an account still due, he would unquestionably be responsible for the purposes as to which the orders had been applied by the men in whose hands he put them. They were acting in a matter in which he had given them an authority to do something, though a limited authority. Yet, if I come to the conclusion that Father Leahy, in giving these orders, was not actuated by any corrupt practice, either with reference to bribing or treating, unless they can go further, and make out that the parties who acted under him gave them for that purpose, there is no evidence before me that they were given for that purpose. It occurs to me that if these men were set upon encouraging this practice of bribing for the benefit of the wide world, the last thing they would attend to would be the interest of the parties for whom Mr. Leahy or any other party was interested. I am therefore without a rational ground for coming to the conclusion that the purpose for which these orders were given was the benefit to the publicans or any of the purposes indicated by the counsel for Mr. Russell. Now, with respect to Moloney, I shall

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speak shortly upon those cases. How am I to come to the conclusion that the orders given by Mr. Moloney, improper as I conceive them to be; leading, as I think, to improper and wholly mischievous results; leading to enormous expense and enormous drinking, at least, upon this occasion, were given for the purpose of affecting the return of the member, supposing Mr. Moloney to be the agent of the sitting member; or that they were given to people for the purpose of corruptly influencing their votes? If the evidence is to be believed, the persons for whose benefit they were given were the persons whose votes (there could not be the slightest doubt) needed no stimulus whatever of this kind. Lamentable as the results of such practices are, I must act by the law; I must go by the strict construction of the Act, and I am unable to come to the conclusion that corrupt purposes of treating have been proved. Consequently, the conclusion which I draw from the evidence is, that with respect to those particular cases, there was no doubt with regard to their votes or how they would have voted. Nothing has been proved in these cases, and I must act upon the evidence before me. If it can be shown to me that some man who had promised his vote had changed, it would be different; but nothing of that kind is proved. The evidence stands uncontradicted, that this was intended for the purpose of persons who had voted. I now come to the last part of the case, and it is one that I approach with the greatest pain; and the whole case is a very painful one, considering the persons implicated in it. There was a sum of between 300*l.* and 400*l.* expended in a couple nights, or nearly so, in giving drink to various persons, to the number of several hundreds, throughout the city of Limerick, for the purpose of securing their services to repel, if necessary, the force used by the opposite side. I will put it no further. I am told that reasonable ground existed for terror on behalf of the party who was about to canvass for Messrs. Russell and Gavin upon the Monday, the day before the day of "nomination;" that these terrors were entertained by a grave assembly of magistrates and clergymen —for that is the way it has been put to me by the counsel for the sitting members; that they were terrified by the demonstration, some of which they saw, more of which they heard; by articles in the newspapers, written against some of them personally, which caused them to be seriously apprehensive of going out upon their canvass. It does appear that some of them actually refused to go out canvassing, and left; and as far as I can gather, the whole thing seems to have been in confusion upon that day. After those persons had left (and Mr. Leahy was among those who left) the canvassing party did go out. Mr. Murphy has truly put it that there was some actual demonstration, and even a threat of violence used by a person of the name of Larry Kelly to one clergyman; and it does appear that the whole feeling of the crowd collected was changed by that circumstance, and by the address of the clergymen. What is the conclusion to which the assembly of magistrates and clergymen really came, attending, as they had a right to do, by the side of the sitting members, Major Gavin and Mr. Russell? The first thing they did was to send for the bookkeeper of the candidate in whose cause they were interested, and to instruct him to provide persons who were to resist, if necessary, the violence threatened upon the other side, and to put it down. The assembly of magistrates interested upon that particular side determine to call upon the bookkeeper of the party in whose return they are interested to set about providing a mob for the purpose of protecting them and counteracting the mob upon the other side. That is the conclusion come to by the magistrates and clergymen. And, accordingly, this man, the bookkeeper, does proceed upon this duty, and, so far as I can gather, the whole of the next two nights he spent in going through the public houses of the city, treating the various men in the employment of Messrs. Russell and otherwise, for the purpose of getting them to act for them upon the nomination day; but that is not all; one of those magistrates communicates with two at least of those clergymen; to one of them he gives 100*l.* for the purpose of raising men, without even the responsibility that might attach to the agent of the other side if put into such a position as that. It is to that man Crow, who was upon the table, that the instructions were given. He is to provide himself with persons like himself for this peaceable mode of putting an end to what had stricken such terror into the hearts of the clergymen and magistrates. In another case the sum of 150*l.* was used similarly, being supplied by a magistrate to a clergyman. For what purpose? It was, as Mr. Conway, another clergyman, said, to get the boys of the town, a specimen of whom we had upon the table in the three witnesses, Skehan, Hayes, and Crow, and accordingly that is done. Whatever view I may personally take of this transaction, it is another question whether it comes either within treating or intimidation. As to intimidation, I cannot see how the evidence applies in the absence of proof that it was directed against electors, or was organised for that purpose. I have not the evidence of a single elector who was prevented in any way whatever from voting; not a particle of evidence. Then how can I bring it within intimidation under the Act of Parliament? To bring it within the definition of treating is still more difficult, because, whatever I may think of this misguided league, if the purpose really were simply and solely the putting down a mob, how can I treat it as one of the corrupt purposes mentioned in the Act? Supposing I were satisfied that a hot and intemperate partisanship had induced men to be so unscrupulous with regard to the lives and persons of their fellow citizens as to trust the safety of the city to a contact between the mob raised by themselves and the mob which they say was raised by the other parties, even then the case would not be brought within the statute. I wish I could say that this wicked folly would not be properly described as acts of hot intemperate partisanship leading to an unscrupulous disregard of the lives and persons of their fellow citizens. It is true that no direct or distinct evidence has been given before me of evil results as regards injury to property or injury to life resulting from this which, I repeat again, was a wicked folly. I have heard of one house being wrecked; but there was not a single instance in which direct evidence was given either as to hearsay or as to anything else, that injury was done to person or property by what is called the mob of Tait. But while I admit that there is no direct evidence upon the other side of injury done after this wicked folly was perpetrated, it is impossible that I can shut my eyes to the mode in which gentlemen in the position of magistrates answered questions, hinting at excesses of that kind by drawing a distinction which they have drawn in this case between knowledge and rumour. However, it has failed in satisfying me that this last head has been sustained on behalf of the petitioners. It will therefore be my duty to certify to the Speaker that the sitting members are duly elected.

Coffey applied for costs.

FITZGERALD, B. stated that, according to Parliamentary practice, he could not give costs unless he were prepared to pronounce the petition frivolous and vexatious, which he was not prepared to do.

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Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Friday, Nov. 19.

(Before Lord Justice GIFFARD.)

Re THE BLAKELY ORDNANCE COMPANY (LIMITED); CREYKE'S CASE.

Company—Winding-up—Contributory—Past member—The Companies Act 1862—*Sect.* 28.

By the articles of association of the above-named company, it was provided that, after one month's non-payment of any calls, the board might declare the shares forfeited for the benefit of the company, and that such forfeiture should involve the extinction, at the time of the forfeiture, of all interest in, and all claims and demands against the company in respect of, the shares, and all other rights incident to the shares; but that any member whose shares had been forfeited should, notwithstanding, be liable to pay all calls then owing on such shares. Under these articles the board duly declared forfeiture of forty shares held by C. He subsequently paid the call due at the time of forfeiture. But as the forfeiture had taken place within one year before the commencement of the winding-up, it was

Held (affirming the decision of the Master of the Rolls), that C.'s name must be settled on the list of contributories as a past member of the company; for, although as between C. and the company the shares were, by the constitution of the company, absolutely extinguished, the Companies Act 1862 *rendered the member liable to contribute for a period of twelve months after the cessation of his interest, whether such cessation be occasioned by a transfer or a forfeiture.*

Bridger's and Neill's case, 19 *L. T. Rep. N. S.* 624, *considered and followed.*

This was an appeal by Mr. Creyke against an order of the Master of the Rolls (reported in 21 L.T.Rep.N.S. 165), by which his Lordship, considering that the appellant was liable to contribute as a past member to the assets of the company, which is now in course of winding-up, ordered that his name should be settled on list B. of contributories accordingly.

The report referred to fully states all necessary circumstances.

Jessel, Q. C. and *Speed*, for Mr. Creyke, contended that forfeiture of the shares altogether extinguished the relationship between company and shareholder having regard to the articles of association, which were different in *Re the Accidental and Marine Insurance Corporation*, *Bridger's Case* and *Neill's Case*, L. Rep. 4 Ch. App. 266; 19 L. T. Rep. N. S. 624, which was the case mainly relied on by the official liquidator. They also referred to

Re the Blakely Ordnance Company, Stocken's Case, L. Rep. 3 Ch. App. 412; 17 L. T. Rep. N. S. 161;

Re the Blakely Ordnance Company, Needham's Case, 16 L. T. Rep. N. S. 472; L. Rep. 4 Eq. 135.

Sir *Richard Baggallay*, Q. C. and *Higgins*, for the official liquidator, were not called upon.

Lord Justice GIFFARD said:—I quite agree that the facts of this case and of *Bridger's and Neill's* case are not identical; but though there is a distinction in the facts, in principle there is no distinction whatever between the two cases. The difference between *Bridger's and Neill's* case and this case is this—that although the shares had been forfeited in the former, the parties whose names were sought to be put on the list were persons who had transferred their shares, and their transferees could not be made liable in respect of calls made on those shares; while in this case the gentleman whose name is sought to be put on the list has simply had his shares forfeited; and there is, I agree, a somewhat different clause as to forfeiture in these articles from that which was in *Bridger's and Neill's* case. The clause in this case is this: "The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the share; but any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing on such shares at the time of such forfeiture." No doubt the shares were extinguished by the forfeiture, and the company had a right to re-issue them if they could get anyone to take them, and, as between the company and the member, apart from the Winding-up Act, the only liability was that the member was bound to pay the calls made on him antecedently to the forfeiture. Well, but apart from the Winding-up Act, the position of the company with respect to a transferor would be just the same as it would be with respect to a person whose shares had been forfeited by any act. Could the company in any one of these cases, according to the ordinary articles of association, proceed against the transferor? The result is, that this liability of a past member is a liability entirely created by the statute, and by nothing else.

That being so, first of all let us see whether this 50th clause was meant to put an end to what the statute provides. I certainly should hesitate, before I decided that a clause which went in the direct teeth of the statute, was good for anything at all, but this clause does not go in the direct teeth of the statute; it is quite consistent with the statute, and it is quite possible to read the clause and the statute together. You must take the articles as they stand; you must take the statute as it stands; and you must take them both together, and then see what is the liability. If you make this a proviso, the upshot would be this, that by the 50th clause of the articles the shares would be extinguished by forfeiture, but if there is a winding-up within a year the liability continues to pay all debts due at the time of the forfeiture. *Neill's and Bridger's* case is a decision that there need not be existing shares in order that a past member may be made liable in respect of shares; that is clearly decided. This case also decides that the amount unpaid on the shares in respect of which the member is liable, is the amount, if any, which has not been paid, and they decide this, as plainly as a case can decide anything, that what you have to look to is the original contract by the shareholder in respect of the shares.

Then you have to consider whether the shareholder has ceased to be a member for more than twelve months; then, whether any other person is liable in respect of those particular shares, and if so you must exhaust him before you can come upon the past member; but if it be the case either that those shares are transferred, and the person who is a member in respect of those shares cannot be made liable, or if those shares do not exist at all, then beyond all question, after all the existing members have been exhausted, the past member is liable. I confess that I should have no difficulty on account of the arguments which Mr. Jessel and Mr. Speed have placed before me—the first of these being with reference to the contribution by contributories *inter se*, and the second of them being

with reference to the third division of the 38th section of the Act. With reference to contributions by contributories *inter se*, if you have twenty past members all of whom have been made contributories, and whose contributions would have to be settled *inter se*, we all know that you may make calls upon past members before you have made your list complete, and you may make calls in such a way that a man may be obliged to pay a given sum, and afterwards recover that given sum from others in the same category as himself. Therefore that creates no difficulty.

Then as to the third subdivision of the 38th section, that has been held to create no difficulty in *Bridger's and Neill's* case, and it certainly creates no difficulty here. It is, "No past member shall be liable to contribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act." That clause means simply this, and nothing else, that the liability of past members shall be secondary to the liability of existing members, that you must exhaust all the existing members before you go on the past members; but when these are exhausted you may go on the past members; it matters not whether there are existing shares or not. Forfeiture and transfer have for this purpose the same effect. Therefore this appeal must be refused with costs.

Solicitors for the appellants, *Taylor, Hoare*, and *Taylor*.

Solicitors for the official liquidator, *Lewis, Munns, Nunn*, and *Longden*.

Saturday, Nov. 20.

(Before Lord Justice GIFFARD.)

Ex parte LUBLIN; *Re* LUBLIN.

Bankruptcy—Practice—Time for entering an appeal—The Bankruptcy Law Consolidation Act, ss. 12, 14, *and* 16—*General Orders of* 12*th Oct.* 1861, *rule* 32.

The limit of twenty-one days for the entering of an appeal fixed by sect. 12 *of the Bankruptcy Law Consolidation Act* 1849, *applies to appeals by way of motion.*

Re Redfearn, 11 *Jur. N. S.* 611; 12 *L. T. Rep. N. S.* 292, *not followed.*

Therefore in a case where notice of motion of appeal had been served within twenty-one days from the date of the pronouncing of an order, but the appeal had not been taken to the chief registrar for entry till after the expiration of the twenty-one days, it was held that the appeal was too late.

This was an appeal from a decision of one of the registrars of the Liverpool district Court of Bankruptcy acting as deputy for the commissioner.

A trader-debtor summons was issued by the Bankhall Oil and Chemical Works (Limited) against one Edward Lublin. When the summons came on for hearing before the deputy commissioner, on the 12th Oct. 1869, various objections were taken by Lublin's solicitor to the form of the affidavit of debt upon which the summons was issued. The deputy commissioner held that the affidavit might be rectified and resworn, and ordered this to be done. Lublin's solicitor then contended that the affidavit would thereby become a new one, of the date in which it was resworn, and that, consequently the summons would not be founded, as it ought to be, on an affidavit duly sworn and filed. The deputy-commissioner overruled this objection, and called upon Lublin to admit or deny the debt. This he declined to do, until an appeal from the decision of the deputy-commissioner could be heard and disposed of. The deputy-commissioner thereupon directed it to be recorded upon the summons that there was no appearance to the summons in the terms of the statute.

From this decision a notice of motion of appeal dated the 1st Nov. 1869, was given on behalf of Lublin, and duly served on the other side within twenty-one days of the pronouncing of the order, but was not taken to the chief registrar for entering until the 4th Nov. The chief registrar declined to enter the appeal on the ground that it was more than twenty-one days from the making of the order. Upon an *ex parte* application of counsel for the appellant, Giffard, L. J. on the 6th Nov. directed the registrar to receive and enter the appeal *de bene esse*. This having been done, the appeal now came on to be heard.

Yate-Lee, on behalf of the appellant, opened the appeal.

De Gex, Q. C. *contra*, took the preliminary objection that the appeal was too late. The twenty-one days were to be counted from the date of the pronouncing of the order appealed from. He referred

Re Hopkins, 3 De G. J. & S. 456;
Re The Risca Coal Company, 31 L. J. N. S. 429, Ch.;
Ex parte Clarke, 2 De G. & J. 245.

Yate-Lee contended that now by virtue of the orders of 12th Oct. 1861, rule 32, appeals were brought by way of motion. Sect. 12 of the Act of 1849, which provided that if no appeal was entered from an order within twenty-one days from the date thereof, such order should be final, could not apply except to the date of the service of the notice of motion. And in *Re Redfearn*, 11 Jur. N. S. 611, 12 L. T. Rep. N. S. 292, Lord Westbury held that if notice of motion of appeal was given within twenty-one days from the pronouncing of the order of appeal that was enough.

De Gex, Q. C. said that from the report of that case in 13 W. R. 665, it appeared that all parties consented to the appeal being received.

Lord Justice GIFFARD said that the registrar informed him that in that case the deposit upon the appeal was made within the twenty-one days. His Lordship was afraid that he could not follow the decision in *Re Redfearn*. In one of the reports it was stated that all parties consented to the appeal being received, and he thought there must be some mistake in the other report. To hold that sect. 12 of the Act of 1849 had no application to appeals brought by way of motion would be in effect to repeal that section. The appeal must be dismissed.

Solicitor for the appellant, *Etty*, of Liverpool.

ROLLS COURT.

Reported by HENRY PRAT, Esq., Barrister-at-Law.

Dec. 2 *and* 6.

THE LAND CREDIT COMPANY OF IRELAND *v.* LORD FERMOY; *Ex parte* MUNSTER.

Practice—Service of decree—Writ of fi. fa.—Motion to discharge on ground of non-service of decree.

By the decree in a suit the defendants were declared to be jointly and severally liable to pay a certain sum on a fixed day. The plaintiff issued a writ of fi. fa. for the whole amount against one of the defendants, without serving him with the decree:

Held, that service of the decree was not necessary when a day certain was fixed for payment, and that the

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plaintiff was entitled to issue the writ against any one of the defendants for the whole amount, when they were jointly and severally liable.

This was a motion on behalf of Mr. Henry Munster, one of the former directors of the company which is now being wound-up, and also one of the defendants in the suit, to set aside a writ of *fi fa*, on the ground of irregularity.

On the 24th March 1869, the Master of the Rolls made a decree in the suit (reported 20 L. T. Rep. N. S. 293; L. Rep. 8 Eq. 7), whereby several former directors of the company, including Mr. Munster, were declared to be jointly and severally liable to repay a sum of 3739*l*, which, in his Lordship's opinion, had been improperly applied in the purchase of shares in the company; and it was ordered that they should, on or before the 30th June then next, pay this sum, with interest from the date of the decree, and the costs of the suit when taxed.

The decree was duly passed and entered on the 10th May 1869, but it it was not served on Mr. Munster.

On the 24th Nov. 1869, the official liquidator of the company issued a writ of *fi. fa.*, directing the sheriff of Sussex to levy on the goods and chattels of the defendant Munster for the sum of 3739*l.*, with interest from the date of the decree, and also for the sum of 580*l.*, the amount of the taxed costs of the suit.

Execution had been levied under the writ, but the sheriff had been stayed, by the direction of the court, from proceeding till the present motion should have been disposed of.

Jessel, Q. C. (*Hemming* with him), for Munster, moved to discharge the writ on the ground that service of the decree was a necessary preliminary to the issue of the writ, and had not been effected; and also on the ground that the writ ought to have followed the decree, and been issued against all the defendants in the suit, instead of being issued against Munster only. He cited

Adkins v. *Bliss*, 2 De G. & J. 286;
23rd Order, Rule 10;
29th Order, Rules 1 and 6;
30th Order, Rule 4.

Sir *Richard Baggallay*, Q. C. and *Shebbeare*, for the official liquidator, contended that service of the decree was not necessary when the date of paym nt was named in the decree, and that the plaintiff was at liberty to issue the writ against one defendant, where a number of defendants were decreed to be jointly and severally liable to pay. They cited

Stresten v. *Whitmore*, 5 Beav. 228;
1 & 2 Vict. c. 110, ss. 18 & 20;
Seton on Decrees, 3rd edit. vol. 2, p. 1240;
Daniel's Chancery Practice, 4th edit. p. 958.

Jessel, Q. C. in reply, referred to
Seton on Decrees, 2nd edit. p. 648.

Dec. 6.—Lord ROMILLY.—I cannot say that the order is quite free from ambiguity; but orders are the creatures of the court, and the court is not bound to construe them strictly according to the meaning of the words. Service of the decree is not required where a day certain is fixed for payment, but it is required where payment is to be made so many days after service. Personal service is in some cases impossible, and substituted service causes great delay. Attachment cannot be resisted on the ground of non-service of the decree. As to the other point, I am quite clear that the sheriff may be directed to levy against any one of the defendants, where they are jointly and severally liable, but without prejudice to the right of such one defendant to require contribution from the others. I am of opinion, therefore, that I cannot discharge this attachment, and that the motion must be dismissed, but without costs, as the question was doubtful.

Solicitors for the applicant, *Ward*, *Mills*, and *Witham*.

Solicitor for the official liquidator, *Henry Gover*.

Friday, Dec. 10.

Re CONSTANTINOPLE AND ALEXANDRIA HOTELS COMPANY;

EBBETTS' CASE.

Company—Winding-up—Contributory—Infant.

An infant applied for shares in a company, which were duly allotted. A few months later he came of age. Two years after the allotment of the shares, the company having meanwhile been ordered to be wound-up, he transferred the shares for a nominal consideration, but the transfer was never registered:

Held, that the execution of the transfer was a confirmation of the transaction, and that he must be retained on the list of contributories:

Semble, that an infant will not be relieved from shares for which he has applied personally.

Adjourned summons.

This was an application by a Mr. Ebbetts to have his name removed from the list of contributories to the above company on the ground that he was an infant at the time when the shares were allotted to him.

In Nov. 1863 he applied for 150 shares, which were duly allotted to him. He attained the age of twenty-one on the 8th April 1864. On the 3rd June 1865, the company was ordered to be wound-up, and on the 28th July following Ebbetts executed a transfer of the shares to a Mr. F. H. Wood for a nominal consideration. The transfer was never registered, and Ebbetts alleged that he had executed it merely under the notion that he would thereby relieve himself from liability. The official liquidator placed his name on the list of contributories, and he took out the present summons to have his name removed from the list. The summons was now adjourned into court.

Bagshawe, in support of the application, submitted that the execution of the transfer, being quite futile, did not affect his right to get rid of a liability incurred during infancy.

Bevir, for the official liquidator, was not called upon.

Lord ROMILLY.—I have no doubt that he is a shareholder, and that his name must be retained on the list. I am not aware of any case where an infant applied personally for shares, and was held not to be liable. An infant can bind himself by fraud; and if the court were of opinion that an infant had applied for shares intending to retain them if the company should succeed, and to get rid of them if the company should fail, the court would in all probability hold him liable, and retain him on the list. But however that may be, in the present case the execution of the transfer was clearly a confirmation of the transaction, and the summons must, therefore, be dismissed with costs.

Solicitor for the applicant, *Pearce*.

Solicitors for the official liquidator, *Routh* and *Stacey*.

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Dec. 10 *and* 13.

Re COMMERCIAL BANK CORPORATION OF INDIA AND THE EAST;

FERNANDEZ'S CASE.

Company—Winding-up—Foreign executor—Probate duty.

An Indian company was ordered to be wound-up by the Court of Chancery. An Indian creditor of the company had received a dividend on his claim. He then died, and his will was proved in India by his executor, whose domicil was in that country. A further dividend became payable after the creditor's death.

Held, that the dividend might be transmitted to the executor, without requiring him to take out probate in England.

Adjourned summons.

This was an application by the executors of a Mr. Fernandez, one of the creditors of the above company, for the payment of a dividend which had become due. Fernandez had his domicil in India; he had before his death received one dividend on the amount of his claim. His will was proved by his executors in Bombay, and not in England, and the question to be decided on this summons was whether the court could direct payment of the further dividend to the executors without requiring them to take out probate in England.

The Commercial Bank Corporation of India and the East was incorporated by royal charter in 1864, for the purpose of carrying on the business of banking in all parts of the world. Its head office was at Bombay, but it had a branch office in London under an agent or manager. In May 1866 it was ordered to be wound-up by the Court of Chancery.

Bagshawe, for the executors of Fernandez, contended that the company was clearly a foreign company, and that the court could therefore direct the payment to be made to the executors without requiring them to take out probate in England.

Sir *Richard Baggallay*, Q. C. and *Kekewich*, for the official liquidator, did not take any part in the argument.

W. W. Karslake, for the Crown, contended that a foreign executor could not take proceedings here for the recovery of a sum due to his testator's estate without taking out probate here. He cited *Lasseur* v. *Tyrconnel*, 10 Beav. 28.

Dec. 13.—Lord ROMILLY.—The question is, whether I can properly pay a dividend to a foreign executor, without requiring him to take out probate here. The bank is an Indian bank, with only a branch in this country, and the debt, in respect of which this dividend has become payable, was incurred in India, and, moreover, the funds out of which the dividend is to be paid are not in court; for all these reasons, I am of opinion that I must send it to the executor in India. The recipient must, of course, pay all the costs of transmission, but will escape the cost of taking out probate here. If the question did not arise on an Indian bank, I do not say what I should do; if such a case should arise, I should wish it to be mentioned to me again. The official liquidator and the applicants must have their costs out of the estate, but I cannot give the Crown any costs, as Mr. Karslake will not consent to treat this as a representative case.

Solicitors for the applicants, *Tucker, New*, and *Langdale*.

Solicitors for other parties, *Freshfields; The Solicitor of the Inland Revenue.*

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

July 14, 17, 19, *and* 20.

GIFFARD v. WILLIAMS.

Partition suit—Disputed legal title—Jurisdiction—Evidence—Decree—Costs.

Where the plaintiffs, on a bill for a partition, sought to establish their title (which was purely a legal one) to the undivided part of the property in dispute, and the defendants denied the plaintiffs' title:

Held, that, inasmuch as the primary object of the bill was a partition, and the establishment of the plaintiffs' title only incidental to that relief, the court had jurisdiction to make the decree asked.

The plaintiffs tendered as evidence in support of their title the rent-rolls, containing entries of the receipt of rent, in the handwriting of the deceased stewards of their predecessors in title:

Held, that such evidence was admissible.

Slade *v.* Barlow, *L. Rep.* 7 *Eq.* 296; 20 L. T. Rep. N. S. 10, *and* Bolton *v.* Bolton, L. Rep. 7 Eq. 298, *commented upon.*

This was a partition suit. The facts, as stated by the bill, were as follows:

Thomas Giffard, by his will dated 18th July 1855, devised all his freehold estates of inheritance to the plaintiffs James Wyley and George Holycak for the term of 1000 years, upon certain trusts therein declared concerning the same, and subject thereto to the use of his first and other sons successively in tail male, with remainder to the use of his brother, the plaintiff Walter Peter Giffard, for his life, with remainder to the use of the plaintiff Walter Thomas Giffard (then the only son of the plaintiff Walter Peter Giffard) for his life, with divers remainders over (which failed), with remainder to the plaintiff Charlotte Josephine Herbert, the eldest daughter of the testator, and the wife of the plaintiff William Reginald Herbert, as tenant in tail.

The testator died in Jan. 1861, leaving no son, and thereupon Walter Peter Giffard became tenant for life, and the plaintiff Charlotte Josephine Herbert became entitled to the first vested estate of inheritance in the property devised by the will.

Part of the property so devised consisted of an estate known as Plas Ucha, situate in Nequis in the county of Flint. This estate was at about the beginning of the last century owned by a Mr. Roberts, whose daughter Helena married Peter Giffard, the ancestor in title of the plaintiffs. In consequence of that marriage the estate passed to Peter Giffard, and from him to Elizabeth Giffard, and after her decease to the testator. Included in the estate was a field called Gwegloed Vadock or Wereglodd Fudog, the right to the moiety of which formed the subject of the present dispute.

The plaintiffs, in support of their claim, stated that the tenant of the field had always (at least since 1738) paid rent for one moiety of it to the owner for the time being of the Plas Ucha estate, and that the tenants, or some persons representing them, had always attended the rent days of those owners; that in 1771 the Plas Ucha estate was parcelled out into farms; and that upon that parcelling out, one moiety of Wereglodd Fudog was assigned as a separate holding to Edward Williams, at the rent of 1*l.* 10*s.* a year; that the owners of the Plas Ucha estate had from time to time repaired the fences of the field, and done other acts of ownership in relation thereto; and that a commutation and apportionment of the tithes took place in 1838, in which apportionment and the plan

thereto one moiety of Wereglodd Fudog was stated to be the property of the said Elizabeth Giffard, and that Miss Elizabeth Henrietta Jones, who was then the owner of the neighbouring estate of Tyntwyll, and entitled as the owner of the other moiety of the field, raised no objection to that description.

They further stated that the other undivided moiety of the field had for many years past constituted part of the Tyntwyll estate, of which the defendant Catherine Margaret Williams, the wife of the defendant Richard Williams, was the owner in fee-simple. The ancestors in title of the plaintiffs generally let their moiety of the field to the owners for the time being of the Tyntwyll estate, who, in their turn, let the entirety of the field as part of the farm of Tyntwyll and Tydryn, which letting was alleged by the plaintiffs to be, as to one moiety of the field, a subletting.

It had recently been discovered that valuable veins and mines of coal and iron existed under the surface of the Wereglodd Fudog Field, and the defendants Richard Williams and his wife had in consequence, and for the first time, insisted that the defendant Catherine Margaret Williams was the absolute owner of the field, subject only to a rentcharge of 2*l.* a year, payable out of the whole of the Tyntwyll estate, and vested in the plaintiffs as the owners of the Plas Ucha estate.

The defendant Richard Williams and his wife had assumed to demise the entirety of the field to the defendant Robert Davies, as tenant thereof from year to year.

Since the 25th March 1861 the defendant Richard Williams had excluded the plaintiffs from the receipt of any part of the rent of the field, and had received the rents for the entirety of it.

The defendants alleged that the plaintiffs were entitled to a divided moiety of the field, and not to an undivided moiety. The plaintiffs, however, showed that the ancestors in title of the defendant, Catherine Williams, the wife of the defendant, Richard Williams, were from time to time tenants under the ancestors in title of the plaintiffs, of their moiety of the field; and thus, if such moiety were a divided one, such tenants confused the boundaries of the estates, and the boundaries thereof could not now be ascertained without the aid of this court.

There were no visible boundaries dividing the field; and no boundaries were known to the persons who had been longest acquainted with the field.

The bill prayed a declaration that the plaintiffs were entitled to an undivided moiety of the field called Wereglodd Fudog, that a partition might be made of the field; but that if the court should be of opinion that the plaintiffs were entitled to a divided moiety of the field, the boundaries of such moiety might be ascertained and defined; for an account and payment of all rents received by the defendant Richard Williams and his wife, or either of them, in respect of the field, which relief however was ultimately waived; that the right of the several parties in the field might be ascertained and declared, and that the defendants or one of them might pay the costs of the suit.

The defendants, by their answer, denied that the field in question ever formed part of the Plas Ucha Estate. They stated that it was included in the Tyntwyll Estate, to which estate the defendants, Richard Williams and his wife, claimed to be entitled since the year 1846, from which time, as they alleged, the rent had been regularly paid to them for the whole estate. That in 1832 the predecessor in title of the defendants, Richard Williams and his wife, to the Tyntwyll Estate, brought an action of ejectment against the then occupier and tenant of the estate, and recovered possession of it, including the entirety of the field in question, and ever since the owners of the estate had been in undisturbed possession of the rents and profits of the whole of the field. They denied that either the tenant of the field or any other person had ever paid rent for the field to the owner of the Plas Ucha Estate; but they stated (in the ninth paragraph of their answer) that some of the former tenants had for fifty years and upwards made certain payments to the plaintiffs, or their ancestors in title, of an annual sum of 40*s.*, which (as they believed) was payable out of or charged upon the whole of their property at Nequis (and not out of or upon the said field in particular), to or in favour of the plaintiffs or their ancestors by way of equality or exchange, on the occasion of "certain exchanges of land effected many years ago, between their predecessors in title, and the predecessors in title of the plaintiffs;" but they said that such payments were not made in respect of rent or otherwise in respect of the field in question, but simply by way of rentcharge, or quit rent on the whole of the Nequis estates, as by the receipts given for the same was so expressed to be made.

The remaining facts of the case will be found in the judgment below.

Fry, Q.C. and *Cozens Hardy*, for the plaintiffs, submitted that they had clearly, by the pleadings, established their claim to an undivided moiety of the field. Their title commenced with the deed executed in Dec. 1672, and had continued uninterrupted down to present time. The rent rolls of the Nequis estate, which were proved to be in the handwriting of the former stewards of the property, showed that rent for the field had been continuously paid to the agents of the plaintiff's predecessors in title. In one of the books relating to the estate, there was an entry proved to be in the handwriting of the solicitor and agent (since deceased), of a predecessor in title of the plaintiffs, to the effect that Robert Roberts (one of the predecessors in title), had one-half of "Wereglodd Fudog." In fact, the whole of the evidence as to the plaintiff's title was indisputable. (They were stopped by the court.)

Osborne Morgan, Q.C., and *Williams* (of the Common Law Bar), for the defendants, objected to the evidence adduced by the plaintiffs. Mere entries in the rent rolls by third parties since dead, without showing whether such entries were made contemporaneously with the events of which they spoke, or in the due course of business, or against the interest of the persons making them, were inadmissible.

Price v *Lord Torrington*, 1 Sm. L. C. 290;
Outram v. *Morewood*, 5 T. R. 121;
Poole v. *Dicas*, 1 Bing. N. S. 649;
Chambers v. *Bernasconi*, 1 Tyrw 342; in error, 4 Ibid. 531.

The plaintiffs had also tendered as evidence in support of their case the tithe commutation maps, but these were no evidence unless it could be proved that all the requirements of the Tithe Commutation Acts (6 & 7 Will. 4 c. 71, ss. 60, 61, 63, 64; and 7 Will. 4 & 1 Vict. c. 69, s. 2), had been strictly observed. They further contended that the court had no jurisdiction to entertain the suit. It was asked under the colour of a bill filed ostensibly for a partition to decide upon a disputed legal title. The court had no power to do so.

Baring v. *Nash*, 1 Ves. & B. 551;
Slade v. *Barlow*, L. Rep. 7 Eq. 296; 20 L. T. Rep. N. S. 10;
The Bishop of Ely v. *Kenrick*, Bunb. 322.

The bill came within Sir John Rolt's Act (25 & 26 Vict. c. 42), s. 4, as an ejectment bill, and ought, in accordance with the authorities, to be retained on the file for a year, with liberty to the plaintiffs, if so advised, to bring an action at law.

Potter v. *Walter*, 2 De G. & Sm. 418; *Bolton* v. *Bolton*, L. Rep. 7 Eq. 298.

R. C. Palmer appeared for other parties.

The VICE-CHANCELLOR.—I will not trouble you Mr. Fry to reply. The principal question in this case is that of jurisdiction. It was said that the court ought not to entertain this suit, because there is a dispute as to the title, and two recent decisions have been referred to, which are, no doubt, cases of importance. They are authorities, however, which it is plain from the argument in the present case, may be very easily misunderstood. In the case of *Bolton* v. *Bolton* (*ubi sup.*), the main purpose was not a partition, but the establishment of the plaintiff's title upon the construction of a will. It was the case of a bill filed by a person out of the possession of the property; and the object of the suit was to recover the possession. That being so, it appears that a bill in equity for a partition, ought not to be made a means of trying a title, which should properly be tried at law. In the same way, in the case of *Slade* v. *Barlow* (*ubi sup.*), which came before James, V.C., he took exactly that view. He treated that case as I did that of *Bolton* v. *Bolton*, and as the Lords Justices treated it—as a case in which, under colour of a bill for a partition, what was sought was to establish a title to the property, of which the plaintiff was out of the possession. In the present case the circumstances of the property are peculiar. In this, as in all other cases, the plaintiffs on a bill for a partition must prove their title to the undivided part of that property which they seek to have divided. There is no such rule, so far as I am aware, as that a bill for a partition cannot be maintained, if a defendant denies the plaintiff's title, and the title is purely a legal one. I never heard such a rule laid down anywhere. No doubt the title must be proved; but even where a plaintiff has come for a partition, and has not at once succeeded in proving his title, this court has given him an opportunity of producing further evidence of it, without sending him to a court of law. In the case of *Baring* v. *Nash* (*ubi sup.*) Sir Thomas Plumer, at the end of a judgment of great research, and with which he took extreme pains, says, "Where the legal title is under suspicious circumstances, a court of equity may well pause in directing partition, but if the title is clear a partition is a matter of right; and it is expressly stated in *Parker* v. *Gerard*, Ambler 236, that there is no instance of not succeeding in such a bill, but where there is not proof of title in the plaintiff; and in the case of *Cartwright* v. *Lord Bath*, the court gave leave and time for the plaintiff to make out his title." Of course, if a title cannot be made out, the right to the partition must fail entirely. The question, therefore, in the present case is this: The bill in this suit is one, primarily, for a partition. The great object of the suit is the partition; and the reason for wishing to effect that object, is the increased value of the property, in consequence of the discovery of some minerals below the land. That being so—the prime object of the suit being the partition of the property, and the establishment of the title to it being only incidental to the partition—the question which this court has to consider is, whether these plaintiffs have established their title to an undivided moiety of this small close of land? The circumstances of the case are, as I have said, very peculiar. The plaintiffs have gone very far back in proving this title. Upon a review of the whole of their evidence, as contrasted with that of the defendants, who deny the title of the plaintiffs, it seems to me, certainly, that the plaintiffs have proved their title very clearly indeed. To begin with their deeds. The first is a deed dated so long ago as 1672. The close of land in question, is, by its proper name, included in their conveyance, and was conveyed to that family through whom the plaintiffs derive their title. The next deed is a deed of 1730. In that deed the close of land is given very clearly mentioned. But it is mentioned with this peculiarity: being mere land, it is nevertheless spoken of as, and called, "all that other messuage or tenement commonly called or known by the name of Gwengloed Vadock, now or late in the tenure, possession or occupation of Robert Williams, at or under the yearly rent of 1*l.* 10*s.*" It has been fairly enough argued that there is no messuage upon this close of land, and the words "messuage or tenement" are not a proper description of a close of land containing four acres. But looking at all the other circumstances of the case, I have not the slightest doubt that the parcel there described is the identical close of land now in question. It is to be observed that although the description contains the word "messuage," there is also the word "tenement." That word clearly is, I think, enough to signify the land, without any messuage at all upon it. Moreover this estate passed in the beginning of the 18th century, about one hundred and thirty years ago, by marriage to the family of the Giffards. A member of that family, Peter Giffard, through whom the plaintiffs claim, married an heiress of the name of Roberts, who was entitled to this land. The title is, therefore, traced down. The property remained in the family; and they, not being obliged to mortgage the land, no other title deed occurs, until a comparatively recent period. But the clear and important evidence in this case in favour of the plaintiffs, is the proof of the payment of rent for this land to the family of the Giffards, and the fact that those claiming under them, as to one undivided moiety of this close of land, held it as tenants in common with the owner of the neighbouring estate. As to the whole of that evidence, however, the plaintiffs' case is met by a denial on the part of the defendant that the rent rolls or rentals are no evidence at all. Some cases were then cited which really have nothing to do with the present question, beyond this, that in *Outram* v. *Morewood* (*ubi sup.*), a case before the Court of Queen's Bench, in which entries by a third party—entries made, not in the discharge of any duty, but simply by a third party—were not admitted to be legitimate evidence. In that case a distinction was taken between entries by a third person deceased, and entries by a steward. In Starkie on Evidence (vol. 1, p. 32), which is, perhaps, the best text-book on the subject of the Law of Evidence, I find in looking at his statement and summary of the case of *Outram* v. *Morewood* that he says this: "In *Outram* v. *Morewood* Lord Kenyon said that, although a general right might be proved by traditionary evidence, a particular fact could not. There the question was whether Cow Close had been part of the estate of Sir I. Zouch, out of which certain rents and coals had been reserved; and the court held that the fact could not be proved by entries made by a third person, deceased, in his books of receipts of rents from his tenant, such entries being considered as no more than a declaration of the fact by such third person, which was different from entries by a steward, who thereby charged himself with the receipt of money." It has been said, although I think, with no very great force, that such entries not being against the interest of the person making them are inadmissible. The fact of the entries being against the interest of the person who makes them is said to be the circumstance that gives them

credibility, and establishes them as evidence. But I think that is not entirely an accurate view of the matter. I quite assent, however, as other judges have assented, to the statement of Mr. Starkie, at p. 347 of the same volume. He there says this:—"It may, however, be observed that the consideration that the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party was engaged, seems both in reason, and upon the authorities, to afford a much safer warrant for giving credit to such evidence, than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party," &c. Lord Hardwick, in *Manning* v. *Lechmere*, 1 Atk. 453, speaking of what is evidence, says:—"Where there are old rentals, and bailiffs have admitted money received by them, those rentals are evidence of the payment, because no other can be had." Therefore, in my opinion, all the objections to the reception of these rentals as evidence in this case are entirely unfounded. I should not have noticed the authorities upon that part of the case if it had not been that so much stress was laid, and the case so strongly pressed upon them, by Mr. Morgan. I think, however, that he has, to say the least, been obliged, for the purpose of his argument, to employ them in a way in which they cannot legitimately be used. Then, looking at these recitals themselves, they extend over the greater part of a century and a half; and leave to my mind not the slightest doubt that the rent, the payment of which they purport to show, was paid to the owners of the Plas-Ucha estate, in respect of this particular close of land. That alone would be enough to establish clearly, to my satisfaction, the claim of the plaintiffs. But when I look at the case set up by the defendants, that of the plaintiffs is, I think, greatly strengthened. The defendants cannot deny that rent has been paid; and they cannot deny that rent has been paid by tenants. In their answer they affect to say that the rent, which, according to the entries, has been paid for more than a century and a half, and was probably paid before that, was paid in respect of rent due for equality upon the occasion of certain exchanges. That is deliberately and distinctly stated in their answer. Now the defendant's case upon that completely broke down; indeed, I think that statement was not even mentioned by Mr. Morgan in his argument. But it is impossible to get over it. Three receipts were produced from the custody of the defendants, but they totally contradict their case. Those receipts are ordinary receipts for rent, such as are given to a tenant upon a proper payment by the proper hand to receive the rent. It seems to me unnecessary to go minutely through the other parts of the case, but they also strengthen that of the plaintiffs. It must be observed, however, that in the year 1838, which is now thirty-one years ago, and more than thirty years before the bill in this suit was filed, the Tithe Commissioners, in discharge of their duties, apportioned the tithe rentcharge on this estate. The statute makes the entries by the commissioners in their proceedings, when properly verified, evidence of the matters therein stated. In the document produced, and authenticated by the Tithe Commissioners, one undivided moiety of this very close of land is stated as part of the property in respect of which they discharged their duty. That was, however, attempted to be got rid of in this way: it was said in effect that the predecessors of the defendants, the persons who oppose the title of the plaintiffs, lived a great way off the property in question, that the defendants themselves now live twenty miles from it, and that they or their predecessors did not hear of the commutation, and probably had no notice of it. But the Act of Parliament requires these things to be done not in a corner, but upon notice, in all the most public places, so that it is impossible to treat this document otherwise than as a public one, and as further evidence that at that time the owner of the undivided moiety of the field was aware of the facts. That being so, it appears to me that the plaintiffs have established their title; and, having established a title against a case deliberately set up by the defendants' answer, and which has failed, this case does not come within the ordinary rule as to the costs of a partition suit. I think, therefore, that the plaintiffs must have the declaration which they pray for by their bill—viz., that they are entitled to an undivided moiety of the field called Wereglodd Fudog, and there must be a decree that the partition shall be made of the field, with costs.

Solicitors for the plaintiff, *John Flower*, for *R. N. Heane*, Newport, Salop.

Solicitors for the defendants, *J. Whitehouse, Kimber*, and *Ellis*, for *Dewes and Co.*, Nuneaton.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

ERRATUM.—In the report of *Cox* v. *Land and Water Company (Limited)*, *ante*, p. 550, the case alluded to by the Vice-Chancellor as the Brighton Directory case was *Mathieson* v. *Harrod*, 19 L. T. Rep. N. S. 629; L. Rep. 7 Eq. 270; and not *Kelly* v. *Morris*, L. Rep. 1 Eq. 697, as stated in the report.

June 9, 14, *and* 23, *and Dec.* 10.

ALLEN v. BONNETT.

Bankruptcy—Mortgage eighteen months previous—Notice subsequently—Bill of sale not registered—13 *Eliz.* c. 5.

A builder having become bankrupt and absconded, his uncle, a publican, gave notice to the assignees of a deed whereby all the bankrupt's property, real and personal, was conveyed and assigned to him to secure 750l., 450l. previously paid, and 300l. expressed to be paid at the date of the deed, bearing date eighteen months before the bankruptcy, and there was also a bill of sale. The bill of sale was not registered, and no notice was given to anyone (there being several other incumbrancers) until after the bankruptcy. There were no accounts to show the advances either in the bankrupt's books or in any documents of the mortgagee, who was not a literate man, but who swore to lending the money, although no one saw it pass, and he admitted that the 300l. was not advanced as expressed by the deed. On the questions whether the money was really advanced; whether the absolute conveyance and assignment was an act of bankruptcy, and even if valid, whether it was not void under the 13 *Eliz.* c. 5:

Held, on the evidence, that there was no proof that it was not advanced; that the case was governed by Alton v. Harrison, *L. Rep.* 4 *Ch. App.* 623; 20 *L. T. Rep. N. S.* 100; *and that the deed was a good deed under the statute.*

This bill was filed by Charles Allen, Richard Wyles, and Charles Hodgkin, creditors' assignees of Elias Bonnett, against Charles Bonnett, uncle of Elias Bonnett, for the delivery up and cancellation as void, of an indenture of mortgage dated the 22nd Feb. 1865, and to restrain the defendant from dealing with or acting on the mortgage; the question being, whether such indenture was not, by reason of its comprising the whole property of the said Elias Bonnett, an act of bankruptcy; and, as being concealed until subsequently to such bankruptcy, void as against creditors as a fraudulent preference under the statute. In July 1866, Elias Bonnett carried on business as a brickmaker at

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Sittingbourne, Kent, and on the 20th of that month was adjudicated a bankrupt, and on the 17th Aug. the plaintiffs were chosen creditors' assignees.

The bill alleged that at the date of his bankruptcy, Elias Bonnett was possessed of considerable freehold and leasehold property near Sittingbourne, subject to mortgages, executed prior to July 1866, to various persons, such property being that described in the alleged mortgage of the 22nd Feb. 1865. That Elias Bonnett never surrendered on his bankruptcy, and had absconded; and, on the 4th Aug. 1866, the following notice was served on the respective solicitors of the mortgagees:

To all whom it may concern. I do hereby give you notice that, by an indenture bearing date the 22nd Feb. 1865, Elias Bonnett, of Milton and Sittingbourne, in the county of Kent, builder and bricklayer, conveyed to me all the freehold and leasehold hereditaments of him, the said Elias Bonnett, and described and referred to in the same indenture, for securing to me, my executors, administrators, and assigns, the sum of 750*l.* and interest, as therein mentioned. Dated this 4th Aug., 1866. CHARLES BONNETT.

That this notice was the first intimation to the mortgagees of the mortgage, and not received till fifteen days after the bankruptcy; and that subsequently to the plaintiffs' appointment as assignees a like notice was served on their solicitors, Messrs. Prall and Son, who, on the 30th Aug., applied to the defendant for a copy of the deed, which they received from his solicitors, Messrs. Duffield and Bruty. This deed was made between Elias Bonnett, of the one part, and the defendant of the other part, and was dated the 22nd Feb. 1865. After reciting that Elias Bonnett was indebted to the defendant in 450*l.*, and had occasion for a further advance of 300*l.*, it was witnessed that in consideration of those sums, 450*l.* due, and 300*l.* to the said Elias Bonnett by the defendant paid on the execution thereof, the receipt whereof was thereby acknowledged, the said Elias Bonnett directed, limited, and appointed, and granted and conveyed unto the defendant and his heirs, certain freehold property, particularly described, to hold to the defendant and his heirs, to the only proper use and behoof of him, his heirs and assigns for ever, subject, nevertheless, to the several mortgages then existing thereon, and the proviso for redemption. And it was further witnessed that for the consideration aforesaid, the said Elias Bonnett bargained, sold, demised, and transferred to the defendant, his executors, administrators, and assigns, certain leaseholds and all other (if any) leaseholds, messuages, and tenements and hereditaments of him the said Elias Bonnett, situate in Sittingbourne or Milton aforesaid, or elsewhere, to hold the same to the defendant, his executors, administrators, and assigns, subject nevertheless to any mortgage or mortgages then affecting the same, and the proviso for redemption. There was then a further witnessing part assigning to the defendant all the bankrupt's stock-in-trade, household goods, chattels, and effects, and personal estate in Sittingbourne, Milton, or elsewhere, then belonging to him, or which might thereafter be acquired, and all debts then and thereafter to become due to him, in the usual form. At the foot of the deed was this receipt:

I do hereby acknowledge that on the day and year first above written I was justly and truly indebted to the above-named Charles Bonnett in the sum of 450*l.*, and that I have this day received of him the further sum of 300*l.*, the consideration money above expressed, to be paid to me on the execution hereof.

ELIAS BONNETT. } £450
300
£750

Witness, W. J. Bruty.

The bill then alleged that, in consequence of this deed not having been heard of, and no notice to prior mortgagees given until after the bankruptcy, nor any reference made to it by the bankrupt when he effected loans upon deeds of subsequent date, and the said Elias Bonnett having left his home several days before his adjudication, the plaintiff's solicitors made inquiries respecting the defendant, and ascertained that he kept a public-house at Margaretting, in Essex, farmed a small piece of land, and dealt in hay and straw; that he was the uncle of the bankrupt, and not a man of means or position to lend such a sum as 750*l.*; that, upon this, the defendant was summoned before the Bankruptcy Court, and examined on the 5th Dec. 1866 on oath, when he stated that for fourteen or fifteen years past he had been in the habit of lending people money, and had had a great deal of business with the bankrupt, who owed him 460*l.* before Feb. 1865, lent on different occasions, never more than 100*l.* at a time, but he could refer to no accounts, nor give any other details.

The defendant alleged that in Feb. 1865, the bankrupt gave him a bill of sale, but nothing was done under it, nor was it registered, and he admitted that no indifferent party ever saw him lend money to the bankrupt, and that not more than three weeks elapsed between the bill of sale and the mortgage. That he could not tell how much he paid the bankrupt when the bill of sale was delivered, but admitted that he did not pay 300*l.* on the execution of the mortgage, although the receipt was to that effect. He professed himself unable to say whether he advanced any money to the bankrupt since Feb. 1865, but he alleged that Elias Bonnett had paid him for interest on the mortgage, 14*l.* at Christmas 1865, and 8*l.* in May 1866, but kept no account and gave no receipt to the bankrupt, and admitted that he never received any money for interest on the old debts. The bill then charged that the deed was entered into with a view to defraud creditors, that the defendant was a person of small means and never possessed the money which he alleged he had advanced, and that at the time of the making the indenture no valuable consideration passed between the parties, and that either the alleged debt never existed, or, if it did, it was a fraudulent preference, and in either case void, and as comprising all the bankrupt's property also void as an act of bankruptcy, as putting it into the defendant's power at any time to stop the trading of the said Elias Bonnett, and never registered under the Bills of Sale Act, and therefore void as against the plaintiffs.

The defendant by his answer admitting the bankruptcy and the main facts, stated that he always believed Elias Bonnett to be a man of credit, and was told by him and believed that at the date of the defendant's mortgage the deeds relating to his property were deposited with his bankers, as the defendant believed, to secure current accounts, or temporary advances, but he was unable to set forth the facts and dates of any mortgages, or to whom, except that after the bankruptcy he was told by Mr. Hills that clients of his held mortgages on the property, and had refused further applications for advances, and that he, the defendant, had no notice of any mortgages previous to the bankruptcy, and he submitted that his mortgage was prior to all equitable incumbrances of subsequent date. That believing him to be a man of substance, he assisted him from time to time, and did not register the bill of sale, fearing that Elias Bonnett's credit might suffer. That he first knew of the bankruptcy on the 31st July 1866, which surprised him; but, being ignorant what persons claimed charges on the property, he left it to his solicitors to realise his security. That the deed correctly stated the consideration for the mortgage and that the defendant was the owner of freehold and copyhold property besides that which he

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farmed; that he was much embarrassed by the examination in bankruptcy, having no books or papers to refresh his memory, and no copy of such examination had been furnished to him. The answer then denied the intention to defraud creditors, and alleged his relationship to the bankrupt as the reason for his advances, and that valuable consideration passed to the amount of 750*l.* in 1864, in three sums of 50*l.* each, and stated various items advanced, making up the full sum. The defendant was a man of very little education, not in the habit of keeping accounts, and had no banker; that the deed being executed eighteen months before the bankruptcy was not void, and that the mortgage was not registered, but was not therefore void. The evidence of the plaintiffs was that they could not discover by the bankrupt's papers (he having taken some with him) anything respecting the defendant's advances, that the value of the bankrupt's property was 11,000*l.* and his debts 12,000*l.* Mr. Hills denied giving the defendant information as to the mortgages, and there was evidence of the defendant's want of means, and affidavits of the bankrupt's clerks, swearing that they knew nothing of advances by the defendant. On the other hand, the bankrupt's solicitor verified the execution of the deed, but admitted that he saw no money pass, but believed the transaction to be *bona fide*, the full effect of not giving notice being explained to the defendant, and giving the same reason for not registering. This affidavit spoke in favour of the defendant, and there were others to the same effect; and in his own affidavit the defendant stated his unincumbered property as worth 1663*l.*, the gross returns of his business being 100*l.* per month, and he in other respects verified his answer.

Glasse, Q. C., *Higgins*, and *Chute*, for the plaintiffs, contended that the whole case was fraught with suspicion, and there was no evidence whatever to prove the advances, except the defendant's unsupported statement; whereas the negative testimony was very strong, and there was admission of the non-advance of the 300*l.* at the date of the deed. The deed itself was an act of bankruptcy; but, not depending upon that, it was void as against the plaintiffs as contrary to the statute of Elizabeth:

Ex parte Bailey, 3 De G. M. & G. 542;
Mercer v. *Peterson*, L. Rep. 2 Ex. 309; 18 L. T. Rep. N. S. 30;
Keely v. *Martin*, 16 W. R. 432;
Ex parte Sparrow, 2 De G. M. & G. 907;
Ex parte Taylor, 5 De G. M. & G. 392;

Next there was fraud in law, being an assignment of his solvency:

Hooper v. *Smith*, 1 W. Bl. 441;
Woodhouse v. *Murray*, L. Rep. 2 Q. B. 639; 19 L. T. Rep. N. S. 570;
Graham v. *Chapman*, 12 C. B. 85;
Ex parte Foxley, L. Rep. 3 Ch. App. 519, 520.

On the evidence it was clear that the whole transaction was collusive, and had no foundation in fact.

Cotton, Q. C., and *Everitt*, for the defendant, insisted that the transaction was *bona fide*, and the defendant was as ignorant of the real state of the bankrupt's affairs as the other parties. There was no trace of collusion, the defendant being so nearly connected with the bankrupt, and being imperfectly educated, and having no banker, the lending of his money was somewhat irregularly managed, and in the case of the bankrupt he was less particular, as he perfectly trusted him. The money advances were necessarily confidential matters, but the security was regularly effected, and the solicitor swore to his belief of its *bona fides*. Under these circumstances, there was no authority to show that the mortgage was void; there was no notice, it was effected more than a year before the bankruptcy, and the mortgage was in the form that might be expected to secure the defendant, and was prepared by his legal advisers.

6 Geo. 4, c. 16, s. 86.
Mercer v. *Peterson* (*sup.*);
Ex parte Foxley (*sup.*);
Ex parte Taylor (*sup.*);
Ex parte Sparrow (*sup.*);
Lindon v. *Sharp*, 7 Scott, N. S. 730;
Goodricke v. *Taylor*, 2 De. G. J. & S. 140; 2 H. & M. 383; 9 L. T. Rep. N. S. 604;
Pennell v. *Reynolds*, 11 C. B. N. S. 709;
Bell v. *Simpson*, 2 H. & N. 410.

Glasse, Q. C., in reply.
Holmes v. *Turner*, 3 K. & J. 99.

Dec. 10.—The VICE-CHANCELLOR.—This is a bill filed by the assignees in bankruptcy of Elias Bonnett, who became bankrupt on the 20th Sept. 1866, for the purpose of setting aside a deed executed by the bankrupt on the 22nd Feb. 1865, therefore more than twelve months before the bankruptcy, in favour of the defendant. The bankrupt had for some years previously to his bankruptcy, carried on the business of a builder and brickmaker, at Milton, near Sittingbourne, in Kent. The deed sought to be impeached was in effect a conveyance and assignment of all the freehold, leasehold, and personal estate of the bankrupt to the defendant, who is his uncle, in consideration of the sum of 450*l.*, stated to have been owing to the defendant for previous advances, and of the further sum of 300*l.* stated to have been advanced before the execution of the deed. [The Vice-Chancellor referred to the deed.] The plaintiffs seek to set aside the deed on two grounds: First, on the ground that no consideration whatever was paid for it, but that the alleged debt of 450*l.* was a mere pretence, and the alleged payment of the 300*l.* on the execution of the deed a mere fraudulent pretence, and that the deed was, in fact, executed for the purpose of defrauding the creditors of the bankrupt; and secondly, on the ground that the deed even if a consideration was given for it, being a conveyance and assignment of all the bankrupt's property to one creditor to the exclusion of the rest, necessarily had the effect of depriving him of the means of carrying on his trade, and was, therefore, not only an act of bankruptcy, but was absolutely void against the creditors under the statute, 13 Eliz. c. 5. [The Vice-Chancellor then referred to the allegations in the bill, the defendant's answer, and the affidavits.] Upon this evidence it is impossible that I can come to the conclusion that the money was never advanced by the defendant to the bankrupt. There is nothing to support the plaintiff's case on this point beyond the suggestion that the defendant was at the time of the transaction a person of no means, and not in a situation to make advances to the bankrupt. It is well known that persons in the class of life of the defendant frequently carry money to a large amount about them, and deal with it in a very irregular manner. I have no doubt whatever of the substantial truth of the defendant's statements as to the advances. It is not necessary to come to the conclusion that the precise sums stated in the deed were advanced. The amount due upon the deed may be the subject of inquiry on some other occasion, or in some other proceedings. The plaintiffs have undertaken to prove that no money whatever was advanced by the defendant, and that I am of opinion they have entirely failed to do. Upon the second objection to the deed, that, even assuming a consideration to have been proved, it is void against the creditors under the statute of Queen Elizabeth, many authorities were cited and commented on upon both sides, and it

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would have been necessary for me to go into a minute consideration of them if it had not been for a recent decision of Giffard, L. J., which, I think, completely covers this case, and renders it unnecessary for me to do more than state it and follow it. The case I refer to is *Alton* v. *Harrison*, L. Rep. 4 Ch. App. 623; 20 L. T. Rep. N. S. 100. [The VICE-CHANCELLOR referred to the case and read the judgment.] Whether this decision is in accordance with many earlier cases, and whether it is consistent with such cases as *Re Sparrow*, 2 De G. M. & G. 907; and *Re Taylor*, 5 Ibid 392; and *Goodricke* v. *Taylor*, 2 De. G. & J. & S. 140, it is not necessary for me to consider; it is enough for me that it is the last decision of the Court of Appeal on the subject. I am of opinion, in the words of the Lord Justice, that the deed is *bona fide*, and not a cloak for retaining a benefit to the grantor, and is therefore a good deed under the statute. I may add that I think the case of *Mercer* v. *Peterson* (*sup.*), has considerably altered and qualified the strict rules as to deeds of this description which were laid down in *Graham* v. *Chapman*, 12 C. B. 85, and the numerous older authorities which were cited in the argument. The plaintiffs' case, therefore, wholly fails, and the bill must be dismissed with costs.

Solicitors for the plaintiff, *Nickinson* and *Prall*.

Solicitors for the defendant, *Duffield* and *Bruty*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

Tuesday, Dec. 7.

DEEKS v. BAILEY.

Practice—Nominal defendant.

A nominal defendant (clerk to a board of health) must answer the plaintiff's bill in his official capacity.

An application to remove his name from the record on the ground of want of interest refused.

This was a demurrer to the plaintiff's bill.

As the point reported has only reference to the question of practice, it is unnecessary to give a detail of the statements of the bill. It may be sufficient to say that it was filed against the defendant Wm. Bailey, clerk to the Aldershot Local Board of Health. The Public Health Act of 1848 (11 & 12 Vict. c. 63), provided that the district local board might be sued in the name of the clerk. By the 29 & 30 Vict. c. 90, s. 46, however, "the local boards of the kingdom are incorporated, and may now be sued in their own names."

The demurrer was on the ground of want of equity.

H. M. Jackson in support of the demurrer.

G. Whitbread, for the plaintiff's bill.

The VICE-CHANCELLOR said that it was quite clear the demurrer must be allowed, but that under the circumstances there must of course be given leave to amend.

Jackson then asked that the name of Mr. Bailey might be removed from the record.

The VICE-CHANCELLOR said that it did not appear to him that the name of the clerk ought to be removed from the record. He must answer the bill in his official capacity. The discovery he could give might be of importance to the defendant's case. The demurrer, however, must be allowed. Usual costs to be paid by plaintiff, with liberty to amend.

Order accordingly.

Solicitors: *Bicknell* and *Jortin*; *J. Lott*.

Wednesday, Dec. 8.

CHICHESTER v. LORD DONEGAL AND OTHERS.

Practice—Discovery—Disclosure of contents of deeds.

Mortgagees (defendants) with whom the plaintiffs have a common interest in the presumed title to the lands mortgaged are bound to answer and set forth the date, particulars, and material contents of the deed of settlement under which the power of mortgaging was created.

This was a summons adjourned from chambers, and the question raised was by way of exceptions to the defendants' answer.

They were mortgagees under a power of mortgaging reserved to the defendant, the Marquis of Donegal, and the late Earl of Belfast, by a deed of settlement of certain estates made and executed in July 1851.

The bill prayed an account and discovery of the matters therein alleged so far as related to the deed of settlement under which both plaintiffs and defendants claimed a common title.

The mortgage-deed was dated in 1852.

Interrogatories had been filed as to the execution and purport of the deed of settlement of July 1851. To the interrogatory as to the date, parties' names, and material contents of this deed, they answered that they believed such deed as in the bill mentioned was executed, but for the reasons thereinbefore mentioned they declined to state what were the lands and hereditaments comprised in such deed, or what was the effect of it, or who were the parties thereto.

These materials, they contended, they were not bound to disclose unless an offer was made to pay off the mortgage debt, principal, interest, and costs.

Freeling, in support of the exceptions to the answer, contended as before stated.

Amphlett, Q. C. and *Montague Cookson*, in support of the answers of the defendants.

The VICE-CHANCELLOR said that the defendants, the mortgagees, were bound to answer these interrogatories so far as they went to the disclosure of the contents of the deed which formed the title of both parties to the suit. In the deed of settlement each party had a common interest. The mortgage deed stood upon a different footing, with which the plaintiffs could not be allowed to interfere. So far as the exceptions filed went to that part of the answer of the defendants as to the contents of the settlement before mentioned they must be allowed.

Order accordingly.

Solicitors, *C. Appleyard*; *Cookson* and *Wainwright*.

Thursday, Dec. 2.

PRICE v. RICKARDS.

Practice—Motion to dismiss bill for want of prosecution—Bankruptcy Act 1861.

A deed of assignment under the Bankruptcy Act 1861 *operates as a transfer of the property, and divests all interest in a party to the suit.*

Therefore the plaintiff (the bankrupt), having no further interest in the suit, a motion to dismiss his bill refused, and leave given to amend or to serve the order on the trustees of the deed.

This was a motion to dismiss the plaintiff's bill for want of prosecution.

It appeared that the bill was filed in Sept. 1868, and a notice of motion for a decree in the suit had been given in June 1869, but the plaintiff had not set down the cause for hearing on the usual motion.

On the 18th July 1869 the plaintiff had executed

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a deed of assignment to trustees, according to the provisions of the Bankruptcy Act 1861, being a deed for the benefit of his general creditors. Shortly afterwards this deed was duly registered.

A defendant, having an interest in the subject-matter of the suit, now moved to dismiss the bill for want of prosecution, the plaintiff not having replied to certain affidavits in proper time, in answer to some filed by this defendant.

Amphlett, Q.C., and *Deere Salmon* in support of the motion.

D. Sturges, on the part of the trustees of the deed, opposed it, on the ground that the plaintiff had no further interest in the suit. He relied upon the 197th section of the Bankruptcy Act 1861, which relates to the jurisdiction of the court, and declares the rights and liabilities of the parties after the registration of the deed.

Amphlett in reply.

The VICE-CHANCELLOR said that the deed of assignment made and duly executed under the provisions of the Bankruptcy Act 1861, and duly registered, was in full operation, not having been set aside, and it operated as a transfer of all the plaintiff's interest in the subject-matter of the suit; consequently the motion must be refused. He should not, however, allow the costs of the application, as the defendant had been possibly misled by the case of *Perkins* v. *The Cape Town Railway Company*, L. Rep. 7 Eq. 225; 19 L. T. Rep. N. S. 634, and he should give leave to amend, and to serve the order on the trustees of the deed of July 1869.

Order accordingly.

Solicitors, *Young, Jones*, and *Co.*; *G. R. Dodd.*

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Saturday, Nov. 20.

WORTLEY (app.) v. THE NOTTINGHAM LOCAL BOARD (resps.)

Market—Removal of part of same to another locality—Bye-law.

Where there is a grant of a market to be holden within certain limits, the grantees may hold such market in any convenient place within the said limits, and may from time to time remove such market, or any part thereof, to any other convenient place within the same limits.

A bye-law for regulating a market must not be so restrictive as to prevent, without leave, a frequenter of it from resorting to it.

This was a case stated under the 20 & 21 Vict. c. 45, upon a conviction of the appellant. It was as follows:

At a petty sessions of the peace holden at the Guildhall in and for the town of Nottingham, on the 15th July 1868, before us the undersigned, two justices acting in and for the said town, the said defendant was charged in and by a certain information, and the said parties respectively being then present, the said charge was duly heard by us, and upon such hearing we adjudged the said defendant to pay a penalty and costs, and in default of distress imprisonment.

The information was that on the 4th July 1868, in the town of Nottingham, Thomas Wortley, of Lenten, did unlawfully place a number of skins of sheep and lambs upon part of the ground occupied for the market, in the Great Market-place, without the authority of the superintendent of the said market, contrary to the said bye-laws duly made and passed, and against the form of the statute. The following is a copy of the bye-law in question:—"No person shall throw or place the skin of any beast, sheep, or other animal, or any part of such skin, or the offal or refuse of any beast, sheep, or other animal, upon any part of the ground occupied for the market, or upon any part of the immediate approach thereto, or in or upon any cart, barrow, or other carriage or vessel standing in any part of the market ground, or of the immediate approaches thereto, without being authorised so to do by the superintendent of the market." The bye-law was made under the provisions of the Local Government Act 1858 (21 & 22 Vict. c. 98), which came into operation in the borough of Nottingham in 1859, and of the Markets and Fairs Clauses Act 1847 (10 & 11 Vict. c. 14), which is incorporated in the Local Government Act 1858 by sect. 50, which enacts that there shall be incorporated with that Act the provisions of the Markets and Fairs Clauses Act 1847, with respect to the holding of markets and fairs and the protection thereof, and with respect to bye-laws. By the Markets and Fairs Clauses Act 1847, sect. 42, it is enacted that the undertakers may, from time to time, make such bye-laws as they may think fit, for all or any of the following purposes, that is to say (amongst other things), for regulating the use of the market place and fair, and the buildings, stalls, pens, and standings thereon, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto; but this power of making bye-laws is subject to the provision that such bye-law shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act, or of any Act incorporated therein; and by sect. 43 of the same Act a penalty not exceeding 5*l.* may be imposed for each breach of such bye-law, and by sects. 44, 45, 46, and 47 of the same Act certain formalities are required to be observed before and after the bye-laws have come into operation, the whole of which have been complied with.

The Corporation of Nottingham are lords of the manor and grantees of the market by virtue of ancient charters. The Great Market-place belongs to the corporation, and occupies an area of between five and six acres. It is situate in the centre of the town, within the district of the said local board, and has from very ancient times been used as a market for the sale of fruit, vegetables, fish, furniture, clothes, hides and skins, and other effects. It is also used for the standing of carriers' carts, which are brought into the Great Market-place from the surrounding country, and the horses being taken out the carts remain standing in the market until the business of the day is over. The principal cattle market is likewise held in the Great Market-place upon a Wednesday (being one of the market days) in each week. A small market for cattle is held upon a Saturday in each week in a new cattle market in Burton-street, also the property of the corporation, at a distance of about 350 yards from the Great Market-place. The butchers' shambles are situate in the Great Market-place, and belong to the Corporation of Nottingham. In the month of May 1855 the following resolution was duly proposed and carried at a meeting of the town council of the borough of Nottingham: "It is also resolved and ordered that the market for the sale of hides and skins be henceforth removed from Smith-row (that being part of the Great Market-place, in which hides and skins had theretofore been sold) and held in the new cattle market in Burton-street, free of

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charge by the corporation, as recommended in the report of the chamber committee, and be there held in such part of that market ground as the superintendent shall from time to time direct."

Shortly before the passing of the resolution above referred to, the corporation erected in Burton-street on part of their ground used for the new cattle market, a building for the public sale and purchase of hides and skins, which building they let to a company of butchers as yearly tenants, and who have the exclusive control of the same building during their tenancy, and all hides and skins taken to such building have, by a regulation of these tenants, to be sold by auction through their broker. A great majority of the butchers, both of the town and country, send their hides and skins to this building to be sold. A piece of land, part of the new cattle market, and adjoining to such building, has been paved by the corporation and set apart as a market for the sale and purchase of hides and skins, and this is the place which the market superintendent points out as the grounds upon which hides and skins may be thrown and sold. It is not used by any person for this purpose. Hides and skins are brought in small lots by carriers in and upon their carts into the Great Market-place, and then and there sold and delivered by them to fellmongers who have their carts with them, wherein they take away the hides and skins so purchased. The butchers who come out of the country to their shops in the shambles on a market day also (but in contravention of an order of their landlords the corporation) bring hides and skins in small quantities into the Great Market-place and there sell and deliver them in like manner as the carriers. No hides or skins are sold in the new cattle market in Burton-street but such as are consigned to the company occupying the building before referred to. The fellmongers, who are very few in number, have never paid any toll to the local board or others for or in respect of their use of the Great Market-place, and Mr. Bayley and one other fellmonger have never ceased to use the same. The local board have only one superintendent of the market to exercise the power contemplated by the bye-law, and he had, at the time when the offence charged in the information was committed, no discretion to grant such authority for the placing of skins in any part of the Great Market.

The defendant Thomas Wortley was in the employ of Mr. Thomas Bayley, of Lenton, near Nottingham, fellmonger, and from the evidence that was given before the magistrates it appears that on Saturday morning, July 4th 1868, that being a market day, the defendant, about twelve o'clock at noon, was at the top of a carrier's van standing upon a part of the Great Market-place, opposite to Angel-row, used as a highway, and means of access to other parts of the Great Market-place, which are for the present used as a market and place of standing for carriers' carts, and for the sale of furniture as above stated, and threw many sheep and lambs' skins from the top of the van on to that part of the market place used as such highway and means of access as aforesaid. At about one o'clock in the afternoon of the same day the defendant was again seen standing on the top of another carrier's van which was standing on another part of the Great Market-place, which is for the present used as a market and place of standing for carriers' carts, and for the sale of furniture as above stated, and he threw from the top of the van a great many sheep and lambs' skins on to the said last-mentioned part of the market place, and they were allowed to remain on the ground five-and-twenty minutes. All the skins thrown upon the ground by the defendant were so thrown for the purpose of examining them previously to their purchase by him. The market superintendent was not present during the time, and the defendant had not applied to him for permission to place these skins on the ground, and if he had so applied it was shown that the market superintendent would have refused him such permission on the ground that the new cattle market, and not the Great Market-place was the place appropriated to the sale of hides. No actual obstruction of the highway was caused by the defendant, who only made use of the Great Market-place in a reasonable and proper manner consistently with the usage of his trade, provided that he had any right to use the same after the Order of Council of the 7th May 1855, or without an express authority from the superintendent of the market. On the part of the defendant it was contended that he had a right by common law or custom to trade in the manner complained of in the Great Market-place, and that such right had not been taken away by what had been done. That the bye-law was bad as being unreasonable and in restraint of trade. That if it was a good bye-law, the offence charged in the information had not been proved, because, as he contended, it was incumbent upon the local board to have a superintendent for the purpose of and authorised to carry out the same in the Great Market-place. The magistrates held that the offence charged was proved, and that the bye-law was good, and they convicted the defendant in a penalty of 20s. and costs. The questions for the opinion of the court are, whether the right to trade in hides and skins in the Great Market-place is now legally determined? If such right be yet existing, then, whether the bye-law is good in law, and if good then whether under the facts and circumstances stated in this case the defendant was rightly convicted? And the conviction is to stand or be quashed according as the court shall decide. Given under our hands and seals at Nottingham this 7th May 1869.

THOMAS ADAMS.
THOMAS BALL.

Wills appeared for the appellant.—The corporation, as owners of the market, had no right to remove a part of it; they might, by their common law right, have removed the entire market to a more convenient place, but not a part only of it, and there is no authority for saying that they can. Indeed, one class of trades may be so connected with another that they cannot be separated in locality without ruinous consequences following. [COCKBURN, C. J.—On the other side it may be said that it may be highly convenient to remove a particular business to another part.]

Islington Market Bill, 3 Cl. & Fin. 512, 518;
Ellis v. *Mayor of Bridgenorth*, 15 Com. B., N. S., 52.

The bye-law also is bad as being in restraint of trade; it is too wide, and prohibits all dealing with skins in the market or its neighbourhood without the consent of the superintendent. He referred to the

21 & 22 Vict. c. 98, s. 50;
10 & 11 Vict. c. 14, ss. 12-16, and 42.

Cave for the respondent.—At common law the owners of a market have power to remove it to any other part within the jurisdiction:

Turner v. *Southhill*, 3 East, 538;
Moseley v. *Walker*, 7 B. & C. 40;
Rex v. *Cotterill*, 1 B. & Ald. 67, Lord Ellenborough's judgment;
De Rutzen v. *Lloyd*, 5 A. & E. 456.

In the present case there was ample reason for removing the skin market from its old locality to a new place, it being in the interest of the public that it should be removed. The bye-law may be too general, as applying equally to the new and to the old market, but this can be easily amended, the question involved in the present dispute being

really whether or not they have power to remove the skin market.

COCKBURN, C. J.—I think it is quite clear that the corporation must be taken to have a right of market anywhere within the manor, and therefore that they could transfer the market from one place to another within such manor, and on the authority of the cases cited this right to transfer a part of the market to another place, so as to suit public convenience, seems to be implied. I am therefore of opinion that the corporation were justified in so transferring the sale of skins to a separate place within the market, and I am against Mr. Wills upon the first question; but as regards the bye-law I agree with him that it is too wide and should be amended. And, therefore, as our judgment is partly in favour of the appellant, the conviction will be quashed, but without costs.

Judgment for the appellant.

June 1 *and Dec.* 13.

DAWKINS *v.* PAULET.

Libel—Privileged communication—Military discipline—Malice.

A military person cannot maintain an action against his superior officer in respect of anything done by such superior officer in the discharge of his military duty, but must follow the special mode of redress pointed out in the Articles of War.

To an action brought by a captain in a regiment of the foot guards against the major-general commanding the Brigade of Foot Guards for an alleged libel, contained in certain reports written by the defendant and sent by him to the Adjutant-General of the Army, the defendant pleaded that it was his duty as the plaintiff's superior military officer to write and forward, for the information of the Commander-in-Chief, such reports relating to the military conduct, duties and qualifications of the officers under him, and that the reports in which the alleged libels were contained were made by him in the ordinary course of his military duty as such superior military officer, and not otherwise, or for any other reason.

To this plea the plaintiff replied that the words in the declaration mentioned were published by the defendant of actual malice, and without any reasonable, probable, or justifiable cause, and not bonâ fide, or in the bona fide discharge of the defendant's duty as the plaintiff's superior military officer. On demurrer to the replication.

Held (per Mellor, Lush, and Hayes, JJ., dissentiente Cockburn, C. J.), that the replication was bad, and furnished no answer to the plea.

Per Cockburn, C. J.—The replication was good, and an answer to the plea. Though acts done in the honest exercise of military authority are entirely privileged, yet if the opportunity it affords is intentionally abused for the purpose of injury and wrong, the person wronged, though a soldier, is not debarred from obtaining redress in a court of law.

Per Mellor, J.—The motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be.

This was a demurrer to a replication.

The declaration alleged that before and at the times of committing of the grievances hereinafter in the several counts of this declaration alleged, the plaintiff was an officer and lieutenant-colonel in the Army, and held Her Majesty's commission as captain in Her Majesty's regiment of Coldstream Guards, and was entitled to certain emoluments in respect thereof. And the defendant falsely and maliciously wrote and published of and concerning the plaintiff and of and concerning him as such officer and captain, as aforesaid, in the form of a letter in the words following, that is to say: "Sir,—I (meaning the defendant) have the honour to forward a letter from Lieut.-Col. Dawkins, Coldstream Guards (meaning the plaintiff), complaining of an order which I considered it necessary to give in consequence of his (meaning the plaintiff's) incompetence in the field, and of his unfitness to conduct the business of a battalion in barracks, and to request that his conduct may be referred for investigation by a court of inquiry. I am fully prepared to support my judgment with regard to Lieut.-Col. Dawkins by the evidence of the general officers and others under whom he has served, and with whom he has been brought in contact, since he has risen to the rank of a superior officer. I have taken the present course advisedly, in order to bring this case to a decision, as in justice to the battalion to which he belongs I submit that an officer who has shown such want of judgment, tact, and temper, is not fit to be entrusted with the responsibility and charge of a command." Whereby the plaintiff lost the value of his said commission and was compelled to leave his said regiment, and was deprived of the emoluments he might and otherwise would have acquired from the holding of his said commission and continuing in his said regiment, and has been and is injured in his reputation as an officer and a soldier, and was and is otherwise greatly injured and damnified. And the plaintiff also sues the defendant for that the defendant falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him in his profession as such officer as aforesaid, in the form of a letter amongst other things, in the words and figures following, that is to say: "If he (meaning the plaintiff) feels himself aggrieved, he has only himself to thank for the position in which he has placed himself, as I (meaning the defendant) could not in justice to myself retract an order I had given him previously, and which he should have the good sense to understand was not to be cancelled by his (meaning the plaintiff) surreptitiously assuming a command I considered him unfitted for." Whereby the plaintiff has been and is injured in his reputation as an officer and a soldier, and was and is otherwise greatly injured and damnified.

Plea 2.—That before, and at the time of the writing and publishing of the words complained of in the declaration, the defendant was an officer in Her Majesty's army on full-pay, holding the public office or appointment of Major-General Commanding the Brigade of Foot Guards, of which brigade the said regiment of Coldstream Guards formed part, and as such officer and major-general aforesaid, the defendant was the superior military officer of the plaintiff, and the plaintiff was under his command; and it was the defendant's duty as such superior military officer and major-general commanding as aforesaid, to forward to the Adjutant-General of Her Majesty's Army at head-quarters certain letters from time to time, written and sent to the defendant, as such superior officer and major-general commanding as aforesaid, in relation to their military conduct, duties, and qualifications by the officers under his command, and to make thereupon, and in relation thereto, for the information of the Commander-in-Chief of the said army, reports in writing to the said adjutant-general of the said army on the subjects of such letters; and as to the orders (if any) therein referred to, and the military conduct, the qualifications, competence, and fitness for their military duties of the officers writing the same; and also generally from time to time to make reports in writing to the said adjutant-general for the information of the Commander-in-Chief of the

said army of, and concerning the battalions and regiments comprising the said brigade; and of and concerning the officers thereof under the defendant's command; and of and concerning their conduct, qualifications, competence, and fitness for their duties as such officers. And the defendant, as such superior military officer and major-general commanding as aforesaid, had received from the plaintiff certain letters in relation to the military duties of the plaintiff, and to certain orders received by the plaintiff as such officer, and to his conduct, and his competence and fitness for his said duties as such officer, in which letters, respectively, the plaintiff requested that the same might, to wit, in the performance of his said military duties as such superior officer and major-general commanding as aforesaid, be forwarded by the defendant to the Adjutant-General of the Army, for the information of the Commander-in-Chief of the said army; and thereupon the defendant, in his said capacity of major-general commanding as aforesaid, and in the ordinary course of his said military duty as such superior military officer and major-general commanding as aforesaid, and because it became, and was, necessary and incumbent upon him, by his duty to Her Majesty as such superior military officer and major-general commanding as aforesaid, so to do, and as an act of military duty and not otherwise, or for any other reason, forwarded the said letters to the said Adjutant-General of the Army, and for the information of the said Commander-in-Chief of the Army, when forwarding such letters, made certain reports in writing in relation to the said letters of the plaintiff, and the contents and subject-matter thereof respectively, and to certain military orders received by the plaintiff therein respectively referred to, and with respect to the plaintiff's conduct as such officer as aforesaid, in relation to the said orders and other matters in the said letters of the defendant mentioned, and as to the plaintiff's incompetence in the field; and his unfitness, as such officer as aforesaid, to conduct the business of a battalion in barracks, to wit, in the form of letters addressed by the defendant to the Adjutant-General of Her Majesty's Forces at headquarters (being the proper officer in that behalf to receive the said letters, and the said reports so forwarded and addressed respectively); and such occasion being the proper occasion, according to the discipline and regulations in force in Her Majesty's army, for the defendant, as such superior military officer and major-general commanding as aforesaid, to make to the said adjutant-general such reports in writing as aforesaid, which are the said letters of the defendant, and the said writing and publishing, complained of in the first and second counts of the declaration respectively.

Replication 2.—The plaintiff, as to the defendant's second plea, says that the said words in the declaration mentioned were written and published by the defendant of actual malice on his, the defendant's, part, and without any reasonable, probable, or justifiable cause, and not *bonâ fide* or in the *bonâ fide* discharge of the defendant's duty as such superior officer as in the said second plea alleged.

Demurrer to the replication, and joinder in demurrer.

Plaintiff's points:—First, that the second replication showing that the defendant published the letters of actual malice without any reasonable, probable, or justifiable cause, and not *bona fide* in the discharge of his duty, as in the second plea alleged, is an answer to that plea; secondly, that notwithstanding the circumstances mentioned in the second plea, the action is maintainable for the publication of the letters complained of, the same being admitted to have been published of actual malice, without any reasonable, probable, or justifiable cause, and not *bona fide*, or in the *bona fide* discharge of the defendant's duty, as in the second plea alleged; thirdly, the plaintiff will also contend that it being admitted by the second plea that the publications complained of in the declaration were false and malicious, the circumstances in that plea set forth constitute no answer to the action, and that the said plea is therefore bad in substance

Defendant's points:—First, the defendant will contend that under the circumstances appearing on the record, this action is not maintainable; secondly, that the motives of an act done in the strict course of military duty, and under the obligation of military discipline, are not examinable in a court of law; thirdly, that the letters complained of related solely to the military capacity and qualifications of the defendant, and were written in the course of military duty, and that no action can be maintained by one officer in the army against another in respect of any loss of military status or position resulting from an act of military duty; fourthly, that the only remedy (if any) in such a case is to proceed under the Articles of War.

The *Attorney-General* (Sir R. P. Collier, Q. C.) (with him the *Solicitor-General* (Sir J. D. Colcridge, Q. C.) *Dowdeswell*, Q C., and *Archibald*), in support of the demurrer to the replication. The plea of the defendant, all the statements of which are admitted by the record to be true, is a complete bar to the action; and the replication furnishes no answer to the plea. It is to be taken on the demurrer that the alleged libels were written by the defendant in the ordinary course of his military duty as the superior officer of the plaintiff, and no action will lie against the defendant for anything written by him under such circumstances. Neither will the averment of actual malice contained in the replication ground such an action. The leading authority on the subject is *Sutton* v. *Johnstone*, 1 T. R. 493, where it was held that the commander of a squadron who maliciously and without reasonable or probable cause brings before a court martial the captain of a vessel under his orders for an alleged breach of duty, is not, for so doing, liable to an action at suit of his subordinate. Lord Mansfield, C. J., and Lord Loughborough, C. J., in the reasons given by them, as reported to the Lord Chancellor, for reversing the judgment of the Court of Exchequer, say, "The great and important question now brought into judgment for the first time is, whether such an action can lie? The occasion has often arisen, at different periods of time, when men of the fleets, put upon their trials before a court martial, have thought the charge without a probable cause, and have warmly felt the injury of such an act of malice or oppression; yet, till this experiment it never entered into any man's head that such an action as this could be brought; consequently there is no usage, precedent, or authority in support of it. The case stands upon its own special ground. The wisdom of ages hath formed a sea military code, which in the last reign was collected and digested into an Act of Parliament. The great object of this code is that the duty of every man in the fleet shall be prescribed and regulated by rules and ordinances adapted to sea military discipline; and that every man in the fleet for any offence against his duty in that capacity or relation, shall be tried by a court-martial. If a man be charged with an offence against the articles, or, where the articles are silent, against the usage of the navy, his guilt or innocence can only be tried by a court-martial. A commander-in-chief has a discretionary power by this military code, to arrest, suspend, and put any man of the fleet upon his trial. A court-martial alone can judge of the charge. But this military

law hath foreseen that though it is necessary to give superiors great discretionary power, it may be abused to oppression; and therefore has provided against such abuse by the 33rd article. A commander who arrests, suspends, and puts a man on his trial without a probable cause is guilty within that article; but the same jurisdiction which tries the original charge must try the probable cause, which in effect is a new trial. And every reason which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction." This reasoning is strictly applicable to the present case. If this action were maintainable the plaintiff would be trying before a jury the reasonable and probable cause. [LUSH, J.—The jury would, in fact, have to determine whether he was a competent commander in the field?] If such actions were maintainable, the discipline of the whole army would be destroyed. The learned judge before referred to, after alluding to the difficulties under which military commanders have frequently to act, says, "A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in if, upon the exercising of his authority, he is liable to be tried by a common law jurisdiction? If this action is admitted, every acquittal before a court-martial will produce one. Not knowing the law or the rule of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them." "The person unjustly accused," say their Lordships, "is not without his remedy. He has the properest among military men. Reparation is done to him by an acquittal; and he who accused him unjustly is blasted for ever and dismissed the service." The judgment of the Exchequer Chamber was affirmed in the House of Lords (see 1 T. R. 784). In *Home* v. *Lord F. C. Bentinck*, 2 Brod. & Bing. 130, where an officer brought an action against the president of a court of inquiry appointed to inquire into his conduct for a libel stated to be contained in the report made thereon, it was held that this report was a privileged communication, and that it was properly rejected as evidence at the trial. It was endeavoured to distinguish this case from that of a court-martial on the ground that the court of inquiry was not a judicial tribunal; but the judgment of the court proceeded upon "The broad rule of public policy and convenience," independently of the character of the court. "The proceeding," said Dallas, C. J., "was in its very nature an official proceeding directed by the commander-in-chief for the purpose of obtaining that information which he was bound to obtain as to the conduct of every officer holding a commission in His Majesty's army, and in furtherance of the exercise of his public duty upon the result of such inquiry, whether the inquiry was to cease in the first instance, or whether the result of that inquiry was to lead to any ulterior measure. The consequence of this was that a court of inquiry was held, of which the defendant in this case was the presiding officer; that court of inquiry was held in consequence of a duty created by the order of the Commander-in-Chief, which was imperative upon him; and a report made by the defendant in conjunction and connection with the officers, was an act of duty imposed upon him as a military man by his superior commander, the Commander-in-Chief, whose order he was bound to obey." [COCKBURN, C. J.—The letter written by the defendant in the present case is not one written *proprio motu* in the course of his military duties, but is a comment upon a letter which it was his duty to forward.] The plea avers that this was done as an act of military duty, and not otherwise, and on demurrer this must be taken to be so. As on the pleadings, this letter must be taken to have been written maliciously, the only question is whether this would entitle the plaintiff to maintain the action. The effect of *Home* v. *Lord Bentinck* (*ubi. sup.*) is thus stated in 1 Wms. Saund. 131 c.: "No action can be maintained for matter injurious to the plaintiff's character contained in a report made to the Commander-in-Chief by the president of a number of military officers acting as a court of inquiry under his directions." [COCKBURN, C. J.—There was no question in that case as to how far the occasion being privileged, the privilege was taken away by the malice of the defendant.] If the reasons of public policy were considered so strong that the court would not even look at the report by receiving it in evidence, the same reasons apply in a case like the present to prevent the action being maintained. Such is the view of the effect of the decision taken in Wms. Saund. If the action will not lie at all, an averment of want of reasonable or probable cause will not alter the matter. An officer is not left without remedy against the wrongful acts of his commanding officer. The 12th Article of War gives a mode of obtaining redress in providing that, "if any officer shall think himself wronged by his commanding officer, and shall, upon due application made to him, not receive the redress to which he may consider himself entitled, he may complain to the general commanding-in-chief of our forces, in order to obtain justice, who is hereby required to examine into such complaint; and, either by himself or by our Secretary at War, to make his report to us thereupon, in order to receive our further directions." [COCKBURN, C. J.—But he would in that way get no compensation in damages for any injury which may have been done him.] If nothing but the military status of a party is affected by the judgment of a military tribunal, this court will not interfere, even where the military tribunal has acted without jurisdiction or has exceeded its jurisdiction. *Re Mansergh*, 1 B. & S. 400. Cockburn, C. J. in that case asks (p. 405), "Does not every person who enters the military service of the Crown, give the Crown a right to determine his military status at pleasure?" and in the judgment, his Lordship says, "I quite agree that where the civil rights of a person in military services are affected by the judgment of a military tribunal, in pronouncing which, the tribunal acted without jurisdiction, or has exceeded its jurisdiction, this court ought to interfere to protect those civil rights; *e.g.*, where the rights of life, liberty, or property are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort, and the only matter involved was the military status of the appellant—a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the sovereign." So in *Dawkins* v. *Lord Rokeby*, 4 F. & F. 831, Willes, J. says: "It is only by reason of the 88th section, to which reference has been made, that a soldier acting *bonâ fide*, and in discharge of what he supposes to be his duty, could ever set up, as against a citizen not a soldier, the justification of superior command. But, with respect to persons who enter into military state, who take Her Majesty's pay and who are content to act under her commission, although they do not cease to be citizens in respect of responsibility, yet they do, by a compact which is intelligible, and which requires only the statement of it to recommend it to the consideration of everyone of common sense, become subject to military rule and military discipline." "I will lay it down," says his Lordship (p. 832), "perhaps, rather more broadly than even

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the defendant's counsel would desire, that even if it had been made out that Lord Rokeby had maliciously, and without reasonable and probable cause, given the evidence he did before the courts of inquiry in 1864 and 1865, and if it had been proved that he was the prime mover in the dismissal of Col. Dawkins from the army, that that gentleman could not have obtained redress in these courts." These authorities are decisive against the maintenance of the present action. There is no precedent for it. It would be against the public interest to permit actions to be brought in the civil courts against commanding officers who make reports in the discharge of their military duty.

S. Hill, Q.C. (with him *Holl*), in support of the replication. It is not contended on the part of the plaintiff that an action similar to the present would lie against a judge, counsel, witness, or juryman; it is necessary for the due administration of justice that such actions should not be maintainable in their case; but a similar reason does not apply to the present case. No decided case has gone to the extreme contended for on behalf of the defendant. In *Sutton* v. *Johnstone*, 1 T. R. 493, the judgment of the Court of Exchequer was strongly in favour of the plaintiff on the ground that there was no evidence of reasonable and probable cause. The judgment of the Court of Exchequer was no doubt reversed by Lords Mansfield and Loughborough, but on the ground that in their opinion there was evidence of the existence of reasonable and probable cause. As to the question whether the action would lie, their Lordships say that "the question is doubtful; and when a judgment shall depend upon a decision of this question it is fit to be settled by the highest authority. According to our opinion it is not necessary to the judgment in this cause; because, supposing the action to lie, we think judgment ought to be given for the defendant." In *Warden* v. *Bailey*, 4 Taunt. 67, it was held that an action of trespass lies for an inferior military officer against his superior officer (both being under martial law), who imprisons him for disobedience to an order made under colour, but not within the scope of military authority; although the imprisonment be followed by a trial by a court martial In this case it was argued (p. 69) that "there were two points made in the case of *Sutton* v. *Johnstone*: first, that there was a probable cause for the admiral's proceeding; secondly, that both parties being under martial law, the action could not be maintained; but the better opinion was that the judgment proceeded upon the ground that there was a probable cause;" and Heath, J. is reported to have agreed to that. And Lawrence, J. said, "Lord Mansfield held that the action could not be supported, because the declaration showed probable cause, and though the inclination of his opinion was that no such action could be maintained, yet he said it was not necessary to decide on that point, for the facts did not raise the argument;" so that the point involved in the present case must not be taken to have been decided in *Sutton* v. *Johnstone*. Further, Lawrence, J. says (p. 75), "I have heard from good private information that the reasons assigned by Lord Mansfield for reversing the judgment of the Court of Exchequer were not adopted by the House of Lords, though the judgment of the chief justices was affirmed;" and Mansfield, C.J., in delivering judgment, thus speaks of the decision in that case:—"The learned judge was desired to nonsuit the plaintiff upon the ground of a doctrine supposed to be established by the case of *Sutton* v. *Johnstone*, that an officer cannot maintain an action against his superior officer for imprisonment inflicted in consequence of disobedience to any command whatsoever issued by the superior to the inferior officer. To be sure, that is a very wide inference to draw from *Sutton* v *Johnstone*, that being only a case of imprisonment for disobedience to the orders issued in the heat of a battle, where obedience and instant obedience is necessary. Lord Mansfield and Lord Loughborough do not decide this point; they expressly avoid determining it, though they intimate a very strong opinion, and observe that it is a very important case, and send it to the *dernier resort*. The only point therefore decided in *Sutton* v. *Johnstone* is that there was probable cause for the imprisonment in that case." [LUSH, J. referred to the words of Mansfield, C.J., "with respect to the order itself, it might indeed be very convenient that a military officer might be enabled to make the men under his command learn to read and write, it might be very useful, but is not a part of military discipline;" whilst the record in the present case admits that the act of the defendant complained of was part of his military duty.] In *Sutton* v. *Johnstone*, in the court below, Eyre, B. distinguishes (p. 503) the case of a military officer from that of a judge or juror. "The presumption of law," he says, "that judge and jurors do nothing causelessly and maliciously does not derogate from the universality of the principle 'that where it can be shown that one man has causelessly and maliciously accused another of a crime, or has otherwise vexed him by causelessly and maliciously exercising upon him, to his damage, powers incident to his situation of superior, the injured party is entitled to redress by this species of action.' The commander-in-chief of a squadron of ships of war is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation. The propositions which attempt to establish a distinction for him are dangerously loose and indefinite." After referring to the difficulties of an officer's situation the same learned judge says, "Considerations of this nature cannot exclude the established jurisdictions of the country; on the contrary, those jurisdictions must be presumed to be equal to their functions; it must be presumed that they will do their duty honestly; if they do no man can have much to fear. To situations which require indulgence they will show it; but, be the risk more or less, all men hold their situations in this country upon the terms of submitting to have their conduct examined and measured by that standard which the law established. Men of honour will do their duty and will abide the consequences." In *Barwis* v. *Keppel*, 2 Wils. 314, an action against an officer for reducing a serjeant of the guards to a common soldier in Germany, was held not maintainable solely on the ground that the cause of action had arisen out of the king's dominions; and it was there never suggested in argument that the action would not lie at all; the defence resting on the ground of the absence of malice. "By the Act of Parliament to punish mutiny and desertion" said the court, "the king's power to make Articles of War is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or Articles of War; and, therefore, you cannot argue upon either of them, for they are both to be laid out of this case, and *flagrante bello*, the common law has never interfered with the army: *inter arma silent leges*." [COCKBURN, C.J.—The court say also, "We think, as at present advised, we have no jurisdiction at all in this case."] That was because the army was then acting abroad, and in time of war. The words "*flagrante bello*, the common law has never interfered with the army," imply that in the opinion of the court *cessante bello* the common law would apply. *Home* v. *Lord F. C. Bentinck* (*ubi. sup.*) differs from the present case in this, that the defendant who wrote the libel was the president of a court of inquiry specially appointed to inquire

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into the plaintiff's conduct; whereas the defendant in the present case had no express orders to pursue the course which he had adopted. [COCKBURN, C. J.—Can that make a difference? On the argument of this demurrer, we must take it that the alleged libel was written by the defendant in the course of his military duty.] No doubt that is so; but the case last referred to approaches much more closely that of judges and juries than the present case. "The proceeding," said Dallas, C. J., "was, in its very nature, an official proceeding directed by the Commander-in-Chief for the purpose of obtaining that information, &c." [MELLOR, J.—I cannot see any difference between an act done in the discharge of a general duty, and an act, such as the making of this report, done in pursuance of a special order of the Commander-in-Chief.] The defendant in the present case adds comments of his own. [MELLOR, J.—He alleges in his plea that it was his duty to do that also; and on demurrer it must be taken to be so.] In *Dickson* v. *The Earl of Wilton*, 1 F. & F. 419, it was held by Lord Campbell, C. J., that though letters from the commanding officer of a regiment to his immediate superior containing charges against the colonel in command, and a conversation with a Member of Parliament as to a question to be put in the House of Commons relative to the dismissal of the colonel on those charges, were privileged communications, yet circumstances showing that the letters were written, not from a sense of duty, but from personal resentment on account of other matters, and that the object of the conversation was to prejudice the plaintiff by reason of such personal resentment, were evidence of actual malice, taking away the privilege. "Whether or not," said Lord Campbell to the jury, "the occasion gives that privilege is a question of law for the judge; but whether the party has fairly and properly conducted himself in the exercise of it is a question for the jury. I, therefore, as the judge, tell you that, in point of law, all the communications to Lord Combermere, to the War Office, and to Mr. Duncombe, were privileged; but whether that privilege has been abused is for the jury. If it has been abused the privilege is gone." According to this ruling it would be a question for the jury to determine in the present case, with what motive the letter of the defendant was written. The opinion of Willes, J., as expressed in *Keighly* v. *Bell*, 4 F. & F. 763, which was an action by an officer against his commander for imprisonment, malicious prosecution, and libel, is in favour of the same view. At p. 799, he says, "There are two elements necessary to maintain this action; one is dishonesty or malice, that is, bad motive for the proceeding; the other is, the absence of any probable cause for the proceedings; and as to the one or the other, I confess the inclination of my mind is that there is no evidence. Officers, we know, vary in their degrees of severity or austerity, and one may be a little more rigid, and another a little more lax, in the maintenance of discipline; but such differences as these cannot be allowed to be the ground of an action founded on malice, and so long as the officers discharge their duty honestly, they are not liable merely for discharging it in a way which others may think more or less severe. It is necessary to prove dishonesty or indirect motive, and of that, where is the evidence?" And the plaintiff was nonsuited on that ground. *Dawkins* v. *Lord Rokeby* (*ubi sup.*), was decided solely on the authority of *Sutton* v. *Johnstone*, and the remark formerly made as to that case applies also to this. In *Dixon* v. *Lord Combermere*, 3 F. & F. 527, which was an action against a late Secretary of State for War, a lord lieutenant (commandant of the militia of the district), and the colonel of a regiment of militia, for causing, by means of false charges, the removal of the plaintiff from the office of lieutenant-colonel of the regiment, Cockburn, C. J. says (p. 584): "It is my duty to tell the jury that we are not sitting as a court of appeal to determine whether he has discharged his duty wisely, as to which he is responsible to his sovereign and his country, but not at the suit of a private individual. It is not a question whether he has exercised his discretion well or wisely. But the jury, in order to find a verdict against him, must come to the conclusion that he has dishonestly and corruptly abused the power entrusted to him." Lastly, as to the argument that the plaintiff has a remedy open to him, the only mode of redress is that given by the 12th Article of War, and that is not sufficient to meet such a case as the present. The plaintiff may ask for a court of inquiry; but if that is refused to be granted, is he to be left without any other remedy? Is there to be no redress for one who has spent the best years of his life in a profession, and invested his money in the purchase of a commission? If such a doctrine as is contended for on behalf of the defendant is to be laid down as to the army, why should it not also be applied to the Civil Service wherever an officer in that service is reported by his superior? [HAYES, J.—In the Civil Service there is no court like a court martial; there is nothing open to members of that service but the civil courts of the kingdom.]

The *Attorney-General* in reply.—*Barwis* v. *Keppel* is in favour of the defendant so far as it goes; and the same is true of *Warden* v. *Bailey*. The opinion of Willes, J., in *Keighly* v. *Bell*, is to a similar effect: "I hope," said his Lordship, "I may never have to determine that difficult question, how far the orders of a superior officer are a justification. Were I compelled to determine that question, I should probably hold that the orders are an *absolute* justification in time of actual war—at all events, as regards enemies or foreigners, and I should think even with regard to English-born subjects of the Crown, unless the orders were such as could not legally be given. I believe that the better opinion is that an officer or soldier, acting under the orders of his superior, not being necessarily or manifestly illegal, would be justified by his orders. The question happily does not arise in that general or abstract form, as here it is a question between military persons, amenable to military authority."

Cur. adv. vult.

Dec. 13.—The judgments of the members of the court were now delivered as follows:—

COCKBURN, C. J.—This is an action for a libel written by the defendant concerning the plaintiff as an officer holding Her Majesty's commission as a captain in the Coldstream Guards, in a letter addressed by the defendant to the Adjutant-General of the army, reflecting on the character and capacity of the plaintiff as an officer, and in which the plaintiff was represented as incompetent in the field and unfit to conduct the business of a batallion in barracks, and it was requested that his conduct might be referred for investigation by a court of inquiry; and in which it was finally submitted that an officer who had shown such want of judgment, tact, and temper was not fit to be entrusted with the responsibility and charge of a command; by reason of which it is alleged that the plaintiff has lost his commission, and has been compelled to leave his regiment, and has suffered in his reputation as an officer. The declaration contained also a second count, but to this it is not material further to refer. To this there is a plea of a somewhat prolix and confused character; but the sum and substance

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of which is that the defendant, being the commanding officer of the regiment in which the plaintiff was a captain, and the plaintiff having written a letter to the Adjutant-General complaining of an order given by defendant as such commanding officer, and having conformably to military regulation sent such letter to the defendant to be by him forwarded to the Adjutant-General, it became the duty of the defendant, in transmitting the letter, to accompany it with a report on the order complained of, and the subject matter of the complaint, with such observations as the circumstances of the case appeared to require; that it thus became necessary as a part of the duty of the defendant to report on the incompetency and unfitness of the plaintiff; that the matter complained of was contained in a report thus made in the course of defendant's duty as such commanding officer, and on fulfilment of such duty, and not otherwise or for any other reason. To this plea there is a replication that the words complained of were written and published by the defendant of actual malice and without any reasonable, probable, or justifiable cause, and not *bona fide* or in the *bona fide* discharge of the defendant's duty as alleged. To this replication there is a demurrer, and we have to determine whether the replication affords a sufficient answer to the plea. Independently of the great question of absolute privilege in military matters, which presents itself in this case, there can, in my opinion, be no question that the replication is sufficient. If the effect of the plea is to be taken to be that the matter complained of was written for the purpose of causing an inquiry to be held as to the conduct and competency of the plaintiff with a view to his removal from the army, it is a sufficient answer in point of law to say that such a proceeding was malicious and without reasonable and justifiable cause. If, which I think is the right view, the effect of the plea is that the matter complained of was published in the discharge of a duty, and as such was privileged, it would, under ordinary circumstances, be sufficient to reply that the words were published maliciously and without *bona fides*. For, to entitle matter otherwise libellous to the protection which attaches to communications made in the fulfilment of a duty, *bona fides*, or, to use our own equivalent, honesty is essential. And to this, again, two things are necessary—first, that the communication be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty; secondly, that it be made with a belief of its truth. By the demurrer the the defendant, for the present purpose at least, in order to raise this question of law, admits, as he must do, that the averments in the replication are true; in other words, that his representations as to the plaintiff, though made on an occasion of military duty, were made dishonestly, maliciously, and without a belief in their truth. To support this demurrer, it is therefore necessary to maintain that in all matters relating to military authority and discipline a subordinate officer, so far as civil redress is concerned, is entirely at the mercy of his superior; that the latter may institute proceedings against him without right or reason on charges which he knows to be unfounded—may, under the disguise of duty, write concerning him that which he knows to be false, and may thus bring upon him consequences the most disastrous, without the party injured being entitled to redress in a court of law. While I fully agree that acts done in the honest exercise of military authority are entirely privileged, I confess that I am not prepared to arrive at a conclusion so startling and apparently unjust as that, if the opportunity it affords is intentionally abused for the purpose of injury and wrong, no redress is to be had by an officer in a court of law. The question may be considered with reference first to legal authority, secondly, to general principle, and, thirdly, to the peculiar position of persons in the army and navy as distinguished from the rest of the Queen's subjects. The question first came before the courts in 1785 in the great case of *Sutton* v. *Johnstone*, 1 T. R. 493, which was an action against the defendant for having, as commanding officer of a fleet, maliciously and without reasonable and probable cause brought the plaintiff to a court martial for breach of duty and disobedience of orders. Two principal questions arose, first, whether the action, as brought by an inferior against a superior officer, would lie, and, secondly, whether the facts upon which the defendant had acted in instituting proceedings against the plaintiff amounted to reasonable and probable cause. A second verdict with large damages having been given for the plaintiff, and a motion in arrest of judgment having been made in the Court of Exchequer, in which the action had been brought, Eyre, B. delivered the judgment of the court. In the difference of opinion which exists on this very important question, I think it desirable to recall to recollection this remarkable and to my mind satisfactory judgment. Dealing with the first branch of the case, he says, "The court never had a difficulty upon this part of the case. The principle of the action, which is pretty clearly ascertained in the decided cases, is general and universal. In the cases alluded to of judges and jurors it cannot apply, because the law gives faith and credence to what they do; and therefore there must always in what they do be cause for it; and there never can be any malice in what they do. The presumption of law that judges and jurors do nothing causelessly and maliciously does not derogate from the universality of the principle that, where it can be shown that one man has causelessly and maliciously accused another of a crime, or has otherwise vexed him by causelessly and maliciously exercising upon him to his damage powers incident to his situation of superior, the injured party is entitled to redress by this species of action. The commander-in-chief of a squadron of ships of war is in the condition of every other subject of this country who being put in authority has responsibility annexed to his situation. The propositions which attempt to establish a distinction for him are dangerously loose and indefinite. It is said subordinate officers may be brought to a court-martial for improper conduct, and that no action lies for anything done in a course of discipline, or under powers incident to situation. If by improper conduct be meant a breach of the articles for the government of the navy; if by a course of discipline be meant exacting that which the discipline of the navy requires; if by what is done under powers be meant that which is warranted to be done under those powers, it will be agreed simply that for doing any of those acts no action will lie; for those are lawful acts in themselves, and there is nothing added to make them unlawful in the particular case. But in respect of the first branch of this proposition, if it be meant that a commander-in-chief has a privilege to bring a subordinate officer to a court-martial for an offence which he knows him to be innocent of, under colour of his power or of the duty of his situation, to bring forward inquiries into the conduct of his officers, the proposition is too monstrous to be debated. Under the second branch of it it may not be fit in point of discipline that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the masthead; but if the superior were to order him thither, knowing that, from some bodily infirmity, it was impossible he should execute the order, and that he must

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infallibly break his neck in the attempt, and it were so to happen, the discipline of the navy would not protect that superior from being guilty of the crime of murder. And one may observe in general, in respect of what is done under powers incident to situations, that there is a wide difference between indulging to situation a latitude touching the extent of power, and touching the abuse of it. Cases may be put of situations so critical that the power ought to be unbounded; but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of government that it is equally impossible to state a case where it can be abused with impunity. . . . We enter into all the difficulties in the situation of an officer whose honour and fortune may come to be so staked. In this particular case they have had their weight with us; the decision has not been a hasty one; but considerations of this nature cannot exclude the established jurisdiction of the country. On the contrary, those jurisdictions must be presumed to be equal to their functions—it must be presumed that they will do their duty honestly; if they do, no man can have much to fear. To situations which require indulgence they will show it; but, be the risk more or less, all men hold their situations in this country upon the terms of submitting to have their conduct examined and measured by that standard which the law has established. Men of honour will do their duty and will abide the consequences." Error having been brought on this judgment, the case was twice argued before Lord Mansfield and Lord Loughborough, the latter being then Chief Justice of the Court of Common Pleas, and the judgment of the Court of Exchequer was reversed, not, however, on the ground that the action would not lie; but solely on the ground that the facts sufficiently showed the existence of reasonable and probable cause. Lord Mansfield, in a masterly argument to which I shall again have occasion to refer, gives his reasons for thinking that such an action ought not to be allowed, but he stops short of deciding the point. At the conclusion of his reasoning he says, "These considerations incline us to lean against introducing this action. But there is no authority of any kind either way, and no principle to be drawn from the analogy of other cases which is applicable to trials by a sea court-martial under the marine law, confirmed, directed, and authorised by statute. And, therefore, it must be owned that the question is doubtful; and when a judgment shall depend upon a decision of this question, it is fit to be settled by the highest authority. According to our opinion it is not necessary to the judgment in this cause; because, supposing the action to lie, we think judgment ought to be given for the defendant." The judgment of the two chief justices was subsequently affirmed in the House of Lords, but, as it appears, upon the same ground, namely, the existence of reasonable and probable cause. In the later case of *Warden* v. *Bailey*, 4 Taunt. Rep., Lawrence, J., in the course of the argument, stated that he "had heard from good private information that the reasons assigned by Lord Mansfield were not adopted by the House of Lords, though the judgment of the chief justices was affirmed." The same question presented itself in the case just referred to of *Warden* v. *Bailey*. There the plaintiff, a sergeant in a regiment of militia, having been arrested by the defendant, the adjutant of the regiment, by order of the lieutenant-colonel, for disobedience of an order of the latter with reference to an attendance at an evening school and contribution to its support, and for inciting one of the regiment to disobey the order; and having brought an action for such arrest and imprison- [illegible] ·rned judge who presided at the trial, on the authority of the case of *Sutton* v. *Johnstone*, nonsuited the plaintiff. On a motion to set the nonsuit aside it was again strenuously urged, as before in *Sutton* v. *Johnstone*, that the action would not lie. The court, however, holding *Sutton* v. *Johnstone* as falling altogether short of deciding so large a proposition, set the nonsuit aside on the ground that while there was no evidence of the mutinous language attributed to the plaintiff, the order of the colonel to attend the school and contribute to the expense of it was beyond the scope of his military authority, and that consequently the disobedience of the order did not justify the arrest. On a second trial before Sir James Mansfield, C. J., the learned judge having ruled according to the foregoing decision, a bill of exceptions was tendered and the case came on before the Court of King's Bench sitting as a court of error. The same points appear to have been made as had been urged in the court below; and in the end the court gave judgment for the defendant in the action, not however on the ground that the action would not lie, but that there was sufficient evidence of mutinous language having been used by the plaintiff to justify the arrest. It can hardly be supposed that had the court been prepared to adopt the reasoning of Lord Mansfield in *Sutton* v. *Johnstone*, they would not have disposed of the case on the question of law, instead of going into an elaborate examination of the evidence. The question again presented itself in an action brought by the present plaintiff, Col. Dawkins, against Lord Rokeby (4 F. & F. 806), an action arising out of these same transactions and regimental disputes. The action was for false imprisonment, malicious prosecution, and conspiracy to cause the plaintiff's removal from the army. The case come on for trial before Willes, J. at Nisi Prius, when the learned judge is reported to have ruled—partly on similar grounds to those set forth by Lord Mansfield in *Sutton* v. *Johnstone*, and partly because it had been so decided in that case—that even were it proved that the proceedings ascribed to the defendant had been malicious and without reasonable and probable cause, and that he had been the prime mover in the dismissal of Col. Dawkins from the army, the latter could not obtain redress from a court of law, and he accordingly nonsuited the plaintiff. These are all the authorities directly bearing upon the question, and the result of them appears to me to be that so much of the decision of the Court of Exchequer in *Sutton* v. *Johnstone*, as is immediately in point to the present case, stands unreversed either by the judgment in error in that case, or by any subsequent decision of a court in banc, while it is supported by the decision of the Court of Common Pleas in *Warden* v. *Bailey*, and incidentally and indirectly so by the decision of the Court of King's Bench when that case was before them on error. The case of *Dawkins* v. *Lord Rokeby* is no doubt to the contrary. But, however great my respect for the opinion of the learned judge who presided, I cannot hold myself bound by a single ruling at Nisi Prius, however positively expressed, in a matter in which the Court of Exchequer in *Sutton* v. *Johnstone* expressly, and the Court of Common Pleas in *Warden* v. *Bailey*, as incidentally appears, entertained a different opinion, and which Lord Mansfield himself declared to be open to grave doubt and fit to be decided by the highest authority. But it is argued that, independently of authority, as a matter of public policy, an action of this nature ought not to be allowed, and that, as in the case of judges, jurors, and witnesses acting in the administration of justice, an absolute immunity is afforded however unrighteous may have been their acts, however malicious and sinister their motives; so, by analogy, on like grounds of public policy, superior

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officers in military or naval command ought to enjoy entire immunity in respect of acts, however unjust and malicious, done by them, if in the exercise of their authority. The argument cannot be put more forcibly than it is presented in the reasoning of Lord Mansfield in *Sutton* v. *Johnstone*. In substance it comes to this—it is essential to the efficiency of an army that discipline should be upheld, that obedience to orders, however despotic and peremptory, should be enforced; that the energy of commanding officers in giving such orders in cases of trying emergency, and enforcing obedience of orders and observance of discipline, by bringing those guilty of disobedience of orders or of breach of discipline to punishment according to military law, should not be crippled by the apprehension of vexatious actions, more especially as juries, by whom such actions would have to be decided, are incompetent to form a judgment on matters of a military or naval character, and might adopt conclusions different from those at which a professional tribunal alone fitted to decide on such a matter, might arrive. And that, if any of those who have voluntarily submitted themselves to military law should suffer injustice or oppression at the hands of a superior, they must be content with such redress as the military law affords. Yielding to no one in respect for an opinion of Lord Mansfield, I must say that this reasoning fails to bring conviction to my mind. I cannot bring myself to believe that officers in command would hesitate to give orders which a sense of duty required, or to enforce obedience and discipline in the due exercise of authority, from any idle apprehension of being harassed by vexatious actions. Men worthy to command would do their duty, as Eyre, C. B. expresses it, fearless of consequences, and would trust to the firmness of judges and the honesty and good sense of jurors to protect them in respect of acts honestly, though possibly erroneously, done under a sense of duty. While no man would more strenuously uphold military authority when legitimately exercised, or would more earnestly urge upon juries the propriety of presuming everything in favour of its legitimate exercise, and of requiring the most cogent and conclusive evidence of its abuse, to entitle an inferior officer to recover in an action against his superior, I cannot bring myself to think that it is essential to the well-being of our military or naval forces that where authority is intentionally abused for the purpose of injustice or oppression—where charges are preferred which to the knowledge of the party preferring them are unfounded and unjust—where representations are made, which the party making them knows to be slanderous and false—the party injured, whose professional prospects may have been ruined, and whose professional reputation may have been blasted, is to be told that the Queen's courts, in a country whose boast it is that there is no wrong without redress, are shut to his just complaint. On the contrary, I cannot but believe that to a force depending upon voluntary augmentation it will be far more beneficial that its subordinate members shall know that, against intentional oppression and manifest wrong, leading to consequences disastrous to professional interests or character, redress may be found at the civil tribunals of the country. Neither can I believe that a jury, under the guidance of a judge, may not be safely entrusted with the decision of such questions. No doubt in matters of military discipline a military tribunal and government is better qualified to form a correct judgment; and where the question turned on nice points of military or naval tactics, a jury would be advised—and doubtless would act on such advice—to presume in favour of military or naval authority. But in cases of manifest wrong and proved maliciou motive, no tribunal can be better qualified to form a just and correct judgment. Nor can I admit the incompetency of juries, when assisted by professional evidence, to form correct judgments even on professional matters. Every day special juries are called upon to decide questions turning on matters of science and professional knowledge, foreign to their ordinary avocations—among others, questions of navigation and nautical skill—and their decisions are on the whole satisfactory. At all events, trial by jury in matters of wrong between man and man is an essential part of our judicial system, and, as it appears to me, the question of competency or incompetency of the tribunal cannot be admitted as an element in our decision of the present question; neither, I must say, do I feel the force of the argument that an individual on becoming a soldier consents, in case of being driven from the army or suffering other wrong by the dishonest exercise of superior authority, to be subject to and abide by the military law alone, or that, as a superior making malicious and unfounded charges against another is amenable to punishment by the military law, redress in such a case is to be sought under the military law and at the hands of a military tribunal alone. It is undoubtedly true that a man on entering the army or navy subjects himself to the military law, and wherever that law conflicts with the civil law applicable to the ordinary subject, he must be content to forego the rights which the ordinary law affords. And if by any provision of the military code a party subjected to its authority were prohibited from resorting to the civil tribunals for the redress of a wrong inflicted under colour of military authority, there would be an end of the question. But no such prohibition exists; and though the punishment of the wrongdoer may be in some sort a satisfaction to the party injured, it affords no compensation for the fatal consequences in a professional or pecuniary point of view, which may have resulted from the wrong. But whatever may be the right view of this matter with reference to considerations of policy, a grave question appears to me to present itself as to how far a court of law is warranted, in the absence of positive law or previous decision in refusing redress in a case of admitted wrong, and in which the right of action would otherwise be undoubted, simply because, on grounds of public convenience, the action as between the particular parties ought not to be allowed. The cases of judges and jurymen seem to me, I must say, very remote. It does not seem to have appeared to Lord Mansfield to be analogous, as he expressly says that no principle can be gathered from other cases analogous to the present. It may be that the immunity afforded to judges and others concerned in the administration of justice may be essential to that great end. It does not follow that a soldier persecuted or slandered by another shall be left without civil remedy. For my own part, I should prefer to treat the immunity of judges as a matter *positivi juris*, as settled by decisions and authority, rather than as resting on sound or satisfactory principle, on which, were the matter *res integra*, it would be desirable to act. I cannot believe that judges or juries would fail to discharge their duty faithfully and fearlessly according to their oaths and conscience, or witnesses give evidence less truthfully, from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small, and would be easily disposed of, while, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice, and that, on sound principles, the authors of such wrong ought to be responsible to the parties injured. At all events, it seems to me by no means to follow that, because such a principle may be re-

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quired in the interest of the administration of justice, it is to be applied, without positive enactment, to wrongs inflicted by one member of the land or naval forces of the Crown upon another. Thinking the question of policy more than doubtful, for the reasons I have given—though after the reasoning of Lord Mansfield, the ruling of Willes, J., and the opinion of my learned brothers from whom I have the misfortune to differ, I of course feel the utmost diffidence in my own views—thinking also that it is exceedingly doubtful whether, assuming that as a matter of public policy an action by an inferior against a superior officer ought not to be maintained, a court of law, in the absence of positive enactment, can act upon such assumption, I cannot but think that if the law is to be thus settled, it should be done by legislative enactment, or, at all events, by a court of error, and that, acting as a court of first instance in dealing with this demurrer, we should give judgment for the plaintiff. But my learned brothers, for reasons they will themselves give, have arrived at a different conclusion, and therefore judgment must be given for the defendant.

MELLOR, J.—This case was argued before my Lord Chief Justice, my brother Lush, the late Mr. Justice Hayes, and myself, in Trinity Term last, and the judgment I am about to deliver was entirely approved of by my lamented friend, Mr. Justice Hayes. I approach the subject with great diffidence, seeing that my Lord Chief Justice has arrived at an essentially different conclusion. This is an action of libel brought by the plaintiff, who was a lieutenant-colonel in the army, holding a commission as captain in Her Majesty's regiment of Coldstream Guards, against the defendant, who held the office of major-general commanding the brigade of Foot Guards, of which the regiment of Coldstream Guards formed part. The alleged libels were contained in certain letters written and sent by the defendant to the Adjutant-General for the information of the Commander-in-Chief, inclosing and commenting upon letters sent by the plaintiff to him, and which the plaintiff required the defendant, as his superior officer, to forward to the Adjutant-General. The question to be determined by the court arises upon a demurrer to the second replication to the second plea. The second plea alleges that the defendant, when he wrote and published the letters, was an officer in Her Majesty's army, holding the public office or appointment of major-general commanding the brigade of Foot Guards, of which the regiment of Coldstream Guards formed part, and was the superior military officer of the plaintiff, who was under his command; and that it was the defendant's duty, as such superior military officer, to forward to the Adjutant-General of Her Majesty's army, at head quarters, certain letters written and sent to the defendant, as such superior officer and major-general as aforesaid, in relation to their military conduct, duties, and qualifications, by the officers under his command, and to make, in relation thereto, for the information of the Commander-in-Chief of the army, reports in writing to the said Adjutant-General on the subjects of such letters. The plea then states the receipt by the defendant from the plaintiff of certain letters in relation to the plaintiff's military duty, and to certain orders received by him as such officer, and to his conduct, and competence, and fitness for such duties as such officer, in which letters the plaintiff requested that the same might, in performance of the defendant's duty as such superior officer, be forwarded by the defendant to the Adjutant-General for the information of the Commander-in-Chief; and that thereupon the defendant, in the ordinary course of his military duty as such superior military officer, and because it became and was necessary and incumbent upon him, by his duty to Her Majesty as such superior military officer so to do, and as an act of military duty, and not otherwise or for any other reason, forwarded the said letters to the Adjutant-General; and, for the information of the Commander-in-Chief when forwarding such letters made certain reports in writing in relation to the said letters and the contents thereof, and to certain military orders therein referred to, and with respect to the plaintiff's conduct as such officer as aforesaid, in relation to the said orders, and to the plaintiff's incompetence in the field, and his unfitness to conduct the business of the battalion in barracks and that such reports were in the forms of letters addressed to the Adjutant-General, being the proper officer to receive such letters and reports, which were forwarded on an occasion being the proper occasion according to the discipline and regulations in force in Her Majesty's army for the defendant to make such reports in writing, and which are the letters whereof the writing and publication is the matter complained of by the plaintiff. To this plea the plaintiff replied that the words in the declaration mentioned were written and published of actual malice on the defendant's part, and without any reasonable, probable or justifiable cause, and not *bona fide*, or in the *bona fide* discharge of the defendant's duty as such superior officer as aforesaid. To this replication the defendant demurred, and in one ground of demurrer alleged that no action is maintainable in respect of words written and published under the circumstances stated in the plea, even if written and published maliciously, and without reasonable or justifiable cause. It is to be observed that the replication admits the facts stated in the plea—viz., that the letters in question were written and published by the defendant in the ordinary course of his duty as commanding officer to the Adjutant-General, for the information of the Commander-in-Chief, and as an act of military duty, and not otherwise, or for any other reason; but yet it seeks to avoid the effect of that admission by the allegation that they were written and published maliciously and without reasonable or justifiable cause, and not *bona fide*, or in the *bona fide* discharge of the defendant's duty as such superior officer. I am of opinion that such replication is bad, and is no answer to the matters alleged in the plea. If it was the defendant's duty to write such letters and to make such reports touching the plaintiff's conduct, qualifications, and fitness as an officer (which is admitted by the replication), I do not see how it makes the defendant's conduct actionable because he did what it was his duty to do maliciously, and not *bona fide* in the discharge of his duty. The defendant in substance says, "I did my duty, and nothing more than my duty." To which the plaintiff replies, "I admit that you wrote the letters and reports as an act of military duty, and not otherwise; but you did so maliciously and without reasonable or probable cause, and not *bona fide*." It is difficult to comprehend how it could be without reasonable or probable cause if done as an act of duty which it was incumbent upon him to do. It is to be observed that the replication contains no allegation that the statements contained in the reports were false to the defendant's knowledge, and I am clearly of opinion that without such an allegation the words "without reasonable or probable or justifiable cause, and not *bona fide*," are, in connection with the admissions in the replication, simply insensible and repugnant. I must not be taken to admit that had such an allegation appeared on the record it would have entitled the plaintiff to judgment on the demurrer, but it would have given rise to different considerations. I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do cannot make the doing of that duty actionable,

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however malicious they may be. I think that the law regards the doing of the duty, and not the motives from or under which it is done. In short, it appears to me that the proposition resulting from the admitted statements on this record amounts to this: does an action lie against a man for maliciously doing his duty? I am of opinion that it does not; and, therefore, that upon the pleadings as they stand we might give judgment for the defendant. The Attorney-General, however, did not rest the defendant's case on the effect of the admissions in the pleadings, but contended broadly that no action would lie at law against an officer of the army charged with duties such as those stated on the record in the discharge of them. He likened the case of the defendant to that of judges of courts of law, to grand jurymen, petit jurymen, and to witnesses, against whom no action lies for what they do in the course of their duty, however maliciously they may do it. He claimed the immunity for the defendant for acts done in the course of duty on the highest grounds of policy and convenience. No judge, nor juryman, nor witness, he said, could discharge his duty freely if not protected by a positive rule of law from being harassed with actions in respect of the mode in which he did the duty imposed upon him; and he contended that the position of the defendant manifestly required the like protection to be extended to him and to all officers in the same position. And there is, I think, little doubt that the reasons which justify the immunity in the one case do in great measure extend to the other. How can a commander freely communicate his real opinions to the Adjutant-General as to the conduct, qualifications, or fitness for particular duty of any officer under his command (if his opinion be prejudicial to such officer), under the dread of an action for libel, or other action which, if he were not protected, might be brought against him by any dissatisfied subordinate officer who might consider himself aggrieved? To this it may be answered that no action would lie, as his communication would be privileged if made *bona fide* and without malice. On the other hand, it must be observed that, although his communication might be privileged under such circumstances, still cases might frequently occur in which the judge on a trial at law would have to submit to a jury the most difficult question of military discipline—such as whether orders disobeyed would be proper orders for a commander to give, or were given maliciously and not *bona fide*, or whether the opinion expressed as to the competence of a subordinate officer for particular duties was justified or not. The promotion of an incompetent man may cause the greatest disaster; and yet if the person who has to make his report as to the fitness or unfitness of such officer is to do it under the idea that the opinion he expresses may be overruled by a jury ignorant of such matters, how can he be expected to do it freely? The Attorney-General, however, relied not only upon the analogy he drew from the case of a judge, juryman, or witness, but he cited in support of his argument the opinion of Lords Mansfield and Loughborough in the case of *Sutton* v. *Johnstone*, in error; and there is no doubt that those eminent judges did in the court of error express an opinion in the analogous case of an action for a malicious prosecution of a naval officer by the commander-in-chief of a naval squadron before a naval court-martial, that no such action could lie, and in the course of their observations they said: "If this action be admitted, every acquittal before a court-martial will produce one. Not knowing the law or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them." And again, "If every trial," that is by court-martial, "is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief will be." These considerations appear to me to apply *à fortiori* to a case like the present, in which the letters and reports complained of were written by the defendant in the performance of a positive duty, and for the purpose of obtaining an investigation of the matters therein alleged by a competent military tribunal. It is to be observed that the opinions expressed by Lords Mansfield and Loughborough, although of the greatest weight, and given after the fullest consideration, were not necessary to the judgment in that case, which actually proceeded on other grounds, and therefore does not amount to a decision binding us to declare that no such action will lie, and does not conclude us with reference to the present case; but the exposition of the law expressed in those opinions has been generally accepted and referred to in other cases as a very weighty authority. It was evidently given after great consideration, and derives additional weight from the fact that it was delivered in a court of error, and after an argument displaying the greatest ability and research. It proceeds upon the principle that the law will rather suffer a private mischief than a public inconvenience. It was observed by Baron Eyre, in delivering the opinion of the Court of Exchequer, that the ground upon which the immunity from actions enjoyed by judges and jurymen proceeds is that "the law gives faith and credence to what they do, and therefore there must always in what they do be cause for it, and there never can be any malice in what they do." Crompton, J., in *Judy* v. *Blackburn*, 3 B & S. 570, stated that the immunity of judges of the Superior Courts was established to secure their independence, and to prevent them being harassed by vexatious actions. It is manifest that the administration of justice would be paralysed if those who are engaged in it were to be liable to actions upon the imputation that they had acted maliciously, and not *bona fide*; but it is to be observed that this absolute privilege is not confined to the administration of justice in the Superior Courts, but it has been also applied in its fullest extent to judges of the County Courts (*Scott* v. *Stansfield*, 37 L. J. 155, Ex). Nor is it, indeed, confined to the administration of justice, for it is well established that members of Parliament cannot be called in question out of Parliament for anything they may say in Parliament, in the course of any proceedings in Parliament; and in like manner Ministers of the Crown cannot, from reasons of the highest policy and convenience, be called to account in an action for any advice which they think right to tender to the Sovereign, however prejudicial such advice may be to individuals (*Irwin* v. *Sir G. Grey*, 4 F. & F. Rep. and C. B. Rep. N. S.) Do not these reasons of public policy and convenience strongly apply to the present case? Can the administrative duties discharged by officers of the army in the position of the defendant be liable to be reviewed by a jury in an action at law without producing the greatest mischief and public inconvenience? I shall presently show that a special mode of redress for all officers in the army who consider themselves aggrieved by their superior officers in relation to the discipline and government of the army is provided by the Articles of War and in that view how inconsistent it would be that the judgment of a military tribunal familiar with the question should be liable to be reviewed and a different result attained by the verdict of a jury in an action of law upon the very same facts. It is true that a standing army was unknown to the common law, and was always looked upon with great jealousy by our ancestors; but it is now and has been for many years regulated by Acts of Parliament, and by Articles of War framed under them; and the machinery for administering it has

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long been recognised and settled, and there is now a Secretary of State for War expressly appointed by the Crown, with a series of officers charged with particular duties, all tending to the regulation and government of Her Majesty's forces, and I cannot but think that the analogies referred to do in principle apply to a case like the present. Upon these considerations, and supported by the opinion of Lords Loughborough and Mansfield, and that of other eminent judges, I come to the conclusion that the present action will not lie. There was another ground of great importance upon which the Attorney-General insisted, and which strongly supports the opinion above expressed. He argued that, the plaintiff being at the time of the printing and publishing of the letters and reports an officer in the army, and the defendant being his commanding officer, and the letters and reports in question being matters simply relating to military duties and discipline, and to the administration of the army, the plaintiff, if he had ground of complaint in respect of them, was bound to make it to the tribunal specially provided by the Mutiny Act and Articles of War relating thereto, and that it was the only tribunal to which a military officer could appeal in respect of such matters. There is no doubt that the 12th section of the Articles of War does provide "that if any officer shall think himself wronged by his commanding officer, and shall, upon due application made to him, not receive the redress to which he may consider himself to be entitled, he may complain to the General Commanding-in-Chief of our Forces in order to obtain justice, who is hereby required to examine into such complaint, and either by himself, or by our Secretary at War, to make his report to us thereupon, in order to receive our further directions." And it is also provided that all the provisions of the Articles of War "shall apply to every person who is or shall be commissioned or in pay as an officer." It would seem to follow from the provisions thus made by the Articles of War for a special mode of redress for every officer who may think himself wronged by his commanding officer, that it was intended that every officer aggrieved by any order or report made in the course of the administration of the army must follow the special mode of redress pointed out in the Articles of War, and that, in respect of any grievances or complaint arising out of such administration merely, he can have no redress in any other way. Certainly this view of the law is supported by the opinion of Lords Mansfield and Loughborough, expressed in the case of *Johnstone* v. *Sutton*, above referred to, in which it is said: "Commanders in the day of battle must act upon delicate suspicion, upon the evidence of their own eyes; they must give desperate commands, they must require instantaneous obedience. In case of a general misbehaviour, they may be forced to suspend several officers, and put others in their places. A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience. But what condition will a commander be in, if upon the exercising of his authority he is liable to be tried by a common law judicature?" I think that these considerations tend strongly to show that the Legislature, in providing special means of redress for officers feeling themselves aggrieved by any exercise of ordinary military authority or duty, by establishing special tribunals for the purpose by the Articles of War, did intend to preclude such officers from appealing to the ordinary tribunals in respect of such matters. This view is confirmed by the opinion of Willes, J., in *Dawkins* v. *Lord Rokeby*, 4 F. & F. 841, upon which he nonsuited the plaintiff in an analogous action, and which, so far as I am aware, was not afterwards questioned. He is reported to have said as follows: "With respect to military men, I beg to say that I cannot conceive anything more fatal to themselves—anything more fatal to the discipline or subordination of the army—if every officer who considers himself to have been slighted by his inferiors, or every officer aggrieved by his superiors, whom, having become a soldier, he has consented to submit to, should seek to undo their judgment before a tribunal which must necessarily have but slight acquaintance with those matters upon which it is called to pronounce an opinion. I have no doubt that this is the law, and that it is that which is most beneficial to the community." The case of *Grant* v. *Gould*, 2 Henry Blackstone, 69 (see *Barwis* v. *Keppel*, 2 Wils. 314), strongly supports the same view. In that case Lord Loughborough said: "The object of the Mutiny Act, therefore, is to create a court invested with authority to try those who are a part of the army in all their different descriptions of officers and soldiers, and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to His Majesty to make Articles of War, those Articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army." And in that case, prohibition being refused, Lord Loughborough further said, speaking of a military court-martial sitting under the Articles of War: "This court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts in Westminster Hall, must depend upon the same rules with all other courts which are instituted and have particular powers given to them." It appears to me that, upon the ground that the defendant and the plaintiff were both officers in the army, the defendant being the superior officer, and both being bound by the Articles of War, it was the duty of the plaintiff to adopt the remedy thereby provided with reference to the matters whereof he complains, and that he has no remedy at law in respect thereof. I am therefore of opinion that upon these grounds our judgment must be for the defendant.

LUSH, J.—It is admitted on the record that the letters complained of were reports made to the Adjutant-General of the army for the information of the Commander-in-Chief by the defendant, as the superior military officer of the plaintiff, in the discharge and under the obligation of military duty touching the competence of the plaintiff as an officer, and his fitness for command in the field and in barracks. And the question turns on the validity of the replication which alleges that these reports were made of actual malice, and without any reasonable, probable, or justifiable cause, and not *bona fide* or in the *bona fide* discharge of the defendant's duty as such superior officer. In the view which I take of this case it is unnecessary to determine what is the precise meaning intended to be conveyed by the latter allegation; whether it is merely a repetition in another form of the malicious motive, or whether, by saying that the letters were not written *bona fide* or in the *bona fide* discharge of duty, is meant to imply that the defendant knew the statements in them to be false. For, however they may be construed, I am of opinion that the question raised is one purely of military cognisance, and not within the province of a court of law. It is to be observed that the letters complained of reflect on the plaintiff in his capacity of military officer, and in that capacity only. They affect his character, not as a citizen, but as a soldier, and they were written, not for circulation among the

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public, nor to a private individual, but to the proper military authority, and for the purpose of originating an inquiry into the competence of the plaintiff, and the propriety of an order which the defendant, as his superior officer, had made. A standing army is an institution unknown to the common law. Without the Mutiny Act, the relation between the plaintiff and defendant, out of, and in respect of which this complaint arises, could not have existed in time of peace; and an army raised in time of war would have been entirely under the dominion and control of the Crown, and all questions of military discipline and abuse of power would be decided by its own absolute authority. On this ground it was held in *Barwis* v. *Keppel*, 2 Wil. 314, that an action would not lie by a private soldier against his commanding officer for reducing him on the field of battle from a sergeant to the ranks, though the act was alleged to have been done maliciously and without any reasonable or probable cause. If, therefore, the jurisdiction claimed for this court by the plaintiff exists, it must be derived from the Act by which the army is created and governed. No such jurisdiction is given in terms, and, so far from its being conferred by implication, I think it clear that the intention of the Legislature was to exclude the interference of the courts of law, and to confine all matters of complaint of a purely military character to the military authorities; for the Mutiny Act supplemented by the Articles of War constitutes what purports to be a complete military code. It professes to deal with the whole military conduct of every soldier, and in every department of the service. It provides rules for the protection of the subordinate against his superior officer, as well as for due subordination; for the redress of grievances as well as for the punishment of offences; and appropriate tribunals are constituted for administering and enforcing these provisions. Amongst the Articles of War are two sections headed "Redress of Wrongs," the one applying to commissioned, the other to non-commissioned officers and privates. The first, which I presume is the one under which the plaintiff acted as stated in the plea, is to this effect: "If any officer shall think himself wronged by his commanding officer, and shall upon the application made to him not receive the redress to which he may consider himself entitled, he may complain to the General Commanding-in-Chief of our Forces in order to obtain justice, who is hereby required to examine into such complaint, and, either by himself or by our Secretary of State for War, to make his report to us thereupon in order to receive our further directions." Can it be reasonably inferred that any other mode or measure of redress was intended by the Act than that which is specified in this article? It is no argument to say that the remedy is imperfect because no pecuniary compensation is given to the injured party. The defect, if it be one, is a defect in the code itself, which we cannot remedy. The plaintiff has no reason to complain, for he has all which the law military, to which he engaged to submit when he entered the service, entitles him to have. The same code creates both the right and the remedy, and this court cannot add to the one or to the other. The elaborate judgment of Lord Mansfield and Lord Loughborough in *Johnstone* v. *Sutton*, an analogous, though not similar case, upholds the view which I have taken upon grounds which I think equally applicable to this case; and though the ultimate decision in the case was based upon an independent ground, I cannot but regard it as a judgment of high authority. As every year since that date Acts have passed for the government both of the army and of Her Majesty's marine forces, without any intimation of a contrary view on the part of the Legislature, and so many occasions for questioning it must have occurred, and yet the judgment stands unassailed, I look upon it as one which has received the tacit assent of both the Legislature and the judicature. It is true that Lord Campbell in *Dickson* v. *Lord Wilton*, 1 F. & F. 419, and again in a case between the same parties (3 F. & F. 1), left the question of malice to the jury, but in neither case was the point now in controversy raised. On the other hand in *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806, Willes, J. ruled that the action was not maintainable. His observations in that case, which have been quoted by my brother Mellor, I entirely adopt. For these reasons I concur with my brother Mellor in pronouncing judgment for the defendant.

Judgment for the defendant.

Attorneys for the plaintiff, *Smith* and *Co.*

Attorney for the defendant, *The Solicitor to the Treasury.*

NISI PRIUS.

SUSSEX SPRING ASSIZES, 1869.—LEWES.

(Before BRAMWELL, B.)

LORD ST. LEONARDS v. ASHBURNER. (a)

Trespass — Title—Evidence — Production of deeds — Length of possession—Effect of is evidence of title apart from the Statute of Limitations.

In an action which raises a question of title to land, the question being one of boundary, long possession and acts of ownership afford pregnant evidence of title in the party possessed, notwithstanding the non-produc- of his title-deeds, and even against some evidence of title in the other party (if such evidence leaves the question in doubt); upon the ground of the acquiescence of the other party in the possession, and acts of ownership. And this evidence is quite independent of the Statute of Limitations, the effect of which is to vest the property in the person in possession, even although until the period of limitation had elapsed it was not his, whereas the effect of possession and acts of ownership is evidence to show that the title was originally in that party.

Action of trespass, by Lord St. Leonards, for cutting trees, alleged to have been growing on his land.

Plea: not possessed.

C. Pollock, for the plaintiff.

Sir *G. Honyman*, for the defendant.

The parties possessed adjoining estates, originally portions of one estate held in the hands of the same owner, but having a natural boundary between them, and they had been occupied by different tenants. More than twenty years before the act complained of, the plaintiff had purchased the portion he held, and had planted trees upon the *locus in quo*, some of which had been cut down to try the title. The defendant, within the twenty years, had come into the possession of the other portion, and had recently claimed the *locus in quo*, as belongings to it. The question was one of boundary. The plaintiff relied upon his possession, and acts of ownership, as proving that the boundary was one which corresponded with the old boundary between the two portions of the original estate, and which included the *locus in quo* in his portion, and he declined to produce his title-deeds, "upon principle." The defendant relied chiefly on a plan indorsed on his title-deeds, and which appeared to be rather in his favour; but it was so small (being merely on

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

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the margin of the deed) that it was necessarily doubtful and indistinct; and although he also gave some evidence as to boundary and acts of ownership, it was slight and inconclusive; and the preponderance of evidence of acts of ownership was vastly in favour of the plaintiff, who indeed had planted the trees in the *locus in quo* more than twenty years before, and had been in possession ever since. The plaintiff was pressed in cross-examination to admit that he was relying on the Statute of Limitations to claim land not really his, but this he strenuously refused to admit, and urged his long possession as the best proof of title.

BRAMWELL, B., to the jury.—The action is to try the title to the land, and it is for the plaintiff to make out his title. The question is one of boundary, and the great point is, which of the parties has actually enjoyed the land in dispute. Title-deeds come to little without evidence of actual enjoyment, for otherwise anyone might pretend to give away the lands of anybody else. Parchment, of itself, comes to little; the real question is as to actual enjoyment; and in this case the great question is, who has enjoyed the land in dispute since the estate was divided. Now, we have the positive and undoubted evidence of Lord St. Leonards that he actually planted the trees upon the piece of land, and that is certainly one of the most cogent pieces of evidence that could possibly be given in a case of this kind; building a wall upon the land could hardly have been more so. It may fairly be presumed that Lord St. Leonards, when he planted the trees, believed or supposed the land to be his, and, as he had bought the estate, he would, of course, take care to know what he bought. And it is difficult to suppose that the owner of the other portion of the estate would not have equally known the boundary, and would not have resisted the plaintiff's acts of possession if the land in question was not within his boundary. Besides, the plaintiff has been in continued possession ever since, cutting the trees and sporting on the ground, exercising every possible act of ownership. It would be difficult to imagine a stronger case. It was said on the part of the defendant, "Produce your title-deeds." But the plaintiff declined to produce them, and this refusal was in accordance with law, with sound reason, and good sense. For it would be extremely hard if a man might commit a trespass upon land in the possession of another, and then say "Produce your title-deeds." Surely the other might fairly answer, "I am not called upon to produce my title-deeds, for I am in possession, and you are a trespasser; produce your own title-deeds, and prove your title to the land you claim." The defendant, indeed, produced his title-deeds, and relied upon a plan indorsed on the margin of one of the deeds. But the scale was so minute that the weight of that evidence was slight. Where, indeed, a deed refers to a plan, it is conclusive between the parties or their privies. So far as it goes, the plan is in the defendant's favour; but it is for the jury to say what such a piece of evidence is worth. And so as to the acts of ownership on the one side or the other. There is further, on the part of the plaintiff, the case under the Statute of Limitations, and if he has been in exclusive possession for more than twenty years, that gives him a conclusive title by virtue of the statute.

Verdict for the plaintiff.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Nov. 23.

(Before LORD PENZANCE.)

In the Goods of COOPER.

Will—Bankruptcy and emigration of executor—Administration granted to one of the legatees.

An executor became bankrupt and emigrated to Australia before proving the will. The estate was of small value, and the court, under the circumstances, granted letters of administration, with the will annexed, to a sister of the deceased as one of the legatees, but directed the written consents of all persons interested under the will to be filed in the registry.

Elvira Louisa Cooper, late of No. 44, Bernard-street, Russell-square, in the county of Middlesex, died Aug. 3, 1869, a spinster, leaving a will duly executed, and dated July 22, 1865, of which she appointed John Johnson sole executor. The value of the property was under 300*l.* By the will the testatrix bequeathed the sum of 100*l.* to her mother, and the remainder of all other moneys, after payment of the funeral expenses, to her sisters, Rosina Mary Cooper, Henrietta Sophia Raikes, Eliza Humes Cooper, and Alice Grace Cooper, and to the said Alice Grace Cooper she bequeathed all her wearing apparel, books, plate, jewellery, pictures, and household furniture. Her executor, John Johnson, on Dec. 28, executed an assignment for the benefit of his creditors. On Dec. 21 he filed his petition for adjudication of bankruptcy in the district court of Leeds, in the county of York. In Jan. 1867 he went to Australia, and was now said to be at Ballarat, with no intention of returning to England.

Searle now moved for a grant of administration, with the will annexed, to Alice G. Cooper, as one of the residuary legatees, relying on the words of the will, which he contended constituted a residuary bequest to the deceased sister.

Lord PENZANCE.—Under the circumstances of the case—the poverty of the estate, the bankruptcy of the executor, and his absence from the country—you may take the grant under the 73rd section; but you must bring into the registry the written consent of the mother and all the other persons interested under the will.

Solicitors, *Benham* and *Tindall.*

Tuesday, Nov. 30.

In the Goods of CROFTS.

Will of married woman — Separation-deed — Scotch divorce — Will not republished after death of husband —Limited grant.

A testatrix for many years before her death had been separated from her husband, and enjoyed under a post-nuptial settlement a separate income of 150l. a year. She had also obtained a decree of divorce in Scotland, but both she and her husband resided in England. Her husband predeceased her, and she did not re-execute the will which she had made before his death. Her property consisted partly of savings and partly of a legacy which had been left to her after the decree of divorce. The Probate Court granted probate limited to so much of her property as on the oath of the party appliant appeared to be the produce of her separate estate.

Harriet Crofts died March 1869, leaving a will duly executed, bearing date June 22, 1868. In 1837 Mrs. Crofts separated from her husband, and never afterwards cohabited with him. On the 21st

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and 22nd Sept., in contemplation of their separation, Robert Crofts, her husband, executed a post-nuptial settlement, by which he secured to her, her heirs, executors, administrators, and assigns, an annuity of 150*l.* In 1840 Mrs. Crofts, then being resident in England, obtained a divorce in Edinburgh, on the ground of adultery committed by her husband when in Scotland—but before the decree was pronounced, her husband returned to England, and never afterwards resided in Scotland. The value of the testatrix's property was under 800*l.*, consisting of money in the Funds and furniture, arising partly out of her savings, and partly from a legacy left her after the date of the Scotch decree of divorce. The will commenced by saying that she had certain separate property over which she had a right of disposal, and that in the exercise of that power, she disposed of the same in the manner therein following. The testatrix's husband died in July 1868, after the date of the execution of the will, and she survived him and died without re-executing the will.

Dr. *Spinks* now moved for probate of the will on behalf of the executor. He submitted that as the property was made up of the deceased's savings and of the legacy which came to her after her divorce, it was her separate estate, of which she had power to dispose by will, and therefore that the executors were entitled to a general grant. [Lord PENZANCE.—The difficulty in your way is that the court, in deciding whether she had power to dispose of her property, will be exercising the powers of a court of construction as to the effect of that separation-deed. I will consider in what form the grant ought to go.]

On a subsequent day, Lord PENZANCE said:—The grant may go, limited to such property as appears, on the oath of the party applying, to the best of his belief to be the produce of her separate property.

Proctors, *Heales* and *Co.*

OLVER v. JOHNS.

Will—Attestation—Signature not seen—Presumption.

The sole surviving attesting witness to a will, which had been prepared by a person well accustomed to the making of wills, deposed that when she signed the will she did not see the testatrix's signature, nor could she remember seeing the other attesting witness sign, though she handed the pen to him. She had been requested by the testatrix to witness her will, and the court

Held the will to have been duly executed.

The plaintiff propounded the will of Jenefer Johns Cole, of St. Austell, in the county of Cornwall, who died March 7, 1868. The defendant pleaded undue execution and undue influence. The will was prepared by one Glanville, who was one of the attesting witnesses, but who had since died. The attestation clause was in this form: "Published as for the last will and testament of the said Jenefer Johns, who signed the same in our presence, and we, in each other's presence, have signed the same as witnesses the day and year as above."

The sole surviving witness, Jane Jenkins, made an affidavit describing the circumstances of the execution. The deceased asked her to witness the will, but the did not see the testatrix sign, nor did she see any signature. After signing she handed the pen to the other attesting witness, Glanville, and left the room without seeing him sign.

Pritchard, on behalf of the intervener, who had been allowed to come in and prove the will, moved for probate of the will. The question is one of presumption. The memory of the attesting witness is a blank, and as the will was made by a man accustomed to make wills in the neighbourhood, the presumption *omnia ritè esse acta* applies.

Dr. *Swabey* contra.—There is nothing to show that the testatrix's signature was there, and the circumstances do not justify such a presumption.

The COURT held that the case came within *Gwillim* v. *Gwillim*, as regarded the presumption of the testator's signature being on the will at the time of attestation. As to the witnesses signing in each other's presence, it held that the facts allowed the Court to assume that they had so signed, and granted probate.

Attorneys for intervener, *Emmet*, *Watson*, and *Emmet*.

Attorneys for defendant, *Westall* and *Roberts*.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Dec. 7.

(Before LORD PENZANCE, J. O.)

PARKINSON v. PARKINSON.

Dissolution suit—Desertion not proved, and charge of cruelty subsequently added—Practice.

A wife brought a suit for dissolution on the ground of adultery and cruelty. She proved the adultery, but failed to prove the cruelty. The hearing was adjourned, and she subsequently discovered that the communication of syphilis amounted to legal cruelty.

The court on motion allowed her to add a charge of cruelty to that effect to the petition.

This was originally a wife's petition for dissolution on the ground of her husband's adultery and desertion. The adultery was clearly established, but the court held the desertion not proved, and the further hearing was adjourned for the petitioner to decide whether she would ask for a decree of judicial separation.

Dr. *Swabey*, on her behalf, now moved for leave to add a charge of cruelty. In support of the motion he read affidavits from Dr. Conolly, deposing that a complaint from which the petitioner now suffers, and has for a long time been suffering, communicated to her by her husband, is syphilis; and another from Mrs. Parkinson, in which she stated that she had only become aware that the communication of such a disease amounted to legal cruelty by hearing a case tried in this court while she was waiting the hearing of her own case.

Lord PENZANCE, J. O.—You may have leave to amend your petition by adding the charge as prayed.

Solicitors: *Chippenden*, *Clarke*, and *Turner*.

Wednesday, Nov. 10.

FINNEY v. FINNEY.

Dissolution suit—Costs of witnesses not called—Maintenance money.

In a suit for dissolution the respondent's counsel withdrew their opposition after a few witnesses had been called. The registrar in taxing the costs disallowed the costs of several witnesses who were in attendance, but not called, and also disallowed maintenance money for the witness on whom the proof of the wife's case chiefly depended.

The court on motion confirmed the registrar's report on

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the latter point, but on the ground that the case was one which, from the circumstances, required to be well proved, allowed the expenses of the witnesses who were not called.

The petitioner, who had a small independent property, married the respondent, Major Finney, in Oct. 1863, and afterwards lived with him in different parts of London, and at Southsea. In Jan. 1867, she separated from him, and soon afterwards she filed a petition praying for a judicial separation on the ground of cruelty. The case was heard in Nov. 1867, when the court held that the cruelty was not proved, and dismissed the petition. Subsequently the petitioner received information from one Louisa Aldridge, that the respondent had committed adultery with her. She alleged that she had been the Major's mistress before his marriage, and that he had kept up an adulterous connection with her afterwards. Mrs. Finney then presented a petition for judicial separation on the ground of adultery. The respondent filed an answer denying the charge.

The case was heard before Lord Penzance, J. O. and a special jury on July 14 and 15, and after the evidence of Louisa Aldridge had been corroborated by several witnesses, the counsel for the respondent abandoned further opposition to the decree, and the jury having found all the issues for the petitioner, the court pronounced a decree for judicial separation. The costs were taxed in the registry, and the registrar disallowed the expenses of several witnesses who were in attendance, but not called on to corroborate the evidence of the witness Louisa Aldridge. He also disallowed a sum charged for subsistence money of Louisa Aldridge during the period between her communication with the petitioner's solicitors and the trial.

Dr. *Spinks*, for the petitioner, now moved that the report be referred back to the registrar for a reviewal of it. The petitioner's solicitor, in summoning these witnesses, had acted under the advice of counsel, who were of opinion that Aldridge's evidence, under the circumstances, ought to be strengthened in every possible way by independent testimony. That they were not called was the result of the respondent's counsel withdrawing their opposition. [Lord Penzance, J. O.—The case was certainly one which required to be well proved.] On the point of maintenance money he cited

Anonymous, 2 Dow & Ry. 424;
Royal Exchange Assurance Company, 7 Wms. 725;
Mount v. *Larkin*, 8 Bing. 195;
Evans v. *Watson*, 15 L. J. 256, C. P.;
Howes v. *Barber*, 21 L. J. 254, Q. B.;
Ansell v. *Marsh*, 22 L. J. 118, Q. B.

Searle, for the respondent, submitted that the court before granting the motion should have before it the report of the registrar, with his reasons for disallowing the costs.

Lord Penzance, J. O.—The best plan will be to have a meeting in chambers, and settle the matter there.

Subsequently in chambers the Judge Ordinary allowed the expenses of the witnesses, but confirmed the registrar's report in disallowing the maintenance money.

Solicitors, *Bischoff* and *Co.*

Saturday, Nov. 13.

Richards v. Richards and Cook.

Suit for dissolution—Suspected connivance of husband—Decree suspended—Queen's Proctor put in motion.

In a suit for dissolution, the court, having reason to suspect the husband of connivance or conduct conducing to adultery, suspended the decree, and directed the Queen's Proctor to make inquiries into the bona fides of the petitioner's case.

This was a husband's suit for dissolution of marriage on the ground of adultery. The parties were married in the United States, and at the time of the alleged adultery they were residing near Bristol. Soon after their return to this country, they made the acquaintance of the co-respondent, and the respondent being in bad health, he took her, as was alleged, to visit some relations of his near Newport. It was proved, however, that they never went to Newport, but lived at Cardiff for ten days or a fortnight as man and wife. On their return the co-respondent went to lodge with the petitioner, and one night he and the respondent were surprised by the petitioner in the act of adultery. Upon this a petition was filed, and the case was tried before the court without a jury. Neither the respondent nor co-respondent had filed an answer.

Inderwick for the petitioner.

At the trial various letters written to the husband during the absence of the wife with the co-respondent were read, which induced the court to suspect connivance or conduct conducing to adultery. The petitioner was called, and his cross-examination did not tend to remove the suspicion.

Lord Penzance, J. O.—This is a peculiar case. The adultery of the wife has been clearly proved, and the question is whether the petitioner has disentitled himself to a decree by his own conduct. When the letters from the co-respondent were read, a suspicion was raised that the petitioner knew what was going on, and when the petitioner came into the box that suspicion was not removed. Among other things, he was not able to say how long his wife remained in the house after he had caught her in the act of adultery. However the petitioner may be merely a stupid man, and his case may be a good one. Under the circumstances the court will suspend the decree for the present, and direct the Queen's Proctor to make inquiries.

Solicitor, *E. W. Le Riche.*

Judicial Committee of the Privy Council.

Reported by Douglas Kingsford, Esq., Barrister-at-Law.

June 22 *and July* 17.

(Present: The Right Hon. Sir William Erle, the Lord Chief Baron (Sir Fitzroy Kelly), Sir Robert Phillimore, and Sir Joseph Napier.)

The Attorney-General for New South Wales (app.) v. Michael Murphy (resp.)

New South Wales—Conviction for felony—Venire de novo—New trial—Access of jury to newspapers—Jurisdiction of Supreme Court of New South Wales—Irregularity not avoiding verdict—Remedy.

The respondent was tried for murder, at a session of oyer and terminer and gaol delivery in New South Wales, was convicted and sentenced to death.

Afterwards an application on behalf of the prisoner was made to the Supreme Court of the colony, sitting in banco, for a rule to show cause why a venire facias de

novo should not issue for the trial of the prisoner. On further affidavits the rule was made absolute, and it was also ordered that a suggestion should be made on the record to the effect that after the jury had been empanelled, and before verdict, the jurors were allowed, during certain adjournments of the court for the night, by the officers of the sheriff having charge of them, to have access to and free perusal of certain newspapers containing reports of the evidence from day to day; and that the last-mentioned trial, by reason of the matters so suggested, was not according to law, but was irregular and void. This suggestion was followed by an entry, purporting to be an order that, for the cause aforesaid, the judgment on the said verdict be vacated, and that the sheriff cause a jury anew to come.

Held (reversing the judgment of the Supreme Court of New South Wales), that the above order vacating the judgment upon the verdict, and for a venire facias de novo was invalid:

First. Because this was substantially an attempt to grant a new trial on the ground that the conviction was unsatisfactory by reason of irregularity in the conduct of the trial, and the discretion to grant new trials does not extend to cases of felony: (R. *v.* Bertrand, 16 *L. T. Rep. N. S.* 752, *followed.*)

Secondly. Because the Supreme Court sitting in banco had not jurisdiction to take cognizance as a court of appeal of the judgment pronounced at the session of oyer and terminer, which had come to an end before the session in banco began.

Thirdly. Because the evidence was insufficient, in that, on mere hearsay information, it showed only possible access by the jury to newspapers, without showing that the newspapers contained matter tending to influence the jury improperly, or that they were ever read by the jury.

The cases in which a verdict upon a charge of felony has been held to be a nullity, and a venire facias de novo awarded, have been cases of defect of jurisdiction in respect of time, place, or person, or cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon; but there is no authority for holding a verdict of conviction or acquittal in a case of felony, delivered before a competent tribunal in due form, to be a nullity by reason of some conduct on the part of the jury, considered unsatisfactory by the court.

If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority, with whom rests the discretion either of executing the law or commuting the sentence.

This was an appeal from a judgment of the Supreme Court of New South Wales delivered on Sept. 24, 1867. The appellant, the Hon. James Martin, Her Majesty's Attorney-General for the colony of New South Wales, sought to obtain the reversal, alteration or variation of that judgment.

The main facts of the case were as follows:—

On the 12th Aug. 1867 an information was filed in the Supreme Court of the said colony, at Sydney, by the appellant, as attorney-general, that the respondent did, on the 22nd Nov. 1865, at South Creek, in the said colony, feloniously, wilfully, and of malice aforethought, kill and murder one Samuel Hassan.

To this information the respondent pleaded not guilty, and issue was joined thereon.

The respondent was, on the 19th, 20th, and 21st days of Aug. 1867, at the session of the said court of oyer and terminer and general gaol delivery then holden, tried, upon the said information, before the Hon. Alfred Cheeke, one of the judges of the said court, and a jury of twelve jurors duly empanelled and sworn.

After having heard the evidence for the Crown and the prisoner, and having been addressed by the counsel for the Crown and the prisoner respectively, and charged by the said judge, the jury, on the said 21st Aug., retired from the bar of the court to consider their verdict. On the following day they returned into court, and by their foreman stated that they had not agreed, and were not at any time likely to agree concerning their verdict; and having been then kept, without separating, for the space of upwards of three days and three nights—during more than twenty-seven hours of which they had been deliberating on the matters before them—they were discharged by the judge from giving any verdict.

The respondent was again tried on the said information at the next session of the said supreme court as a court of oyer and terminer, and general gaol delivery, on the 10th, 11th, 12th, 13th, and 14th Sept. 1867, before the Honourable Peter Fawcett, one of the judges of the said court, and another jury, duly empanelled and sworn. And on the said 14th Sept. the jury found that the respondent was guilty of the felony and murder charged, and thereupon the respondent was by the court sentenced to death.

After the adjournment of the court on the evenings of the said 10th, 11th, 12th, and 13th Sept respectively, the said jurors were lodged at "Butt's" Metropolitan Hotel in Sydney, under the charge of the sheriff's officer. During the times when they were at such hotel, and before giving their verdict, the said jurors were allowed the use of the newspapers of the day, containing alleged reports of the trial so far as it had gone. The heading of the report in one of such papers was "The South Creek murder case," and in one report the following passage was contained: "The witness was cross-examined, but was not shaken in his evidence."

The said jurors were also allowed during the time of their sojourn at the said hotel to hold communication, without the permission of the presiding judge, with persons other than the officers in charge of them; but such communications had no reference to the matters in issue.

On the 19th Sept. 1867, a rule was granted by the said Supreme Court, calling upon the appellant to show cause why a *venire de novo* should not issue for the trial of the respondent on grounds appearing in an affidavit of James Hart, referred to in the said rule, and which grounds were in substance that the said jurors, after they had been empanelled to try the said case, and during their sojourn at the said hotel and before they delivered their verdict, were allowed the free use of the said newspapers containing the said reports, and that without the permission of the presiding judge, but with no reference to the matters in issue, intercourse was permitted between the said jurors and other persons not being in charge of them during the time they were at the said hotel.

On the 24th Sept. 1867, the said rule was, after reading certain further affidavits, and after hearing counsel for the Crown and for the respondent, made absolute, and by such rule absolute it was ordered that an entry should be made on the record of the respondent's conviction of the said charge to the effect that, after the jury had been empanelled to try the case, and before they delivered their verdict, they were improperly allowed the free use of the newspapers of the day which contained reports of the trial as far as it had gone, in one of which newspapers the heading given was "The South Creek Murder Case," and lastly that a *venire facias de novo* should issue for the trial of the respondent upon the said charge. The judgment below was not

written, but the reasons for that judgment were afterwards stated for the purpose of the appeal, and were as follows:—

Stephen, C. J.—I am of opinion that there must be a *venire de novo.* It is laid down in Tidd's Practice, 2 vol. 953 (8th edit.), citing a note to *Davies* v. *Pierce,* 2 T. R. 126, that a *venire de novo* is grantable when the jury have misconducted themselves. The authority quoted for this position is a case mentioned in 2 Strange, 887. In Viner's Abridgment, title "Trial," K., g. 4, it is said that "capias was awarded against the under-sheriff charged to keep a jury, and he permitted them to go and to have meat and drink, for he, upon his examination, confessed the matter, which is of record now, and he is an officer, &c., and therefore capias, &c., and against the jury, because the matter is only surmise, *venire facias* was awarded, and another *venire facias* between the parties at issue to return a new jury." In the margin it is added, that Brooke says, "it seems that this matter was confessed or notably proved," Br. Jurors, pl. 12. In Hale's Pleas of the Crown, p. 306, it is said that "if, after the jury sworn, either party deliver a piece of evidence to the jury, and the verdict is given for him that delivered it, it shall avoid the verdict, but then this must appear by examination, and be endorsed upon the postea or verdict so as it appears of record." The distinction between an award of a *venire de novo,* and a rule for a new trial, appears to be, says Manning, Serjt., in a note to *Gould* v. *Oliver,* 2 M. & G. 238, "that the former is always founded upon some irregularity or miscarriage apparent upon the face of the record, whilst the latter is an interference by the court, in the discretionary exercise of a species of equitable jurisdiction, for the purpose of relieving a party against a latent grievance. After a rule for a new trial, and a new trial had thereon, the record is in the same state as if no trial, except the last, had taken place, whereas upon a *venire de novo* the fact of the first trial, and the circumstances under which that trial became nugatory or abortive, and which rendered a second trial a matter not of discretion, but of right, necessarily appear on the record." And, again, in the following page, Hale, P. C. 308, Hale, C. J. says: "If depositions are read in court to the jury, and after the jury sworn and going from the bar, the solicitor or prosecutor for the king or party, without consent of parties or order of the court, deliver the copies of the deposition to the jury, if they find against him on whose part the copies were delivered the verdict is good, but if they find for him on whose part they were delivered, and this appear by examination, and be (as it ought to be) endorsed upon the *postea* or record, the verdict shall be quashed, and a new *venire facias* or award for a new jury shall be returned." If the court is satisfied by evidence before it that there has been a miscarriage of justice, the authorities show that the court has authority to direct the matter to be entered on the record, and it thus appears on what ground the *venire de novo* is awarded. I think, therefore, that it is our duty to direct the matter to be stated on the record, as was done in *R.* v. *Fowler,* 4 B. & A. 273. An entry was there made like the one I propose to have made in this case. I am satisfied that what occurred here was by the permission of the officers in charge of the jury, they being in fact officers of the Crown. The jurors were allowed to read, and some of them did in fact read, reports (or papers purporting to be reports) of the evidence daily given at the trial, or said to have been given, so far as it had proceeded. There is nothing to show whether the evidence was rightly or wrongly reported. These reports may, as far as appears, have been written by the Crown, or the authority of the Crown. It is sufficient to say that the officers of the Crown permitted the jurors to read reports, or what purported to be reports, of the trial. Such a proceeding, in my opinion, was wrong and dangerous in the last degree. The newspapers might have contained a comment on the trial. In fact, the following passage was contained in the report, "The witness was cross-examined, but was not shaken in his evidence." What was done must be considered to have been done by one of the parties to the proceeding, and therefore it vitiates the verdict. I have come to this conclusion, although keenly alive to the absurdity of adhering to form rather than substance in the conduct of criminal proceedings. It is quite possible to pervert rules of practice so as to secure impunity to guilt. But I think that there has been in this case a substantial miscarriage of justice, or, at all events, an extreme risk of such miscarriage. The mischief is obvious, and the proceedings so dangerous that no court could sanction it. It is better to allow the case to go down to another trial than to allow the verdict to stand. As to the effect of communicating with a juryman in respect to indifferent matters, it would be monstrous, I think, to say that a juryman should not receive a communication from his wife as to the illness of a child, or as to circumstances which might irretrievably injure his fortunes. I never understood that jurymen might not receive communications of this kind. In order to set aside a verdict on such ground, it would be necessary to show that some mischief had been caused by what had occurred.

Hargrave, J.—First, I concurred generally in the Chief Justice's elaborate statement in court, and review of the old authorities as to writs of *venire de novo* from very early date to the present time, but, not having read the written reasons of the Chief Justice as now filed, I assume that these authorities justify the technical issue of this writ on this present occasion, on the ground that the trial was conducted with such a substantial and gross miscarriage of justice as required the whole trial to be treated as a nullity, and this independently of all consent from any party. Secondly, I think that the giving of printed newspapers to the jurors during the trial containing (as was admitted) alleged reports of the case composed by mere newspaper employés, or any other unofficial bystanders, being the usual popular summaries of the evidence interspersed with remarks upon the relative importance and effect of particular testimony, the demeanors of the witnesses, the reporter's opinions as to the effect and bearing of cross-examination, and the usual condensed popular narrative of the speeches of counsel, and other court proceedings of this trial, were circumstances which constituted a substantial miscarriage of justice, and which seemed to me to come strictly (however unintentionally) within the common law offence of "embracery," defined (by Hawkins, P.C. vol. 1, c. 86, ss. 1, 5, and other authorities, cited at Russell's Crim. Law, chap. 21) to be "any practice which tends to affect the administration of justice by improperly working on the minds of jurors." The jurors ought not even to be "instructed by letters, persuasions, &c.," but only by the strength of the evidence, and the arguments of counsel in open court. If such a practice as that under consideration should be now authoritatively sanctioned by this court, or even for an instant tolerated, it is impossible to foresee the perversions of justice which may easily follow; and the common law and statutes referred to by Hawkins and Russell were intended to prevent all such irregularities by making all such offences indictable. Thirdly, I think that the delivery of these newspapers to the jury, whether

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by way of substitution for the perusal of the judge's notes, or in addition thereto, was, in fact, a gross contempt of court, and within the decisions of Lord Langdale in *Littler* v. *Thompson*, 2 Beav. 129, and of Lord Cottenham in *Lechmere Charlton's case*, 2 My. & Cr. 217, as an "attempt by private communication to influence the conduct of anyone invested with the duty of judicially disposing of matters pending in court," or "to obstruct the ordinary course of justice." I need scarcely point out that the delivery of these alleged reports, even though being open, and in court, or even by consent of the judge and of the parties, are circumstances not in the slightest degree altering the illegality of such conduct, as contrary to all judicial regularity and criminal procedure. Fourthly, I considered the decisions of the House of Lords in *O'Connell's* case, and of the Privy Council in *Bertrand's* case, as strongly directed against all such exceptional novelties in criminal procedure, being necessarily calculated to render trial by jury "a delusion, a mockery, and a snare," and "to interrupt the due and orderly administration of the law." Many other mischiefs, theoretical and practical, arising from the course adopted in this case, were pointed out by Mr. Pilcher as counsel for the prisoner, but the above were the chief grounds of my own judgment. I think it right to add, that the report in 6 S. C. R. 24 to 35, is very erroneous in many particulars.

Faucett, J.—The following is in substance what I said when giving judgment in this case: Having expressed my general concurrence in the observations made by the Chief Justice and Hargrave, J., I then said, I am of opinion that an irregularity has been committed, and the only question is how it ought to be remedied. The court cannot say that the matters improperly brought before the jury did not influence their minds. The irregularity complained of was allowed by the officer of the Crown who had charge of the jury, and the case is in this respect somewhat analogous to those cases in which evidence had been, without leave of the court, handed in to the jury by one of the parties or by the attorney of one of the parties; but, as I consider the act was an oversight on the part of the officer, I prefer to rest my decision on the general ground that what purported to be a report of the evidence had got improperly into the hands of the jury, by which their minds might have been prejudicially affected, and that this was an irregularity. And, on the whole, I consider that this irregularity having taken place out of court, and without the knowledge of the presiding judge, was, in effect, such a misconduct on the part of the jury as ought to render the verdict void; and that, in accordance with and in analogy to the authorities cited in 21 Viner's Abr., title "Trial" (G. g., 6 to 19), a *venire de novo* ought to be granted. I also think that the matter complained of ought to be set out on the record.

A suggestion in pursuance of the said rule absolute was thereupon entered upon the record, and an entry was also made on the said record that it had been ordered by the said court that the judgment on the said verdict should be vacated, and that the sheriff should cause a new jury to come for the trial of the issue joined upon the information aforesaid, and that the prisoner was remanded to the custody of such sheriff in order to take his trial on that information accordingly.

The appellant, Her Majesty's Attorney-General for the colony of New South Wales, afterwards presented a petition for special leave to appeal to Her Majesty in Council against the said judgment of the 24th Sept. 1867, vacating the judgment on the said verdict, and awarding a *venire de novo*; and on the 29th Feb. 1868 Her Majesty in Council gave the appellant special leave to appeal (5 Moo. P. C. N. S 47), on the same conditions as were imposed in *Attorney-General of New South Wales* v. *Bertrand*, 4 Moo. P. C. N. S. 460.

Sir *Roundell Palmer*, Q. C., and *Cohen*, for the appellant.—The ordering—a *venire facias de novo*, under the above circumstances, was, in effect, granting a new trial. In *R.* v. *Bertrand*, 16 L. T. Rep. N. S. 752; 1 L. Rep. Priv. Co. 520, it was held that, according to the English law prevailing in New South Wales, the Supreme Court there has no power to grant a new trial in a case of felony. The previous case of *R.* v. *Scaife*, 17 Q. B. 238, in which a new trial, after conviction for felony at the assizes, was granted by the Court of Queen's Bench, was there examined and overruled. And in the present case a *venire facias de novo* could not be granted. The rule as to such writs is correctly laid down in *Witham* v. *Lewis*, 1 Wils. 55, where it is said, "a *venire facias de novo* can only be granted in one or other of these two cases; first, if it appear upon the face of the verdict that the verdict is so imperfect that no judgment can be given upon it; secondly, where it appears that the jury ought to have found other facts differently; and it cannot be granted in any any other case." See too

Davis v. *Lucas*, 2 T. R. 126, and note;
R. v. *Huggins*, 2 Str. 887; 2 Raym. 1585;
R. v. *Keite*, 1 Raym. 138; Viner's Ab., title "Trial," K. g. 3; K. g. 4 (1), (25); Hale's P. C. c. 42, p. 306;
R. v. *Fowler*, 4 B. & Ald. 273.

In the present case the matters relied upon for the issue of a *venire facias de novo* were not such as to warrant the court in awarding such a writ. The cases that will be probably relied on by the other side were before the courts in error or on appeal. But the Supreme Court in New South Wales had no jurisdiction in error or on appeal. The verdict was given by a jury duly empannelled, and there was nothing that amounted to a mis-trial.

The *Solicitor-General* (Sir J. D. Coleridge, Q.C.) and *Archibald*, for the respondent.—There was such a substantial miscarriage of justice in the course of the second trial, in allowing the jury the use of the newspapers, as to amount to a mis-trial. The jury ought only to be instructed by the strength of the evidence and the arguments of counsel in open court, and allowing them to read newspaper reports of the trial as it proceeds had a tendency to interfere with the due and orderly administration of justice. The case of *R.* v. *Bertrand* (*ubi sup.*) is no doubt a decision that there could be no new trial, but there is a clear distinction between a *venire facias de novo* and a new trial. The latter will be granted where any irregularity sufficient to avoid the trial appears on the record, and that whether the suggestion on the record was made before or after judgment. See

Archbold's Crim. Pl. 16th edit. 165–8;
1 Chitty Cr. Law, 654;
Deacon Cr. Law, 1341.

Reference was also made to

R. v. *Campbell*, 1 Cox C. C. 269:
R. v. *Yeadon*, 1 Leigh & Cave, C. C. R. 81; 5 L. T. Rep. N. S. 329;
R. v. *Mansell*, 27 L. J. 4, Mag. Cas.;
R. v. *Mellor*, 1 D. & B. 408;
R. v. *Winsor*, L. Rep. 1 Q. B. 289, 390; 14 L. T. Rep. N. S. 195;
Leverson v. *The Queen*, L. Rep. 4 Q. B. 394.

Sir *R. Palmer* replied.

Cur. adv. vult.

July 17.—Judgment was delivered by Sir W ERLE:—Upon this appeal it appears by the proceed-

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ings returned to this court that the prisoner Murphy was tried for murder at a session of oyer and terminer and gaol delivery for the month of September, before Mr. Justice Faucett, and was convicted and sentenced; and all the proceedings, as far as appeared, were regular in due form of law. Afterwards, an application on behalf of the prisoner upon an affidavit was made to the supreme court sitting in banco, in term, for a rule to show cause why a *venire de novo* should not issue for the trial of the said prisoner, and, upon further affidavits, the said rule was made absolute; and therein it was also ordered that a suggestion should be made on the record to the effect that after the jury had been empannelled, and before verdict, the jurors were allowed, during certain adjournments of the court for the night, by the officers of the sheriff having charge of them, to have access to and free perusal of certain newspapers containing reports of the evidence from day to day; and that the last-mentioned trial, by reason of the matters so suggested, was not according to law, but was irregular and void. This suggestion was followed by an entry, purporting to be an order, that, for the cause aforesaid, the judgment on the said verdict be vacated, and that the sheriff cause a jury anew to come. It farther appears by the same proceedings above referred to that the only affidavit giving judicial knowledge to the supreme court of the alleged irregularity in keeping the jurors was that of the attorney for the prisoner, who deposed "that he was informed by one of the jurors who acted on the said trial, and he verily believed, that after they had been empanelled to try the said case, and during their confinement at the hotel (where they were kept during adjournments), and before verdict, the jurors were allowed the free use of the newspapers of the day which contained reports of the aforesaid trial as far as it had gone, in one of which newspapers the heading given was the 'South Creek Murder Case.'" These are the proceedings in the courts below to which we think it necessary to advert as relevant to this appeal. Upon the argument in this court the question has been whether the above-mentioned order for vacating the judgment upon the verdict and for a *venire de novo* in order for another trial was valid, and their lordships have come to the conclusion that the answer should be in the negative, both on the ground which their lordships relied upon in the case of *Reg.* v. *Bertrand* (16 L. T. Rep., N.S., 752; L. Rep. 1, P. C., 520), and also on the further grounds stated below—1st. Their lordships consider that the present case is in substance an attempt, by the exercise of a discretion, to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial. In *Bertrand's* case the irregularity was, that the evidence of the witnesses was read to the jury from the notes of the evidence on a former trial. Here the irregularity was in so keeping the jury during the course of the trial, as that the jurymen may have had access to some newspapers during that time; but the law is clear that the discretional power vested in certain courts and cases to grant new trials does not extend to cases of felony. The law on this subject was declared by their lordships in that case, and we consider that the law so declared governs the present case. Each of these cases falls within the rule that no person ought to be put in peril twice on the same charge. The application of the rule is shown in detail by Blackburn, J., in *R.* v. *Winsor*, L. Rep. 1 Q. B. 313; 14 L. T. Rep. N. S. 195, who there states, "When the jury have been brought together, and the prisoner has been given in charge, and the trial has commenced, the right course, if practicable, is that the jury should give their verdict convicting or acquitting the prisoner. When the jury have once found a verdict of conviction or acquittal, the matter has become *res judicata*, and after that there can be no further trial." He further shows that a *venire de novo* on the same indictment would be erroneous, and a new indictment on the same charge would be defeated by a plea of *autrefois acquit* or *convict*. These remarks relate to a verdict returned upon a good indictment for felony before a competent tribunal. Their Lordships cite this statement of the law to show the finality of a verdict upon a charge of felony when the indictment is good, and the prisoner has been given in charge to a jury, in due form of law empanelled, chosen, and sworn, and a verdict of conviction or acquittal has been returned. In the present case, if the prisoner should have been tried and convicted upon the *venire de novo* ordered to issue by the rule here appealed against, according to the passage just cited, a judgment thereon would be erroneous. The cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded have not been classified in the Digests; there are cases of defect of jurisdiction in respect of time, place, or person—cases of verdicts so insufficiently expressed or so ambiguous, that a judgment could not be founded thereon; but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of felony delivered by a competent jury before a competent tribunal in due form of law to be a nullity by reason of some conduct on the part of the jury which the court considers unsatisfactory. As to the two supposed exceptions to this rule against new trial in cases of felony, *R.* v. *Scaife*, 17 Q. B. 238, was noticed in *R.* v. *Bertrand*, and the other case of *R.* v. *Fowler and Johnson*, 4 Barn. & Ald., was explained to be no decision in the course of the argument on this appeal. Secondly, the farther grounds for sustaining the present appeal beyond those expressed in the judgment in *Bertrand's* case relate both to the form of the proceeding in the Supreme Court when exercising appellate jurisdiction under which the rule appealed against was granted, and also to the sufficiency of the evidence on which that court acted in granting that rule. Their Lordships are not aware of any principle either of the law of England or of this colony by virtue whereof the Supreme Court, sitting in banco in term, could take cognisance as a court of appeal of the judgment pronounced by Faucett, J. at the session of oyer and terminer, which had come to an end before the session in banco began; and although the relation of the courts to each other in respect of appellate jurisdiction has not been ascertained by us with precision, still, whatever be that relation, we find no form of proceeding analogous to that which is required by the common law in proceedings when the aid of a court of error or appeal is invoked, but the form is the form adapted to an application to the discretion of the court for a new trial. Then as to the sufficiency of the evidence of the facts on which the court acted in granting the rule appealed against, their Lordships do not find any strictly legal evidence of any fact; they find nothing beyond an affidavit of mere hearsay information, obtained from a person who had been on the jury, but was then discharged; and this information, if admitted to judicial notice at all, showed possible access to newspapers, without showing that they contained matter which tended to influence the jury improperly, or that the jury ever did, as a matter of fact, read the newspapers. There is also the further objection that the supposed informant had been one of the jurymen, and the courts here have at times expressed a reluctance which we consider salutary against receiving the separate statements of any of the individuals who had in combination

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formed a jury, in order to impeach the verdict. The whole of the proceedings in the Supreme Court are referred to the Judicial Committee, and as their Lordships consider that the rule *nisi* for a new trial, and the rule absolute founded thereon, were each granted on insufficient grounds, both rules fail to produce any effect, and the conviction stands unimpeached thereby. We do not examine the authorities cited for the respondent, because none of them appear to us to sanction the notion that a verdict, even in a civil case, could be set aside upon an imagination of some wrong without any proof of reality. The suggestions upon which verdicts have been so set aside in civil cases have alleged traversable facts, material and relevant, to show that the verdict had actually resulted from improper influence, and we refer to the special verdict reported in 11 H. 4, f. 17, as affording an example of such facts as would, if stated in a suggestion on the record, have had the effect of setting aside the verdict. The case in the Year Book, 11 H, 4, 17, we translate as follows:—"The plaintiff in an assize had delivered an escrowment [writing to be used in case of need?] to a juryman on the panell, for evidence of his matter; and after the same juror, with others, had been sworn, and put into a house to agree on their verdict, he showed the writing to his companions, and the officer who kept the enquest showed this matter to the court, through which the justices took the writing from the jurors, and took their verdict; and by the examining ("per l'apposaile") of the jurors the time of the delivery of the writing was inquired into, and it was found (*i.e.*, by the jurors) to be as above stated; and as the verdict was for the plaintiff, now he prayed judgment. Gascoigne and Hull said that the jury, after that they were sworn, ought not to see or carry with them any evidence, except that which was delivered to them by the court, and by the party put in court as the evidence shown; and inasmuch as they did the contrary, the plaintiff ought not to have judgment." This case, with the words of Gascoigne and Hull, has been frequently referred to in abridgments and treatises by Brooke, Rolle, Hale, Viner, and others; but the general words of those judges, as well as of judges in general, are to be limited in some degree by reference to the facts of the case in respect of which they were spoken, and the issue of this case is not altered by transcription. We take one reference to this case, as an example, from Bro. Ab. "Gen. Issue," p. 85, thus:—"After stating that an enquest must not take evidence privily, he adds, 'Et par Gascoigne et Hull s'ils preignent escrowe extra curiam et passent pur le plaintiff, si ceo appiert sur examination par le court, ceo est cause d'arrester le jugment:'" (11 H. 4, 17.) So that the result of the examination, viz., that the verdict was not "according to the evidence," but upon evidence taken out of court, from one party without the assent of the other, appeared by the finding of the jury, and was upon the record, as Brooke understands the case, or the judgment could not have been arrested. The special verdict here reported may be contrasted with the suggestion in the present case. In the case 11 H. 4, 17, the court which had jurisdiction both to try the suit and to arrest the judgment ascertained the fact of the misconduct of the plaintiff by examining the jurors, while acting as jurors, and by their verdict. Judicial knowledge from this source is in contrast with the affidavit above described. Also the interest of a plaintiff as a party may be contrasted with the supposed interest of the Queen (referred to in the judgment of the Chief Justice in the court below) in an indictment in which, although it runs in her name, she has no interest beyond that of truth and right. Neither is the sheriff her agent, as also there suggested; he emanates from the people, and is neither appointed by, nor can be dismissed by, nor is he paid by, the Queen; furthermore, the mere omission of his bailiffs to clear a room in an inn where jurors are confined, of the newspapers coming there by the course of the inn, is in contrast with the culpable craft of the plaintiff who prepared a statement of his case, and sought out a juryman into whom he probably infused a prejudice in his favour, and so influenced the verdict. In conclusion, their Lordships desire to add that they are sensible of the importance of guarding the channels for information through which the minds of the jury are led to their verdict, and concur with the learned judges of the court below in their zeal for the prevention of any such misconduct in future; but they think that the court was wrong in granting a new trial as a remedy for this misconduct, and that the mischief would be greater if uncertainty was introduced respecting the course to be pursued in administering the law relating to charges of felony. If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority with whom rests the discretion either of executing the law or commuting the sentence. As there was, in the opinion of the court below, irregularity in the trial of the respondent sufficient to vacate the judgment, their Lordships have no doubt that, upon proper application on behalf of the respondent, which they recommend to be made, such weight will be give to these remarks as they may appear to deserve. But, as between the appellant and respondent, their Lordships will advise her Majesty that the appeal should be sustained without costs, and that the order for a new trial should be reversed.

Judgment reversed.

Agents for the appellant, *Oliverson, Peachey, Denby,* and *Peachey.*

Agents for the respondent, *Solicitor to the Treasury.*

Common Law Courts.

COURT OF COMMON PLEAS.

Reported by M. W. McKellar, and H. H. Hocking, Esqrs., Barristers-at-Law.

Saturday, Nov. 20.

REGISTRATION APPEALS.

DURANT (app.) v. KENNETT (resp.)

Parliament—Borough vote—Corporation, occupation by member of—Occupation as owner or tenant—2 Will. 4, c. 45, s. 27.

In 1724 T. left certain real and personal property to trustees and their heirs in trust to make an annual allowance out of the proceeds thereof to each one of seven persons. These persons were to be disabled or superannuated lieutenants of the Royal Navy; they were to be appointed in a certain prescribed manner to receive this allowance, and as a vacancy occurred in their number it was to be filled up in the same manner. T. expressed it as his wish that these seven persons should be incorporated, and that power to hold lands should be given to such corporation; also that they should dwell together in one house to be provided for that purpose, live in a collegiate manner, dine at one table, conform to certain rules, and be in subordination to certain visitors.

In 1793 these seven persons were incorporated by a royal charter, and the charter was framed with a view to give effect to the above-mentioned wishes of T. Certain lands that had been devised by T. as aforesaid were then vested in fee simple in this corporation.

Among others there was a piece of ground in the borough of W., on which was erected a range of buildings which went by the name of T. college, and which formed seven separate dwelling-houses and a mess-house with offices attached; there was a colonnade in front of the houses, and a small lawn walled in with a gate opening on to a public highway. This building had been erected with a view to carrying out the above mentioned wishes of T.

In 1867 *K. was duly appointed to fill a vacancy in this corporation, and by virtue of that appointment he went into occupation of one of the above-mentioned seven dwelling-houses, which he chose with the consent of the governor. He held this house for his life subject to his being expelled for certain causes. He was separately rated to the relief of the poor in respect of this house, while the corporation was rated in respect of the mess-house and the garden. He had fulfilled all conditions as to length of residence and payment of rates:*

Held, that he did not occupy this house as owner or tenant within the meaning of 2 *Will.* 4, *c.* 45, *s.* 27.

Appeal from the revising barrister for New Windsor.

At a court held on Saturday, 23rd Oct., 1869, before the barrister appointed to revise the lists of voters for the borough of New Windsor, Benjamin Chandler Durant duly objected to the name of Edward Kennett, hereinafter called the respondent, being retained on the householders' list of voters for the parish of New Windsor, in the said borough.

The description of the respondent on the list was as follows:—

Name.	Place of abode.	Nature of qualification.	Street where property is situate.
Kennett, Edward.	Travers College.	House.	Travers College.

The respondent occupied during the qualifying period one of seven houses known as Travers' College, each of which was numbered and separately rated to the poor-rate, and he had paid all poor-rates that had become payable by him in respect of the said premises.

The respondent was one of the seven naval knights of Windsor, who were incorporated by Royal Charter, bearing date 23rd June, in the 38th year of the reign of King George the Third, by the name of "The Poor Knights of Windsor," of the foundation of Samuel Travers, Esq.

By stat. 24 & 25 Vict. c. 116, s. 4, it was enacted that "the said poor knights shall henceforth be styled Naval Knights." By the said charter (which may be referred to as if it were part of this case), after reciting that Samuel Travers, Esq., deceased, by his last will and testament, in writing, dated 16th July, 1724, gave, devised, and bequeathed all his real and personal estate unto his executors and their heirs, upon trust, out of the rents and profits, to settle an annuity or yearly sum of 60*l.*, to be paid to each and every one of seven gentlemen to be added to the then eighteen Poor Knights of Windsor, the said annuities to be charged upon an estate of 500*l.* per annum, to be purchased and set apart for that purpose, in the county of Essex, and that the said testator humbly prayed that the said seven gentlemen might be incorporated by charter, with a clause enabling them to purchase and hold lands in mortmain, and that a building, the charges thereof to be defrayed out of his personal estate, might be erected or purchased in or near the Castle of Windsor for a habitation for the said seven gentlemen, who were to be superannuated or disabled lieutenants of English men-of-war; but the repairs were to be in the first place paid out of the said estate of 500*l.* per annum, and then 12*l.* per annum to be applied to the governor or senior of the seven, and the remainder to be equally divided between him and the other six; and that the said testator desired that the seven gentlemen so to be incorporated might be single men without children, inclined to lead a virtuous, studious, and devout life, to be removed if they should give occasion for scandal; and that the said testator declared his mind to be that they should live in a collegiate manner, in order whereunto he would have 26*l.* a year deducted out of their several allowances to keep a constant table; and that the said testator appointed the chief Governor of Windsor Castle, the Dean of Windsor, and the Provost of Eton College to be visitors, with power for them, or any two of them, to act, and that as often as any vacancy should happen, the said testator desired they might be thus supplied: the Commissioners of the Royal Navy to choose three lieutenants for each vacancy, out of which the Lord High Admiral, or the Commissioners of the Admiralty for the time being, to choose two, and the King's Majesty to nominate one of them. And that by an order of the Court of Chancery, bearing date the 26th July 1793, in a certain cause pending in the said court, proposals for setting apart a part of the said testator's estates in the county of Essex for the purpose of making a provision for the support and maintenance of the said seven gentlemen to be added to the eighteen poor knights of Windsor, instead of purchasing an estate for that purpose; and also the purchasing a piece of ground at Windsor wherein to erect a habitation for the said seven gentlemen, and the erecting such new buildings thereon would be a proper execution of the trusts and directions in the testator's will respecting the same; the seven persons therein named and their successors, to be elected and nominated in the manner prescribed in and by the last will and testament the said Samuel Travers, were constituted one body corporate and politic by the name of "the poor knights of Windsor of the foundation of Samuel Travers, Esq., "and by that name were to have a perpetual succession and a common seal with capacity to receive and hold for the ends and purposes of their institution the land or ground to be purchased for the purpose of erecting a house or building for their habitation, and that the house or building to be erected thereon, as well as the lands, tenements, and hereditaments, in the county of Essex, to be appropriated and set apart under the direction of the Court of Chancery for their support and maintenance in such manner and under and subject to such conditions, restrictions, and regulations as the Court of Chancery should direct. The charter further ordained that there should be a governor of the said corporation, viz., the senior of the lieutenants, members of the corporation, according to their rank in the Royal Navy, and that the Chief Governor of Windsor Castle, the Dean of Windsor, and the provost of Eton College for the time being, or any two of them, should be visitors of the said corporation, and that the said seven knights and their successors should observe and obey the rules, orders, and regulations thereinafter contained, and such further rules, orders, and regulations as the king, his heirs or successors, should at any future time make for the better government of the said knights, or the better carrying the intentions of the founder into execution, and as the Court of Chancery should also make or declare in further ance of the will of the said Samuel Travers.

The charter further ordained that the said seven knights and their successors should lead virtuous, studious, and devout lives, and should daily attend divine service in the chapel in Windsor Castle, and should live together in a collegiate manner in the house or building to be erected for their residence,

and keep their table together in their common hall, and that such table should be provided out of their common stock or purse; and that they should not go away from and leave their said house, and absent themselves therefrom for more than ten days in any one year without a licence first obtained for that purpose from the said visitors upon reasonable cause, and that during their residence at their said house they should not lie out of their respective apartments, nor haunt the town, the alehouses, or taverns; and that the governor of the said seven knights for the time being should have the care and custody of their common seal, and that the other six should be obedient to the governor, and all the seven should be obedient to the said visitors in the observance of the rules, orders, and regulations therein contained, and of all others which the king, his heirs, and successors, should thereafter make for their orderly behaviour and government.

The charter further ordained that the said visitors should once in every year appoint a day and hour at which the said seven knights and their successors should be warned to be present, and should cause the rules, orders, and regulations to be read to them, and that if any of them should neglect to attend, not having leave of absence from the said visitors, or should offend against the said rules, orders, and regulations, it should be lawful for the said visitors to impose a reasonable fine or penalty; and in case the offence should seem to require such punishment, it should be lawful for them to give a solemn warning to the offender not to offend again in the like manner; and he that should have been twice so warned should, upon the third offence, be expelled or removed by the said visitors; and that if any knight should refuse or neglect to pay any fine or penalty, he should be liable to be expelled or removed by the said visitors. And that the said visitors should also have full power to expel or remove any of the said seven knights and their successors, who should marry or give occasion for scandal, or who might be convicted of felony or any notable crime; and that the said seven knights and their successors should, before they were let into possession of the apartments to be erected for them, take their oaths that, during the time of their continuing such knights, they would observe, conform to, and keep all the rules, orders, and regulations contained in those presents, and such other rules, orders, and regulations as should thereafter be made as aforesaid.

By indenture of bargain and sale bearing date the 26th June 1799 (approved by the master and enrolled in the Court of Chancery), Henry Emlyn conveyed a messuage or tenement with the garden and ground thereunto belonging situate in Datchet-lane, near Windsor Castle, in the parish of New Windsor, to the said poor knights and their successors for the ends and purposes of their institution, and subject to such orders and regulations as the said Court of Chancery should from time to time make concerning the same.

The college, which was erected on the ground so conveyed, consists of a range of buildings forming seven dwelling-houses, containing three apartments each, viz., kitchen, sitting, and bedroom, and a mess-house with kitchens and other offices at the back. There is a colonnade in front of the houses, and a small lawn walled in with a gate opening into Datchet-lane, now called Datchet-road.

The mess-house is separately rated to the poor-rate, and the rates payable in respect of it are paid out of the common fund of the college. Each knight keeps the house which he occupies in repair.

In the year 1867 the respondent was appointed by royal warrant to supply a vacancy, and by virtue of that appointment, he went into occupation of a vacant house in the said college, which he chose, with the consent of the governor. This is the house which he now occupies, and he holds it for his life subject to his being expelled or removed for any of the causes above stated.

The respondent claimed to have his name retained upon the said list on the ground that he was the inhabitant occupier as owner of the said house, and relied on *Fryer* (app.) v. *Bodenham* (resp.), 19 L. T. Rep. N. S. 645; 38 L. J. 185, C. P.; L. Rep. 4 C. P. 156. It was objected that the ownership of the said house was in the corporation aggregate, and not in each member of it separately, and *Heath* (app.), v. *Haynes* (resp.), 5 C. B., N. S., 389; 27 L. J. 50, C. P. was cited.

The revising barrister held that the respondent was the inhabitant occupier of the said house as owner, and retained his name on the said list.

If the court should be of opinion that the respondent was the inhabitant occupier of the said house as owner, his name was to be retained, otherwise, his name was to be expunged.

H. James, Q. C. for the appellant.—The respondent is not the owner of these premises at all, and does not occupy personally. His occupation is merely the occupation of the corporation aggregate. He occupies solely by virtue of his being a member of such a corporation. The claim was that he occupied as either owner or tenant. It is clear that he could not be said to occupy as tenant; the only question then is whether he occupies as owner. The case of *Fryer* v. *Bodenham*, L. Rep. 4, C. P. 529; 19 L. T. Rep. N. S. 645, on the authority of which this question was decided by the revising barrister, has nothing at all to do with this case. This case falls within *Heath* v. *Haynes*, 27 L. J. 50, C. P. [BRETT, J.—But why need he be actually either owner or tenant? Is it not sufficient that he occupies as if owner or tenant?] Even if he has an estate in this house other than that which he has as a member of a corporation, he has no right to a vote. Here there is no contract between him and the corporation, and he pays no rent. The respondent holds so long only as he obeys the rules which the king or his successors may lay down. He cited

Heartley v. *Banks*, 28 L. J. 144, C.P.; K. & G. 219;
Bridgewater v. *Durant* 31 L. J. 46, C. P.; K. & G. 377;
Fryer v. *Bodenham*., 38 L. J. 185, C. P.; 19 L. T. Rep. N. S. 645; L. Rep. 4 C. P. 529;
Davies v. *Waddington*, 7 M. & G. 37; 14 L. J. N. S. 45, C. P.
Simpson v. *Wilkinson*, 7 M. & G. 50; 14 L. J., N. S., 49, C. P.; 1 Lutw. 168;
Roberts v. *Percival*, 34 L. J. 84, C. P.

H. Matthews, Q. C. for the respondent.—It is a fallacy to assume that a man must be actually owner or tenant in order to claim the franchise; the words "as owner or tenant" are merely descriptive of the nature of the occupation. If a man occupied a house in the character of owner, without any title at all, that would be sufficient to give him a right to a borough vote. The naval knights have not the legal estate, it is true; but they have an equitable estate for life in their houses. [BOVILL, C. J.—All the cases in which members of a corporation have been held to have no title to a vote are those in which no trust is imposed on the corporation for their benefit. But when a trust is imposed on a corporation to demise its property to its members, the members then have a right to a vote. Still, in order to succeed, you must either distinguish the present case from *Heath* v. *Haynes* (*ubi sup.*), or else say that that case has been overruled.] The distinction between that case and the present is that there the occupation was precarious, while here it is not. The occupation is different in point of fact. [BOVILL, C. J.—I see that

by the rules the knights are to be obedient to the visitors. What, then, is there to prevent the visitors from making a rule making all the knights change rooms?] The occupation here is not precarious, but permanent, though according to rules: (*Beeson* v. *Burton*, 12 C. B., N. S. 247; 2 Lutw. 225; 22 L. J. 83, C. P.) We must get rid of the notion that it is impossible for a corporator, *qua* corporator, to have a vote. It is true I have not found any case in which a member of a corporation has been allowed a vote *qua* member, but *Davies* v. *Waddington* (*ubi sup.*) is very near. It is not necessary for a borough vote that a man should have even an equitable estate; mere occupation is sufficient: (Rogers on Elect., 10th edit., p. 50, note.) [BOVILL, C. J.—I thought that in *Roberts* v. *Percival* (*ubi sup.*) it was admitted on all hands that a member of a corporation as such had no right to a vote.] The question there was whether the eleemosynary character of the occupation did not disentitle. [BRETT, J.—How do you distinguish this case from *Heartley* v. *Banks* (*ubi sup.*)?] There there was no finding of a permanent tenure. The obedience exacted from the knights was general and unqualified, whereas here it is limited to the rules. He cited also

Baxter v. *Brown*, 7 M. & G. 198;
Bligh v. *Brent*, 2 Y. & C. 268;
Bennett v. *Blain*, 15 C. B., N. S., 518; 33 L. J. 63, C. P.;
Roberts v. *Percival* (*ubi sup.*),
Simpson v. *Wilkinson* (*ubi sup.*);
Heath v. *Haynes* (*ubi sup.*).

H. James, Q.C. in reply.—All the authorities show that a member of a corporation, as such, cannot claim a vote in respect of the corporate property:

Vin. Ab., tit. "Corporation;"
Heywood's County Election, 2nd edit., p. 115;
A Resolution of the House of Commons, A.D. 1624, p. 798 of the first Journal of the House;
May on Elections, 268;
Acland v. *Lewis*, 30 L. J. 31, C. P.;
Roberts v. *Percival* (*ubi sup.*)

Next it is contended that, even if that proposition cannot be maintained, still here a second estate has been created, in respect of which Mr. Kennett can claim a vote. But is it pretended that he could go to a court of equity and compel the governor to allow him to remain in a particular house. He has a right to occupy one of the seven houses, but no right to any particular house. [WILLES, J.—The question here is whether the corporation has created a distinct estate in the corporator.]

BOVILL, C. J.—The question for us to decide is, whether the claimant, Mr. Kennett, is entitled, as the occupier of a house which he occupies either as owner or tenant, to a vote for the borough of New Windsor. It was contended on his behalf before the revising barrister, that the case fell within the principle of the case of *Fryer* v. *Bodenham* (*ubi sup.*), while on the other hand it was objected that the case of *Heath* v. *Haynes*, 27 L. J. 50, C. P., was decisive against the claim. With regard to the cases cited on behalf of the respondent before the revising barrister, I may remark that in neither of them was the claimant a member of a corporate body. In each case, there was an independent body of trustees who held for the bedesmen in the one case and the brethren in the other. In those cases, the facts which raised that state of things were expressly found. The present case, however, is one in which there is a corporation aggregate, of which the claimant is a member. The corporation is one in the nature of a collegiate establishment of an eleemosynary character, where certain property is held by the corporation for the purposes of the corporation and for the benefit of its members. The original constitution of the charity contemplated the occupation of one house for the general benefit of the members. Subsequently, however, the institution was incorporated, and the corporation purchased a range of buildings forming several houses, which houses were assigned to the different members, one to each. The houses were thus assigned merely for the more convenient enjoyment of the property by the members of the corporate body. There is no instance where the individual members of a corporation have been held entitled to a vote in respect of the property of the corporation that may be held by them. From the earliest times we find decisions of the House of Commons against such a claim. It is perfectly true, as Mr. Matthews has contended, that the precise point before the court did not then arise, as in those cases the claim was to a vote for the county, and not to a borough vote. Still the general principle is distinct enough. In earlier times a higher qualification was required for a county vote than is now necessary; still those cases must be regarded, because the question was, equally then as now, whether the claimant was in occupation of the land as either owner or tenant. And in all cases where he was held to be the owner, the only test was the value of the lands so held. Thus in earlier cases relating to a dean and chapter, it was held that the dean was not entitled to a vote for his house, because it was a part of the estate of the corporation, and this notion has prevailed in the later cases. There are other cases of a similar character where the members of a corporation holding corporate property were held not entitled to a vote. The latest case decided on this point was the case of *Heath* v. *Haynes* (*ubi sup.*) In that case the brethren were incorporated; they had separate residences and exclusive occupation of the property assigned to them. Still they were held to be not entitled to a vote, in accordance with the previous decisions. The ownership of the property was held to be in the corporation, and not in the members. This and that individual member was not considered to occupy either as owner or tenant, but his occupation was the occupation of the corporation in the person of its members. The law was clearly laid down in that case, and the present case has not been distinguished from it. That this case is still law is shown by the more recent decision in the case of *Roberts* v. *Percival*, 34 L. J. 84, C. P., the case of the bedesmen of Lord Burleigh's Hospital. In 1844, it had been decided that they were entitled to a vote. Between that time, however, and 1864 certain transactions took place, on which it was contended that, assuming the legal origin of the foundation, if the claimants had any estate it was only as members of a corporation aggregate, and that these very transactions led to this conclusion. These fresh facts were laid before the revising barrister, and it was contended that it must be assumed that the bedesmen occupied solely as members of the corporation. As to this point, Erle, C. J. said: "In *Simpson* v. *Wilkinson* (*ubi sup.*), this court was then of opinion that the inmates of Burleigh Hospital had a freehold interest in the rooms assigned to them, and I am of opinion now that the inmates of that hospital have a freehold interest in the rooms assigned to them, and that they are entitled to vote. The origin of the hospital is unknown; but in *Simpson* v. *Wilkinson*, 7 M. & G. 50, the court were of opinion that the revising barrister might presume that the hospital was established before the 39 Eliz. c. 5, and that it had been created and endowed by Lord Burleigh, by granting the land to feoffees in trust for the members of that hospital. Now it seems to me that the parties taking under such an endowment would have all the rights of property given by the terms of the feoffment, and they might have all the property in the shape of an equitable freehold, just as a cor-

poration for charitable purposes under the 39 Eliz. c. 5 might have, only that in the case of such corporation the whole of the property would be vested in the corporation, and the members would not, by reason of their membership, be qualified. The majority of the hospitals are now incorporated, and that is why there is an end of any question about the members of such hospitals having a right to vote. But if the lands be conveyed to feoffees in trust for the inmates of the hospital, then the legal interest would be in the feoffees and the equitable interest in the members of the hospital, and that equitable interest would be according to the terms of the deed; and where the deed is lost, the terms of it would be presumed from the way in which the property has been enjoyed." In that case as here, each member was put into a room for life. That being so, instead of saying that in this case each member has an estate for life in the house assigned to him, the charter of the corporation is set out. The case further states that in 1867 the respondent was appointed one of the naval knights, "and by virtue of that appointment he went into occupation of a vacant house in the said college, which he chose with the consent of the governor." If the case merely stated that and no more, we might come to a different conclusion. But we must judge from the whole of the facts; and these facts clearly show that the naval knights lived in their houses only as members of the corporation. That is a matter of fact found by the revising barrister. Under these circumstances, it seems to me impossible to distinguish this case from those of *Heartley* v. *Banks*, and *Heath* v. *Haynes* (*ubi sup.*), the doctrine laid down in which was fully confirmed by the judgment of Erle, C. J., in *Roberts* v. *Percival* (*ubi sup.*) There is no authority for saying that the members of such a corporation occupying under such circumstances, have a right to vote. But then it is contended, that in this case the corporation holds its property in trust for its members, and that they have each a right to their houses independently of the corporation. But in a case where the property is vested in an independent body of trustees, in trust to allow certain persons to occupy, subject to certain known rules, that is not such an occupation as to entitle these persons to a vote; though where the rules, subject to which the tenements are occupied, are not known, the case may be different. Without dealing any further with the authorities, what is the character of the occupation in these eleemosynary cases? The eleemosynary character does not necessarily deprive the occupier of a vote, still it is an important feature in the character of the occupation. In the case of *Freeman* v. *Gainsford*, 11 C. B., N. S., 68; 31 L. J. 33, C. P., the property was vested in trustees; the claimant was a member of the charity and occupied rooms subject to the rules of the hospital. It was, however, held that the claimant had no estate in his chambers, but that he was simply an object of charity. At p. 92 of 11 C. B., N. S., Williams, J. says: "The occupier of a residence as part of the benefits of a charitable institution is not entitled to an estate of freehold therein, unless the founder has expressly assigned it to him directly or indirectly during his life. . . . I assume that there is sufficient to show that the claimant would have a freehold interest in the rooms allotted to him if he had any property in them. But the question is whether he has *any property*. I am of opinion that he has none. The language of the constitutions simply is, that the accommodation provided for the recipients of the charity shall be regulated in a certain way. They are to take for their lives, subject to removal for any of the offences specified. But it does not therefore follow that the particular rooms are to be assigned to each of them *as owner* for his life. It seems to me clear that he has not the right of an equitable owner at all. If he had, although the purposes of the charity might require him to be removed to another set of rooms, he might set the governor at defiance. It is quite manifest that no such state of things as that could have been intended. It is simply the case of a number of persons placed on a charitable foundation, who by the regulations of the charity are entitled to be properly and reasonably accommodated with chambers to live in, and other allowances." Although these words apply to a county vote, yet the principle as to the character of the occupation is the same, and they show that the respondent here cannot claim as either owner or tenant of his rooms. Then again *Bridgewater* v. *Durant*, K. & G. 377; 31 L. J. 46, C. P. was decided on the ground that the claimant had not shown that he had a sufficient occupation, either as owner or tenant; and in *Hall* v. *Lewis*, 11 C. B., N.S., 114; K. & G. 499, it was held that the claimant was not entitled to a vote. In *Heartley* v. *Banks*, 28 L. J. 144, C. P.; K. & G. 219, it was held that the military knights had no title to a vote. The military knights were not a corporation; the legal estate was in the dean and canons of Windsor. A separate house was assigned to each knight, and exclusive possession given; but it was held that these knights occupied by royal charity, and nothing more. They were subject to any regulations that might be made by the dean and canons. It was held that they did not occupy as either owners or tenants, but were mere recipients of charity. The same reasons apply here in determining the character of the occupation. In all these cases the members occupy in severalty only by private arrangement among themselves and for their general convenience. As to the case of *Beeson* v. *Burton*, 12 C. B. 647; 22 L. J. 33, C. P.; 2 Lutw. 223, it was decided on the same grounds as *Roberts* v. *Percival* (*ubi sup.*). The claimant here is a member of a corporation aggregate. The corporation is owner of the fee simple, and there is no estate in the members. The corporation occupies its houses by its members. These members are bound to live in a collegiate manner and are removable for misconduct. They have no estate in their houses. They do not occupy them either as owners or tenants, but simply as members of the corporation. The case falls within that of *Heath* v. *Haynes* (*ubi sup.*). As to the character of their occupation, it is the same as that of the military knights. In this case there is, in a certain sense, an occupation by the members, but it is the occupation by the corporation as owners of the property, and there is no occupation by the members individually. The undergraduates at the universities have exclusive possession of the rooms assigned to them, but they have no vote in respect of them. The same remark applies to persons resident in almshouses. In this case then the respondent has no equitable estate for life and no occupation as owner; he does not occupy in either character. On these grounds I am of opinion that the decision of the revising barrister was wrong, and that it must be reversed.

WILLES, J.—I am of the same opinion. When the principle on which these cases are decided is borne in mind, the conclusion is inevitable, that Mr Kennett is not entitled to a vote. That principle is, that a corporation aggregate has no vote. That is the plain rule; and, though it is true that a member of a corporate body may have a distinct estate, or that a tenure may exist between the corporate body and the individual, or there may be a distinct right in the member, we must be satisfied, before we come to any such conclusion, that such a state of things has been created by some means known to the law. If, however, we strain facts for the purpose of making

ing them fit into the similitude of a tenure, we shall find that we enable a corporation to do indirectly what the law does not enable it to do directly. It is not our duty to do that. We must look at the facts of the case and remember, that *prima facie* the property of a corporation is occupied by the members in their corporate capacity, and the ownership is not distributed among the individual members who at a given time happen to enjoy particular parts of the corporate property. As to the question of ownership and tenure, so long as the member of a corporation enjoys corporate property for the purposes for which the corporation exists, the *prima facie* presumption is that his enjoyment is that of the corporation itself. Let us then apply these principles to the present case. The fact mainly relied on by the respondent for the purpose of showing that he has a distinct ownership or tenure in his house is, that he was "appointed by royal warrant to supply a vacancy, and by virtue of that appointment he went into occupation of a vacant house in the said college, which he chose with the consent of the governor. This is the house which he now occupies, and he holds it for his life, subject to his being expelled or removed for any of the causes above mentioned." On this finding he rests his claim to be considered to have an equitable estate for life in his house. He does not pretend that he occupies as tenant; and it is plain that he could not do so. I quite agree that, if this statement stood alone, that a man holds lands for life subject to good behaviour, that would amount to an equitable estate for life. There may be something in the charter which may render it impossible for us to consider it an estate for life. But let us assume that there is nothing, and that Mr. Kennett actually has an equitable estate for life in his house; but then can we say that he *holds* an equitable estate in the technical sense in which this word "hold" is used by lawyers? What do we mean when we say that a man holds an estate; do we mean that he possesses it by benevolence, or as of right? It is clearly to be taken in the latter sense, so that the question becomes whether Mr. Kennett holds an equitable estate for life in his house as of his own right. To determine this question it becomes necessary to look to the history of this foundation. It appears that in the year 1728 a person left certain property for the purpose of making provision for seven superannuated or disabled lieutenants of the royal navy. I am far from thinking that the eleemosynary character of the foundation is unimportant; still, for the purposes of my decision, I omit this circumstance. The naval knights have a right to share in the property left by the founder of this charity. The founder made provision for the common habitation of the knights. They were to live together in a collegiate manner. For a long time the institution had no house of its own; but in the year 1793 the charity was brought before the Court of Chancery, when an order was made by which new buildings were directed to be built for the habitation of the recipients of the founder's charity. It had been the wish of the testator that the knights should be incorporated. Accordingly, at the time I am speaking of, they were constituted a corporation by royal charter. This charter is even more express than the founder's will as to their living together in one house, as their common residence, and in a collegiate manner. Thus the intention plainly was that the corporaton should be of a collegiate character. It was not contemplated that each house should become the exclusive property of its occupier; nor on the other hand can it be pretended that in this case the *singuli* enjoy the *universitas*. The charter goes on to provide that the knights shall not lie out of their apartments, and that they shall be subject to certain rules. It provides for the appointment of visitors. The knights were liable to be expelled on certain occasions, so that in this respect the property was enjoyed by them in the same manner as property is enjoyed by a woman, to whom it is left for her to possess it so long as she remains chaste. What is the result when a person holds property under such circumstances? My answer to this question I have, in order to be precise, put into writing. It is (the learned judge here read what he had written) that the naval knights have no such exclusive or permanent right in or to their houses as to constitute a several property or occupation, any more than if, besides using a common hall, they used also a common dormitory. The system of appropriation is not a strict right, only for convenience, founded on usage not amounting to prescription or habitual mode of enjoying the corporate property without a transfer of ownership or the creation of a term. As to ownership, that remains in the corporation; as to tenure, each of the knights, by allotment or by the consent of the trustee—which is not a mode of creating a tenancy, and does not make the knight a tenant in any sense either legal or popular—occupies a certain place which it is usual and decent to allow him to occupy during good behaviour. There is no occupation either as owner or tenant. On these grounds I think the claim must be disallowed.

KEATING, J.—I am of the same opinion, and concur entirely with the reasons given by my brother Willes. I think that Mr Kennett occupies simply and solely as a member of the corporation, in pursuance of the purposes set forth in the charter. Mr Matthews has not been able to find any case in which it has been held that the members of a corporation occupying houses under circumstances like the present, have been entitled to a vote. The principle which would prevent their being so entitled applies to a county vote: but it has been extended by resolution to the case of burgesses. In addition to that, there is an express decision of this court in the case of *Heath* v. *Haynes* (*ubi sup.*). Mr Matthews cannot show any substantial distinction between that case and the present. The two cases may differ in some minute details; but there is no substantial distinction between thm. It seems to me impossible to say that the claimant here is entitled to a vote without overruling the case of *Heath* v. *Haynes* (*ubi sup.*). On these grounds, and on the grounds set forth by my brother Willes, and my Lord, in which I entirely agree, I am of opinion that Mr Kennett is not entitled to a vote for the borough of New Windsor, and that the decision of the revising barrister must be reversed.

BRETT, J.—I think that the claimant in this case is not entitled to a vote, because he occupies solely as a member of a corporation aggregate, and therefore the nature of his occupation is not that of either an owner or a tenant. When that is said, there is to my mind an end of the case; but it further appears that certain trustees have powers of management in this institution, so that this case is precisely similar to the cases of *Heath* v. *Haynes* (*ubi sup.*), and *Heartley* v. *Banks* (*ubi sup.*). The authority of these cases has never been impeached, much less overruled. In the case of *Davies* v. *Waddington*, 7 M. & G. 37; and 14 L. J. 45, C. P., the claim was to a county vote; but there it was held that the members of a corporation had not an equitable freehold in the estates of the corporation, because they were removable from their houses at the discretion of the prinicpal and the governors. In the case of *Heath* v. *Haynes* (*ubi sup.*) the claim was to a borough vote; there it was held that the claimants did not occupy either as owners or tenants, but that the

corporation occupied in the persons of its members. In *Heartley* v. *Banks* (*ubi sup.*) the claimant was a member of a charitable foundation of which certain trustees had a discretionary power of management. There Cockburn, C. J., in delivering the judgment of the court said: "We are of opinion that the characteristics of ownership are wanting; that the occupation is only as subordinate to the purposes of a charity and subject to the immediate control of the principal of the institution." In *Freeman* v. *Gainsford* (*ubi sup.*) the claim was to a county vote. The institution of which the claimant was a member was not a corporation, but the property was vested in trustees, who had also powers of management. The present case falls within the decision in *Heartley* v. *Banks* (*ubi sup*). I do not think that the claimant can be said to have an equitable freehold in his house. He occupies it solely for the purposes of the charity, so that the case of *Simpson* v. *Wilkinson*, 7 M. & G. 50, and 14 L. J., N. S., 49, C. P., does not apply. In the latter case the claim was to a county vote; but the bedesmen were not members of a corporation, and the revising barrister was upheld in his decision that they were entitled to an equitable freehold. In *Roberts* v. *Percival*, 34 L. J. 84, C. P., the facts were very similar to those in *Simpson* v. *Wilkinson* (*ubi sup.*). Neither of these cases, however, overrules *Heath* v. *Haynes* (*ubi sup.*). In the case of *Fryer* v. *Bodenham*, L. Rep. 4 C. P. 529; 19 L. T. Rep. N. S. 645, all the judges agree in saying that they do not pretend to overrule the case of *Heath* v. *Haynes*. They said that there was evidence of the claimants having a freehold for life, and therefore that the case fell within that of *Simpson* v. *Wilkinson* and *Roberts* v. *Percival* (*ubi sup.*). The judges distinguished these cases from that of *Heartley* v. *Banks* (*ubi sup.*), but expressly said that they were not to be understood as overruling it. I am of opinion that the present case falls within that of *Heath* v. *Haynes* (*ubi sup.*), and if not, that it must be governed by *Heartley* v. *Banks* (*ubi sup.*). On these grounds I am of opinion that the decision of the revising barrister must be reversed.

Decision reversed.

Attorney for appellant, *Thos. Durrant.*

Attorney for respondent, *Jno. Taylor, jun.*, for *C. T. Phillips*, Windsor.

Saturday, Nov. 20

FORD (app.) v. HARINGTON (resp.).

Borough vote—Corporation—Dean and chapter—Canon —2 Will. 4, c. 45, s. 27.

H. as a canon of E. was a member of the dean and chapter of E. On his appointment to the canonry he was put into possession of a house the property of the dean and chapter of E. This house he held for his life in right of his canonry.

Held, that H. occupied this house as owner within the meaning of 2 Will. 4, c. 45 s. 27.

Upon an appeal from the decision of the revising barrister for the city of Exeter, the following case was stated for the opinion of the court:—

At a court held on the 21st Oct., 1869, before me, the revising barrister appointed to revise the list of voters for the city of Exeter, Brutton John Ford duly objected to the name of the Rev. Edward Charles Harington being retained upon the list of persons entitled to vote in the election of members for the said city, as well in respect of his ownership of a freehold house situate in the precinct of the close within the said city as of his occupation of the same house.

The name of the said Edward Charles Harington appeared upon the freeholders' and occupiers' list respectively as follows:

Harington, Rev. Edward Charles	The Close Exeter	Freehold House	The Close.

Harington, Rev. Edward Charles	The Close Exeter	House	The Close.

The facts proved were these: The Rev. Edward Charles Harington is one of the canons residentiary of the cathedral church of St. Peter, in Exeter, and his qualifying property is the residentiary house belonging to him in respect of his canonry.

The dean and chapter of the said cathedral are a corporation aggregate, consisting of the dean and five residentiary canons, and sixteen non-residentiary prebendaries.

There are five canons who are appointed for life, and five houses which the canons are entitled to occupy, and with their enjoyment of which the chapter as a body cannot interfere.

On the election of a canon he produces the key of the house occupied by his predecessor, and prays to be admitted. As one of the canons he is elected and decreed to be installed, and thereupon takes possession of his house. No evidence was produced to show how he got the key. The senior canon has the right of occupying the vacant house if he chooses, and that might have been exercised. Each canon must reside three months, and each canon repair his house outside and in at his own expense.

At one time there were more canons and houses than there are now. For some years two of the canons, Canon Martin and Canon Butt, occupied the same house during their respective residences. The canonical residences on the suppression of the canonries were let and the rents paid into the common fund of the chapter. The present canons have occupied the houses in which they are now living ever since their appointments.

The questions for my decision were:

1. Whether the said Edward Charles Harington was entitled to such an estate or interest of freehold in his said residentiary house as entitled him to vote. 2. Whether he occupied the same house as owner or tenant.

I decided both questions in the affirmative, and retained the name of the said Edward Charles Harington both on the freeholders' and occupiers' list.

If the court should be of opinion that the first question was wrongly decided, the name of the said Edward Charles Harington will be expunged from the freeholders' list, and if of opinion that the second question was wrongly decided, his name shall be expunged from the occupiers' list.

Kingdon, Q.C., for the appellant.—The recent case of *Durant* v. *Kennett* (*vide* preceding case) and the case of *Heath* v. *Haynes*, 27 L. J. 50, C. P., show conclusively that Mr. Harington's claim cannot be maintained.

Philpotts for the respondent.—A canon is no doubt, as such, a member of the dean and chapter, and has a share in the property belonging to that corporation aggregate; at the same time he is also a corporation sole, and is capable of holding property as such. The finding of the revising barrister is decisive in favour of this claim, for Mr Harington is found to occupy this house, "which belongs to him in right of his canonry." The recent case of *Durant* v. *Kennett* (*ubi sup.*) does not go beyond the case of *Heath* v. *Haynes* (*ubi sup.*) Both those cases are plainly distinguishable from the present, as in them the occupation of the claimants was adjudged to be the occupation of the corporation aggregate to which they respectively belonged, whereas here, although

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Mr Harington as a canon is a member of a corporation aggregate, he holds this house in right of his canonry, that is to say, in his own right as a corporation sole. A canon, as canon, has duties wholly distinct from his position in the dean and chapter. The corporation aggregate of the dean and chapter has no spiritual duties, it is only a council for the bishop, to consent to and confirm his acts, whereas a canon has to preach. A canon holds his house for life, and the dean and chapter have no right to interfere with his enjoyment of it. If he leaves it in a dilapidated condition his successor has a right of action against his personal representatives. [WILLES, J.—That doctrine was extended to the case of a vicar choral in *Greaves* v. *Parfitt*, 7 C. B., N. S.] He cited

Randolph v. *Milman*, L. Rep. 2 C. P. 60; L. Rep. 4 Ex. Ch. C. P. 111;
Com. Dig., tit. "Eccles Persons;"
Churton v. *Frewin*, 16 L. T. Rep. N.S. 171; L. Rep. 2 Eq. 634;
Dr. Sand's Case, Skinner, 121;
The Case of the Dean and Chapter of Norwich, 3 Co. 72 b;
The Case of Sutton's Hospital, 10 Co., 23 a;
3 & 4 Vict. c. 113, s. 59.

Kingdon, Q.C., (in reply).—True that Mr Harington is found to hold this house in respect of his canonry, but as canon he is a member of the corporation aggregate, and accordingly, that finding of the revising barrister is not conclusive of this question. It is consistent with that finding that Mr Harington holds his house in respect of his membership in the dean and chapter. There are many authorities to show that this is the true view to take of his position: (Rogers on Elections, p. 30, citing Middlesex cases, 2 Peck. 113.) The 50th sect. of 3 & 4 Vict. c. 113, certainly recognises the possibility of a dean or canon holding property as such dean or canon, and in addition to his share in the corporate resources of the dean and chapter; but it expressly provides that all such separate property shall vest in the Ecclesiastical Commissioners. The formalities which a canon at Exeter has to go through before he gets possession of his house show that the ownership of the corporation is distinctly recognised. Moreover, on a vacancy, the senior canon may take the vacant house if he chooses; thus the whole property is floating about, and is the general property of the dean and chapter [Brett, J.: Would the personal representatives of a canon be liable to his successor if the house were left in a dilapidated state?] I think not. In *Greaves* v. *Parfitt*, 29 L. J. 216 C. P.; and 7 C. B., N.S. 838, the vicar choral had been expressly collated by the bishop, and had a house of residence attached to his office. He cited also:

Com. Dig. tit. "Eccles. Persons;" cc. 3 and 4.
Cripps on Church and Clergy, 5th edit., p. 118.

BOVILL, C. J.—The respondent, as one of the dean and chapter of Exeter, is a member, no doubt, of a corporation aggregate, and if he occupied his house in that character alone it is clear that he would not be entitled to a vote. The case would, under these circumstances, be within the case of *Heath* v. *Haynes*, 27 L. J., 50 C. P., and our recent decision in the case of the Naval Knights of Windsor, *Durant* v. *Kennett*, *vide* prec. case. In those cases, on the facts presented to the court, the court came to the conclusion that the brethren in the one case and the knights in the other occupied under the circumstances only as members of a corporation aggregate. But here Mr. Harington bears two characters. He is, first of all, a member of a corporation aggregate, and next he is, as a canon, a corporation sole. There can be no doubt that as a canon he is a corporation sole. Of the property belonging to the dean and chapter, some belongs to the dean and chapter jointly in their corporate capacity; but other portions of the property are enjoyed in severalty, a portion being enjoyed by the dean himself and other portions by the canons. The dean may be said to enjoy a portion in respect of his office, and the same remark applies to the canons. Thus in Burn's Ecclesiastical Law, 9th edit., p. 90, it is said that "the possessions of the dean and chapter are for the most part divided, the dean having one part alone in respect of his deanery, and each particular prebendary a certain part in right of his prebend; the residue the dean and chapter have alike, and each of them is for this purpose incorporate by himself. For a prebendary who hath a distinct estate, and hath also a vote in the chapter, is a corporation sole in respect of the one, and at the same time is a member of a corporation aggregate in respect of the other." Here, on the statements in the case, Mr. Harington has separate possession of, and separate rights over, this house. He has also separate liabilities in respect of it. If, on his death, the house which he has occupied as canon were dilapidated, his executors would be liable to his successor to make the dilapidations good. That point was decided in *Dr. Sand's case*, Skinner, 121, and also in *Radcliffe* v. *D'Oyly*, 2 T. R. 630, and the doctrine was confirmed and extended to the case of a vicar choral in the case of *Greaves* v. *Parfitt*, 7 C. B., N. S., 838; 29 L. J. 216, C.P. Where a prebendary has an advowson in right of his prebend, and the incumbent of the living having died, the prebendary dies before a presentation is made, his executors present: (*Rennell* v. *The Bishop of Lincoln*, 7 B. & C. 113.) This case was afterwards confirmed in the House of Lords: (8 Bing. 490.) That a prebendary, as a corporation sole has separate and distinct rights over his house, altogether independently of his membership in the dean and chapter is further shown by the following passage from 2 Burn's Eccles. Law, 9th edit., p. 92: "But by the stat. 28 Hen. 8, c. 11, the profits of a prebend during the vacation shall go to the successor towards payment of the first fruits. In order to reconcile which, perhaps the distinction may be this: that the issues of those possessions which he hath in common with the rest of the chapter shall, after his death, be divided among the surviving members of the chapter; but the profits of those possessions which he hath in his separate capacity, as a sole corporation of himself, shall be and enure to his successor." The form of the writ, as given in Fitzherbert, strongly confirms the view, that a prebendary takes in right of his office, of course subject to Mr. Kingdon's observations that he is, as prebendary, a member of the corporation aggregate. From the cases referred to, it appears that a canon is regarded by the law for many purposes in several different aspects. The question for us here is, whether, so far as the occupation of his house is concerned, he is to be regarded as holding in severalty or as a member of a corporation aggregate. The case says that the house belongs to the respondent in right of his canonry. From these findings in the cases, I come to the conclusion that, as in other cases, a canon may hold property in his own right as a canon. Mr Harington occupies this house in his character of canon, and not as a member of the dean and chapter of Exeter. In some old authorities (2 Peck. 113, *Middlesex cases*), it was held that a prebendary was not entitled to a vote in respect of his prebend. But in Eliot, p. 24, there is a passage quoted from Heyw. Co. 2nd edit. 125, which explains this: "With respect to chapters, where the dean and each prebendary has a separate portion in right of his office, each is a corporation sole and may vote; but where the whole annual income is divided among them as a corporation aggregate, they cannot vote." In the

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Westminster case, 2 Peck. 113, the dean and chapter, as a corporation aggregate, were considered to occupy their houses separately only by agreement among themselves, and the corporation aggregate kept the houses in repair. The report of the case is short, but if the facts were sufficient to support the contention that the members of the dean and chapter in that case occupied in severalty only by agreement among themselves, then one can understand how the court came to the conclusion that they were not entitled to vote in respect of their houses. The passage I have just cited from Heywood shows that a prebendary may be entitled to vote, and I think that the distinction there made is conclusive in favour of Mr. Harington's claim. In the present case the corporation aggregate of the dean and chapter cannot be said to occupy Mr. Harington's house. It cannot interfere with his occupation as canon, nor can it transfer the house to another. On the other hand, we find that Mr. Harington is a corporation sole with a freehold office for life. He occupies his house solely in respect of his canonry. He cannot be disturbed in his occupation. He does not occupy, in my judgment, as a member of a corporation aggregate. I am of opinion that he occupies as a corporation sole in his own right and in respect of his canonry. Or, if we consider that the dean and chapter held this house in trust for him, we must still regard him as having an equitable freehold for life. But I think that he has a freehold in his house, with all the rights that by law flow from such an estate, and amongst others the right to a vote. On these grounds I am of opinion that the decision of the revising barrister must be affirmed.

WILLES, J.—I am of the same opinion. I quite adhere to the judgment of this court in the recent case of the Naval Knights of Windsor (*Durant* v. *Kennett*, *vide* prec. case), and to the proposition I then laid down that when a member of a corporation enjoys and occupies a part of the property of such corporation in pursuance of the purposes for which the corporation exists, it must be *primâ facie* presumed that his occupation is the occupation of the corporation, and the estate is in the corporation. I think, too, that it would be straining the law to say that, because a corporator is allowed to occupy part of the corporate property for life unless he does something to induce the corporation to turn him out, this would confer any estate on him, or that he acquires any interest in the property which he has entered on as his allowed share, by force of an usage which is not of such a character as to confer a prescriptive right. I think, too, that it is a refinement for Mr. Philpotts to say that a corporation aggregate is incapable of occupying. I should have thought the contrary. More than one case has occurred in which a corporation, having occupied without any instrument under seal, has been held liable for use and occupation. The principle, then, is that a corporation aggregate has no vote. The presumption is, that where a member of a corporation occupies part of the corporate property, his occupation must be regarded as the occupation of the corporation; and further, that it would be absurd to regard him as holding as tenant under the corporation. That, however, is the whole extent of our decision in the case of the naval knights. In conferring among ourselves, however, in that case, it was agreed by every member of the court to be open to any member of a corporation to rebut this presumption by showing that he has a distinct occupation. The whole discussion in this case, then, is whether Mr Harington has shown sufficient to rebut this presumption. It is quite open to him to rebut it, and show that he has a separate ownership. The finding of the revising barrister is precise, and on that finding it appears that the house was taken by Mr Harington on succeeding to his predecessor, and that he occupies the house in right of his prebend, he being at the same time, as a prebendary, a member of the dean and chapter of Exeter. In other cases relating to corporations, with the nature of which we are not acquainted, it might appear right to send the case back to the revising barrister to be restated. That, however, is unnecessary in this case. My reason for saying this is, that it is necessary for the purpose of our decision to determine whether Mr. Harington has the character of a corporation sole. That character is only borne by certain persons. In any other case if a person were presumed by the revising barrister capable of holding property as a corporation sole, it might be necessary that the revising barrister should set forth the facts on which his conclusion was founded. This, however, is not so in the case of a member of a dean and chapter. When a member of a dean and chapter holds separate property to the exclusion of the other members, we recognise a case in which the presumption is that he holds such property as a corporation sole, and not merely as a member of a corporation aggregate. In the present case we find that the other members of the dean and chapter cannot interfere with the respondent in his enjoyment of his house. We find that this house has been assigned to him, not by private arrangement among the members of the corporation aggregate for the more convenient enjoyment of the common property, but as something which belongs to him in right of his prebend. That this is the general character of the occupation of property by the members of a dean and chapter appears from Com. Dig.tit. "Dean and Chapter," where reference is made to this very distinction: "And though the dean and chapter make a corporation, yet the dean and every prebendary of the chapter may be a corporation by himself. So the dean may have belonging to his deanery a church, prebend, or other possessions." In speaking of a prebendary Comyns says: "A prebend is jus spirituale percipiendi proventus in ecclesia, competentes percipienti ex divino officio cui constitit. A canon is he, qui est electus in fratrem, and has a stall in choro, et locum in capitulo. . . . If a prebendary aliens his whole possession he continues prebendary, for he has his stall in the choir and his place in the chapter." Nothing could more clearly show the separation of the property. In the case of the *Dean and Chapter of Norwich*, 3 Coke's Reports, 72 b, the authority of Comyns is fully borne out, that "if a prebendary demises his prebend, the prebendary shall do the things proper to his function, and not the lessee." A prebendary, then, is capable of taking as a corporation sole, and he does not take in succession, except in that character. I should have thought that that was sufficient for our conclusion. It might perhaps have been better for the revising barrister to have ascertained and explained the way in which the property of the dean and chapter is held; but it was perhaps thought inconvenient to set out their title. There is no question, that if a living is attached to a prebend, the prebendary holds that as a corporation sole. In ordinary cases, where a living is so attached, the prebendary is admitted by the bishop, though the living belongs to him in right of his prebend. Stress has been laid on the fact that the prebendary, on being appointed, appears before the house, and begs the dean and chapter to admit him. That, however, does not weigh in my mind. But all doubt is removed by the form of the precedent for a writ to obtain possession, in the case where the preceding prebendary has demised his house, and the tenant holds it over without licence. The form of the writ is evidence of the law, especially as

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Fitzherbert, without even a note expressing doubt upon the subject, shows that the right to the house is not in the dean and chapter, but in the prebendary. With regard to the *Westminster case* in 2 Peck. 113, the chapter was but lately formed. No prescription was relied on, and whether the decision was right or wrong is explained by the case, that where the members of the dean and chapter occupy the property in severalty only, by agreement and arrangement among themselves, they gain no right to a vote. In this case, however, Mr Harington does not occupy this house as his share of the common property, allotted to him by agreement among the members of the corporation aggregate, but he holds it as his separate property. The result of the case to my mind, even without these authorities, is that a prebendary occupies his house in right of his prebend. In case of dilapidations, the incoming prebendary would have to sue the executors of the late one; but it would be difficult to see the reason of this, if the deceased prebendary had no successor. Under these circumstances, I think we should do wrong if we were to act on what I have said is *primâ facie* presumption in these cases. I am clearly of opinion that the revising barrister was right, and that his decision must be affirmed.

KEATING, J.—I am entirely of the same opinion. At the same time, I do not in the least wish to interfere with the decision in the case of the naval knights (*Durant* v. *Kennett*, *vide* prec. case). There is, no doubt, a presumption that a member of a corporation occupying part of the corporate property occupies in respect of his membership alone; and it is for him to show that he has a distinct occupation, and holds in his own right. The question then here is, whether this presumption is rebutted by the facts. It seems to me that the statement of the revising barrister, that Mr Harington occupies this house in right of his canonry, rebuts it, and consequently that the decision of the revising barrister must be affirmed.

BRETT, J.—At first I had some doubts whether the case had been sufficiently stated, but with the knowledge that we have, as matter of law, of the way in which property is held by a dean and chapter, we are enabled to decide that the claimant in this case occupies his house, not merely as a member of a corporation aggregate, but in his own right as a corporation sole. It is contended that a canon is entitled as a member of the corporation aggregate to be installed in his house, and that he holds it simply and solely as such member. If that were so, the case would fall within *Heath* v. *Haynes* (*ubi sup.*), and our decision in the case of the naval knights (*Durant* v. *Kennett*, prec. case), which cases I am happy to find are entirely justified by the old authorities. I am clearly of opinion that in those cases the claimants were not entitled to a vote, as they were shown to occupy only because they were members of a corporation aggregate. Here, however, that is not so. Mr Harington occupies his house, not only as a member of a corporation aggregate, but as a corporation sole, to whom the house has been assigned by law. On these grounds I am also of opinion that the decision of the revising barrister must be affirmed.

Decision affirmed, with costs against the appellant.

Attorney for the appellant, *J. E. Fox.*

Attorney for the respondent, *G. E. Philbrick.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Nov. 8 *and* 10.

WILLIAMS *v.* TAYLOR AND OTHERS.

Bankrupt—Liability of assignees—Lease—Election to take benefit of—Acts evidencing intention to elect—Possession for limited period—Action for rent under lease—Use and occupation—B. A. 1849, *s.* 145—*B. A.* 1861, *ss.* 110, 131.

By lease, dated 8th March 1866, *the plaintiff demised a house and premises to R. for seven years, at* 600*l. a year, payable quarterly on 8th June, 8th Sept., 8th Dec., and 8th March. On 25th March* 1869 *R. filed a petition for adjudication of bankruptcy, which was subsequently annulled on the 15th April, on which day R. was adjudicated a bankrupt on a creditors' petition, under which, on the 7th May, the defendants were appointed assignees, and at a meeting of creditors on the same morning it was resolved, pursuant to sect.* 110 *of the B. A.* 1861, *that no further proceedings should be taken under the bankruptcy, which resolution was confirmed at an adjourned meeting on the 21st May, and it was then resolved that the bankrupt's estate should be wound-up and administered by the assignees in like manner as if the same had remained in bankruptcy. On 27th March* 1869 *plaintiff distrained for the quarter's rent due on the 8th March, and at the request of the solicitors to the petitioning creditors and the official assignee, the plaintiff remained in possession, without selling, till 12th May, when the defendants' solicitors paid the rent and the costs of the distress to the plaintiff. The defendants, as assignees of the bankrupt's estate, remained in possession "for the purpose of realising the stock, fixtures, and furniture, and not otherwise," and on 8th June another quarter's rent became due, and was paid to the plaintiff on the same day by the same solicitors on behalf of the defendants. On the 12th June the plaintiff's attorney wrote to the defendants' attorneys as follows: "I take it that as the assignees have not declined the lease of the premises, but are still in possession, they have elected to take the lease See sect.* 131 *B. A.* 1860." *No answer was sent to this letter. The defendants remained in possession for the purposes before mentioned, and no other, and on the 23rd June they sold by auction on the premises the tenant's fixtures belonging to the estate. The removal of the fixtures was completed by 30th June, and attempts were made to deliver the keys of the premises to the bankrupt, but the defendants were unable to ascertain his address. On 21st July they tendered the keys to his solicitors, who declined to accept them; and on the 30th July, having learnt where the bankrupt was, they forwarded the keys to him at Belfast by registered post letter, and informed him that they declined to accept the lease. On the 1st Aug. the defendants' attorneys wrote to the plaintiff's attorneys that the defendants had disclaimed any interest in the premises, and had delivered the keys to the bankrupt. On 8th Sept. plaintiff took possession upon the understanding that his doing so should not affect his right (if any) against the defendants to the quarter's rent due that day. The lease had been deposited by the bankrupt, prior to the bankruptcy, with a creditor, as security for a debt, and remained in the creditor's possession till after 8th Sept., when it was delivered by him to the plaintiff.*

In an action by the plaintiff to recover from the defendants the quarter's rent to 8th Sept., on a special case stated without pleading for the opinion of the court, it was

Held, by Channell, Pigott, and Cleasby, BB. (dissentiente, Kelly, C. B.) that the question of election being one of intention, the acts of the defendants, as stated

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in the case, were acts evidencing such an unequivocal *intention on their part, to elect to take to the lease of the premises for at any rate the six months to 8th Sept., as to fix them with liability, in the present action, for the quarter's rent to that day; and (per Channell, B.) to render it unnecessary to decide whether, having regard to the decision in* Goodwin *v.* Noble, *an action for use and occupation could be maintained against them.*

Goodwin *v.* Noble, 8 *E. & B.* 587; 27 *L. J.* 204, *Q. B., discussed and distinguished.*

Sed contra, per Kelly, C. B.—The acts of the defendants did not amount to such an unequivocal *act of election to take to the lease, as precluded them from disclaiming it on the 1st Aug., or rendered them liable in the present action for the quarter's rent:* (Goodwin *v.* Noble.) *And the plaintiff, as was said by Lord Campbell in that case, should have forced the defendants to their election under sect.* 145 *of the Bankruptcy Act* 1849:

Also, per Kelly, C. B., that, notwithstanding the decision in Goodwin *v.* Noble, *the plaintiff would not be entitled to recover for use and occupation; it being contrary to every principle of the law that a lessor should be entitled to recover the same rent, for the same premises and for the same period, under the covenant against his lessee, and at the same time for use and occupation against the assignees.*

This is an action brought by the plaintiff against the defendants for the recovery of 150*l.* for one quarter's rent of premises, No. 60 and 62, Church-street, Liverpool, from the 8th June 1868, to the 8th Sept. 1868, and by consent of the parties, and by the order of Master John C. Templer, dated 9th May 1869, according to the Common Law Procedure Act 1852, the following case has been stated for the opinion of the court, without any pleadings.

1. The plaintiff is the owner of a dwelling-house and shop, Nos. 60 and 62, Church-street, Liverpool, and by an indenture dated the 8th March 1866, he demised those premises to James Robertson for seven years, from that date, at the rent of 600*l.* per annum, payable quarterly on the 8th June, the 8th Sept., the 8th Dec., and the 8th March.

2. On the 25th March last, James Robertson filed a petition for adjudication of bankruptcy in the Liverpool District Court of Bankruptcy. On the 30th of the same month, Messrs. Potter and Taylor, of Manchester, who are creditors of the said James Robertson, filed a petition for adjudication of bankruptcy against the said James Robertson in the same court, and on the 15th April the bankrupt's petition was annulled, and the said James Robertson was adjudicated bankrupt on the petition of Messrs. Potter and Taylor, and on the 7th May, under the last mentioned petition, the defendants, Francis Taylor, John Howell, and Joseph Barnicot, were appointed assignees of the estate and effects of the bankrupt. At a meeting of creditors of the said James Robertson, held on the same day, it was resolved, pursuant to sect. 110 of the Bankruptcy Act 1861, by the requisite majority of the said creditors that no further proceedings be taken in the said bankruptcy. And on the 21st May an adjourned meeting was held, at which this was duly confirmed, and the requisite majority, required by the said section, directed that the said estate and effects of the said James Robertson should be wound-up and administered by the said assignees, in like manner as if the same remained in bankruptcy.

3. On the 27th March, two days after the bankruptcy petition was filed, the plaintiff distrained for the quarter's rent, due to him for the premises, on the 8th of that month, and, at the request of the solicitors to the petitioning creditors and the official assignees, plaintiff remained in possession without selling up to the 12th May following, when Messrs. Haigh, Son, and Co., the solicitors or agents acting for the defendants in the bankruptcy, paid plaintiff the rent due on the 8th March last with the costs of the distress.

4. The defendants, as assignees of the estate of the said bankrupt, remained in possession of the premises *for the purpose of realising the stock, fixtures, and furniture, and not otherwise;* and on the 8th June another quarter's rent became due, and was paid on the same day by Messrs. Haigh, Son, and Co., on behalf of the defendants, to the plaintiff. On the 12th June 1868 the plaintiff's attorney wrote the following letter to the defendants' attorneys, *which remained unanswered:*—

Re Robertson.

I take it that as the assignees have not declined the lease of the premises in Church-street, but are still in possession, they have elected to take the lease. See sect. 131 Bankruptcy Act 1861.

5. The defendants still remained in possession of the premises for the purposes mentioned in the last paragraph, and for no other purpose; and on the 23rd June they sold by auction, upon the premises, the tenant's fixtures belonging to the said bankrupt's estate.

6. The removal of the said fixtures was completed by the 30th June, and attempts were at once made to deliver the keys of the premises to the bankrupt. The said assignees were unable to ascertain his address, and on the 21st July they tendered the said keys to the bankrupt's solicitors, who declined to accept them. On the 30th July the assignees ascertained that the bankrupt was in Belfast, and on that day the keys were forwarded to him by registered letter, and he was informed that the assignees declined to accept the lease or the benefit thereof.

7. On the 1st August the defendants' attorneys wrote to the plaintiffs' attorneys that the defendants had disclaimed any interest in the premises, and had delivered the keys thereof to the bankrupt.

8. On the 8th Sept last the plaintiff took possession of the said premises, it having been agreed with the defendants' solicitors that his so taking possession should not affect his right, (if any) against the defendants, to the rent from the 8th June to the 8th Sept. last, or any part thereof.

9. The said lease had been deposited by the said bankrupt, prior to the bankruptcy, with a creditor as security for the payment of a debt, and the same remained in his possession until after the 8th Sept., when it was delivered by the said creditor to the plaintiff.

10. The court is to be at liberty to draw such inferences from the facts as a jury could properly have drawn.

The question for the opinion of the court is, whether the said plaintiff is entitled to recover from the said defendants the sum of 150*l.* for one quarter's rent of the said premises; or any, and (if any) what part thereof.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff for the amount to which the plaintiff shall be found to be entitled, with costs of suit, if the said amount shall exceed 20*l.*; otherwise for the said amount, with costs. If the court shall be of opinion in the negative, then judgment of *nolle prosequi*, with costs of defence, shall be entered up for the defendants.

The plaintiff's points for argument:—1. That there is evidence on the facts stated of an election by the defendants to take the premises in question for the residue of the term created by the lease of 8th March 1866. 2. That there is evidence of an election by the defendants to take the said premises for the quarter in respect of which the rent sued for is claimed. 3. That the defendants are liable in use and occupation for the last mentioned period, and

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that the rent in the lease is evidence of the value of the said premises. 4. That the plaintiff is entitled to the judgment of the court for 150*l.*

The defendants' points:—1. That under the circumstances set forth in the special case the plaintiff is not entitled to recover any rent from the defendants. 2. That the facts show that the defendants did not elect to take the benefit of the lease of the premises.

The following sections of the Bankruptcy Act 1849 (12 & 13 Vict. c. 106) and the Bankruptcy Act 1861 (34 & 35 Vict. c. 134) respectively are material, and were referred to in the argument and judgments.

The Bankruptcy Act 1849 (12 & 13 Vict. c. 106) enacts, by sect. 145, that if the assignees of the estates and effects of any bankrupt having or being entitled to any land, either under a conveyance to him in fee, or under an agreement for any such conveyance, subject to any perpetual yearly rent reserved by such conveyance or agreement, or having or being entitled to any lease or agreement for a lease, shall elect to take such land, or the benefit of such conveyance or agreement, or such lease, or agreement for a lease, as the case may be, the bankrupt shall not be liable to pay any rent accruing after the issuing of the flat or filing of the petition for adjudication of bankruptcy against him, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements, in any such conveyance or agreement, or lease or agreement for a lease; and if the assignees shall decline to take such land, or the benefit of such conveyance or agreement, or lease or agreement for lease, the bankrupt shall not be liable, if within fourteen days after he shall have had notice that the assignees have declined, he shall deliver up such conveyance or agreement, or lease or agreement for lease, to the person then entitled to the rent, or having so agreed to convey or lease, as the case may be; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such land or conveyance, or agreement for conveyance, or such lease or agreement for lease, any person entitled to such rent, or having so conveyed or agreed to convey, or lease or agreed to lease, or any person claiming under him, shall be entitled to apply to the court, and the court may order them to elect and deliver up such conveyance or agreement for conveyance, or lease or agreement for lease, in case they shall decline the same, and the possession of the premises, or may make such other order therein as it shall think fit.

The Bankruptcy Act 1861 (34 & 35 Vict. c. 134) enacts as follows:—

Sect. 109 provides for a meeting of creditors after adjudication.

Sect. 110 enacts, that in case at such meeting, or any other meeting of creditors, any proposal shall be made by or on behalf of the bankrupt, which it shall appear to the major part in value of the creditors then present, ought to be accepted, or if it shall appear to the majority in value of creditors present at any meeting, to be desirable on any ground to resolve, and such majority shall resolve, that no further proceedings be taken in bankruptcy, the meeting shall be adjourned for fourteen days, in order that notice of such resolution may be given to every creditor by the official or creditors' assignee, which shall be done accordingly; and if at such adjourned meeting a majority in number representing three-fourths in value of the creditors present shall so resolve, proceedings in bankruptcy shall be suspended, and the estates and effects of the bankrupt shall be wound-up and administered in such manner as such majority shall direct, and the bankrupt having made a full discovery of his estate, shall be entitled to apply for an order of discharge.

By sect. 117, on appointment of the creditors' assignee, all the estate, real and personal, of the bankrupt shall be devested out of the official assignee, and vested in the creditors' assignee.

Sect. 131, in every case of a lease, or an agreement for a lease, it shall be lawful for the assignee to elect to take the same and the benefit thereof, and to keep possession of the premises up to some quarter or half-yearly day, on which rent is made payable by the same lease or agreement, such day not being more than six months from the adjudication of bankruptcy, *and upon such day to decline such lease or agreement for a lease.*

Powell, Q. C. (with him was *C. Russell*) for the plaintiff.—It is difficult to see what answer there can possibly be to the defendants' liability for the rent of the quarter during nine weeks of which they held possession. It is enough that they were in possession, and it is not for the plaintiff to argue the question of election to take to the lease. Before the statute of 1849, assignees under the old law were held liable where they had taken possession and occupied for the benefit of the estate (see *Ansell* v. *Robson and another*, 2 Cr. & J. 610; 1 L. J., N. S., 216, Eq, and the judgment of Lord Lyndhurst, C. B.), that being on the premises, and actually taking possession is sufficient to bind them. No doubt the defendants will rely on *Goodwin* v. *Noble and others*, in the Queen's Bench, 8 E. & B. 587; 27 L. J. 204, Q. B.; but that case is, at all events, an authority for the plaintiff to this extent, that it shows them to be liable, at any rate, for a quarter's rent, for use and occupation. Subsequently to this was passed the Bankruptcy Act 1861, which relieved assignees from a dangerous position. Previously to that if assignees interfered or did anything with the lease they were held to have elected to take possession; but under sect. 131 of the Act of 1861, they may hold for a limited period, and then at its expiration may decline further interest in the premises. Here the plaintiff may say the defendants have elected to take the lease entirely, but at least, having paid the quarter's rent on the 8th June and continued to occupy for several weeks of the second quarter, they are liable for that. He cited also *McDonald* v. *Thompson*, a very recent case in the Common Pleas, 20 L. T. Rep. N. S. 666; L. Rep. 4, C. P. 747 (and was stopped by the court, who called on)

J. Brown, Q. C. (with him *C. Jeffery*), for the defendants.—There has, it is submitted, been no election here by the assignees, nor is there any evidence of any, and without election there can be no liability on their part as lessees, and there can be no action against them for use and occupation, inasmuch as the premises are let under a lease. Sect. 131 of the Act of 1861 makes no difference in the case, but leaves the matter exactly where it was before. It only confers on the lessees a power which they had not before got. Prior to 1861 if they elected at all the election was taken to be for the whole term, unless they got rid of it by assignment. There is nothing in the section defining what is election, or altering the doctrine. It is a mixed question of law and fact. [KELLY, C. B.—What effect then do you give to the words "and upon such day to decline such lease or agreement for a lease," in sect. 131 of the Act of 1861?] The section gives the assignees power to hold the premises for six months after the adjudication, and then to decline the lease, but they have not done it here, and the section has no application. In *Copeland* v. *Stephens*, 1 B. & Ald. 593, after much discussion it was held by Lord Ellenborough, C. J. delivering the considered judgment of the Court of Queen's Bench, that the general assignment of a bankrupt's estate

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under the commission did not vest a term of years in the assignees unless they did some act manifesting their assent to such assignment as regarded the term, and then accepted of the estate and rents. That judgment has been acted on ever since as laying down the law correctly. It was so held also in a more recent case, *Lindsey* v. *Limbert*, 12 B. Moo. C. P. 209; 5 L. J. 52, C. P.; 2 Car. & P. 525. The question, then, here is, have these defendants done any unequivocal act evidencing an election to take to the lease? The payment of rent under the first distress proves nothing. Until the resolution of the 7th May was confirmed on the 21st May the assignees could do nothing. The payment of rent on the 8th June was obligatory upon them in the course of their duty, to prevent the loss which would have accrued to the estate by a forced sale. They remained in possession no longer than was absolutely necessary to enable them to dispose of the bankrupt's estate. They had not elected on the 12th June, nor were they then bound to do so. The cases show that six and even twelve months have been allowed to assignees under such circumstances without rendering them liable for the whole term. At most "the circumstances are equivocal," as was said by Lord Campbell, C. J. in *Goodwin* v. *Noble* (*ubi sup.*). That case, the facts of which are parallel with the present, overrules the old cases and the dicta cited on the other side. He cited also

Ex parte Tilston, in re Tilston, 15 L. T. Rep. N. S. 493, Chan; L. Rep. 2 Ch. App. 199;
Ex parte Webster, in re Wickham, L. Rep. 2 Ch. App. 556;
Ex parte McKerrow, 12 L. T. Rep. N. S. 753;
Mallett v. *Levin*, 16 L. T. Rep. N. S. 531, Ex.;
Tuck v. *Fyson*, 6 Bing. 321;
Wheeler v. *Bramah*, 3 Campb. 340.

The case of *Macdonald* v. *Thompson*, cited on the other side, was a case of ordinary goods and chattels, and involved no question of election at all. It was impossible, without overruling all the cases cited, to hold that there had been any election here. Nor is there anything amounting to an estoppel. The most that can be said is that they did not answer the attorney's letter—that they in fact did nothing. It was competent to the landlord (and he was bound to have done so) if the assignees were slow to elect, to apply to the Court of Bankruptcy and put pressure upon them (sect. 145 of the Bankruptcy Act 1849.) The lease still continuing there could be no claim for use and occupation. A count for it would not lie. [CLEASBY, B. refers to *Hanson* v. *Stevenson*, 1 B. & Ald. 390; and to sect. 110 of the Bankruptcy Act 1861.]

Powell, Q. C. in reply.—The cases cited *contra* have little or no application. The question turns entirely on sect. 131 of the statute of 1861. Before that statute, if the assignees interfered in the least degree, they were fixed with the liability for the whole term. Speaking broadly, the meaning of sect. 131 was this: "Three courses are open to you, the assignees, and you may either not enter at all, or you may enter for a limited period, or if you enter, and fail to exercise the power given you by the statute of expressing your intention of taking it only for a limited period, then you shall be held to have taken it for the whole term." The same acts, which before the statute might not have been, may now well be, held to amount to an election. Why did not the defendants write and disclaim taking possession? They knew the landlord's address. *Goodwin* v. *Noble* is not disputed, but it was decided under a totally different state of the law, and has no analogy here. This is not an action against the defendants as assignees, but against them as persons entering upon and occupying the plaintiff's premises. Unless the defendants are liable, how is the landlord to get his rent? He cannot get it from tl bankrupt. He cited also the case of *Ex parte Syk re Steel*, before Commissioner Holroyd, 32 L. T. Re 19, and referred to

Woodfall's Landlord and Tenant, 220 *et seq.* 9 edit., by Cole.

Cur. adv. vult.

Their Lordships retired for some time, and c their return into court, there being a difference opinion upon the bench, they proceeded to deliver tl following judgments.

CLEASBY, B.—The plaintiff, is, I think, entitl to judgment in this case. The action is brought b him as landlord, to recover from the defendants quarter's rent, under a lease. It seems that tl tenant or lessee, a Mr. Robertson, became a bank rupt on his own petition on the 25th March 186 which bankruptcy was subsequently annulled, an he was eventually, on the 15th April 1868, adjud cated bankrupt on a creditor's petition, and on tl 7th May following such adjudication, the defer dants were appointed creditors' assignees, and o the same day came a meeting of creditors, which, pursuant to sect. 110 of the Bankrupt Act 1861, a resolution was passed that no furth proceedings should be taken under the bank ruptcy, which resolution was confirmed in th regular way at an adjourned meeting on tl 21st of the same month of May, it bein then resolved that no further proceedings i the bankruptcy should be taken; and that tl bankrupt's estate and effects should be wound-u and administered by the assignees in like manner if the same had remained in bankruptcy. This dat the 21st May 1868, therefore, so far as the petitio of the defendants as assignees is concerned, is a ver important one. Now no particular reliance has bee placed on this transaction as regards the liability c the defendants. I shall, therefore, consider th case as if they had remained assignees of the bank rupt in the usual course, guarding myself onl against its being supposed that the creditor after resolving that no further proceedings i bankruptcy should be taken, and so withdrawin the matter so far from the complete jurisdictio of the court, though it could not be take out of the court altogether, could, by this re solution, still confer on the defendants all th rights and privileges of assignees in bankruptcy We must, however, deal with the case upon th concession of the parties as involving the respon sibility of the defendants as assignees. The bank rupt is the lessee under a lease at the rent of 600 a year, and I take it to be clear that the propert in the lease, and the character of assignees of th lease, do not belong to the defendants unless the have done some act to make them belong to them Mr. Powell, in arguing for the plaintiff, stated mor than once that the effect of the later Act of Par liament of 1861 was to make it pass to them a once, more than it did before. I differ from tha construction of the 117th section of the statute which leaves the case, I think, pretty much as i was before, because the only effect of sect. 117 i that, upon the appointment of the creditor assignee, the property passes out of the officia assignee to the creditors' assignee; nor is ther anything, I think, to show that this section make it vest in the assignees, or that it can in an way be said to vest in them, until they have don some act to make it do so. The simple questio then in this case is, have the defendants, or hav they not, done some act to make it vest in them They may make it vest in them by positive election or by notice to creditors, or by doing some ac equivalent to election. Any act which clothe them with a right in the property as assignees

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any right of possession would, in my opinion, be an election from which they could not escape. The merely being in possession by the messenger, for the purpose of disposing of the property, as goods, chattels, pictures, or the like, would of itself leave it an open question whether or not there had been an election, and to determine whether or not that act amounted to an election, we must, I think, see whether there is anything showing them to have been there in the character of tenants. The moment it is established that they have a claim of title as tenants or, in any way, to the lease by election, the moment they have done any act availing themselves of any right to the occupation of the premises as lessees, they have made a conclusive election, and they cannot get out of the 131st section of the Act of Parliament. Have they, then, made themselves tenants under the lease or not? Now the first distress, in respect of the rent due on the 8th March, is nothing, for that became due long before they had anything to do with it, as their real characters only commenced on the 21st May. Therefore we may, I think, throw altogether out of our consideration the payment of money for the first distress for the purpose of redeeming the property which belonged to them, as they had no alternative but to make the payment. We must look, then, to what took place afterwards. We find them in possession—the rent day (the 8th June) coming round—the day arrives—no particular demand or pressure is made or put upon them for payment of the rent, but we find that they pay it. How far they had a right to occupy these premises for the purpose of selling the fixtures which may or not have been very valuable to them, we need not say; but we know they are in possession, and that as the rent day came round they paid the rent, and according to the statement in the case they paid it on behalf of the estate. From that time, therefore, the plaintiff, the landlord, was estopped from regarding them in any other light than as his tenants. He could not have turned them out, having received rent from them. I do not feel myself at liberty to infer that the rent was not received from them as tenants, and that being so, they paid it as tenants and became tenants, and could not subsequently make an election. But it does not stop there. The plaintiff's attorney, having regard to sect. 131 of the late Act of 1861, and knowing that the defendants might or might not elect, according to the Act, with reference to the quarter that remained, wrote them the letter set out in the case, not, I think, for the purpose of inveigling them into a position of unlimited liability as to this lease of 600*l.* a year, but merely of ascertaining the position of the parties and how matters stood between them respecting the next quarter, which had then just commenced. This letter is dated 12th June, and is as follows: "I take it, as the assignees have not declined the lease, but are still in possession, they have elected to take the lease. See sect. 131 of the Bankruptcy Act 1861." Undoubtedly, when the assignees paid the rent on the 8th June they might, as has been said, at the same time have given up the key and possession of the premises, and have rid themselves of all further liability. But they did not do so. All goes to show, in my opinion, that they elected to remain in for another quarter, and sufficient, I think, has taken place, on the statement of facts in the case, to make the defendants responsible. There remains the question, how does the case stand with regard to the authorities? It seems to me that the important case of *Goodwin* v. *Noble*, on which so much reliance has been placed, does not, when the judgment is carefully looked at, profess to overrule the previous authorities, or to lay down any new rule. Its effect is that every question arising on these matters must be judged of by a close attention to the circumstances of the particular case, in order to enable it to be seen whether or not there has been an unequivocal election. Taking the facts in this case—namely, the fact of the defendants remaining in possession for a particular purpose, the fact of their payment of rent when it became due, without anything to show it to have been paid otherwise than in the character of tenants, the fact that it was received by the landlord from the defendants as tenants, and the letter of 12th June,—and coupling all three circumstances together, with what took place after that letter,—namely, that the assignees took no steps until a much later period, when their attorneys wrote to the plaintiff's attorneys to say that they had at that time disclaimed any interest in the premises, and had sent the key to the bankrupt—it appears to me that the effect of the whole matter is, at all events, to bind them to an election to come under the liabilities of this lease as tenants to the extent of six months, or rather to the extent of the rent to the 8th Sept. So far as that goes, therefore, my judgment is that the defendants have so far bound themselves to pay that they cannot relieve themselves to that extent, and that our judgment ought to be for the plaintiff.

PIGOTT, B.—I cannot say that I have not hesitated a good deal as to the proper conclusion at which the court ought to arrive in this case; but, in the result, I come to the conclusion that the plaintiff is entitled to our judgment. I think the case depends mainly on the question whether we can say that these assignees have elected to take the benefit of this lease. That must depend upon the evidence in the case—the question of election being a question of intention. A man may have in his mind an intention in one direction, and all his acts may point in another. We cannot enter into another man's mind, except so far as his acts enable us to do so. Judging by the acts of the defendants, I feel bound to infer that they had an intention to elect, and did elect, to take the benefit of this lease. I do not feel at all pressed by the argument adduced on behalf of the defendants as to the difficulties thrown in the landlord's way by the bankruptcy. On the contrary, I think the Bankruptcy Act shows the mode in which all the parties may be relieved. It seems to me that the Act has taken pains to put them all—the landlord and the tenant, the bankrupt and the assignees—in such a position that they may easily ascertain how they stand, and extricate themselves from any difficulty by taking the proper course there pointed out, and has vested in the court power to do full justice between them all, by making "such order as the court shall think fit." My judgment is rested on the question whether or not the defendants have elected to take the benefit of this lease; and I have come to the conclusion that they have. What are the facts leading me to that conclusion? First, there was the rent which came due on the 8th March, and was paid under the distress, and which, I agree with my brother Cleasby, may be put out of our consideration. Then the next rent became due on the 8th June. In the meanwhile the defendants were in possession, but I do not lay much stress on that, for it may be equivocal; that is to say, they may have been there for the purpose of taking the goods, or for the purpose of asserting a right to the possession. But nevertheless there they were. Then, on the very day the rent became due, they pay it, or it is paid for them, without any demand or any threat of distress, or sale of goods. But even so far, I would agree that that might be equivocal, if they paid it to avoid a distress, or because they knew that if they did not,

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then they might be compelled to pay it by way of distress. But the next thing is that the plaintiff's attorney takes the course which seems to be the most straightforward and business-like course for him to take; he gives notice to the defendants, or to their attorneys rather, of the view he himself takes of this act of payment of rent. The letter says, "I take it that as the assignees have not declined the lease of the premises, but are still in possession" (and he might have added "and have paid the rent") "that they have elected to take the lease," and he gives as a reason for so concluding "See 131st section of the Bankruptcy Act." What more could a landlord do than that? It is said that he might have applied to the court. So of course he might, at some cost and trouble; but surely the more reasonable course was to tell the other side the view he took of the acts of the defendants. I must say that if the defendants have done an act such as paying their rent, which may be equivocal as to the intention taken to be involved in it, and they have notice that the other party, who is interested in the matter, and is a party to the business, takes the view that their continued possession, coupled with the payment of rent, amounts to an election, and that it is taken by him to be so, I think there is but one course open to them if they do not mean to be judged otherwise by their silence, and that is to say, "You are mistaken; we do not by paying the rent mean to be taken to have elected to continue in possession. We know we must pay rent one way or the other if our goods are on the premises, and we have paid it as the most beneficial course for us to take." On the contrary, however, they treat the matter with silence, and thus, in my opinion, tacitly assent to the view which the plaintiff's attorney had taken. But if I am stretching that too much against the defendants, yet the evidence of election does not stop there. The possession still continues, and it continues in spite of the notice that continuance of it would be taken to be an intention to elect. It does not even stop there, for on the 1st Aug. the defendant's attorneys wrote to the plaintiffs' attorney to say that they had disclaimed any interest in the premises, and that they had delivered the key to the plaintiff. Why, if they meant from the first to treat the landlord and his attorney as persons with whom they had nothing to do, do they send that notice? They might have said, "You may go to the court, or do anything else, or write us letters, but we will not answer them; our business is not with you, it lies with the court and the bankrupt and the estate, and we have nothing to do with you." It would have been consistent, therefore, that they should have sent the keys to the bankrupt, and taken no notice of the plaintiff and his attorney, and their conduct then might have been consistent, although perchance it might have been equivocal. But on the 1st Aug. they do not continue this consistent, though unbusinesslike, conduct, but write and say they have disclaimed any interest, as though, up to that time, they had been acting as if they had not disclaimed, or as if they had elected to take to the lease. It was time under sect. 131 for them to disclaim, as it required them so to do. Their acts seem to me to be no longer equivocal. Whatever their *intention* may have been, they cannot complain if a judge, who has to determine whether by their *acts* they had elected or not, comes to the conclusion that those acts evidence an election in point of fact. I have come to that conclusion, as I have already said, not without some hesitation. I think the case differs from that of *Goodwin* v. *Noble*. In that case no doubt there were the payment of rent and other circumstances, but there were not the circumstances of the notice imparting the view taken by the other side, which was treated with silence, and the subsequent continuing in possession after such a letter, with the notice of the 1st Aug., that I have already referred to in paragraph 7 in this case. That seems to me to cause the present case to differ from the facts in *Goodwin* v. *Noble*. In the conclusion I have arrived at I am not embarrassed by that case, or by the other cases. I agree with that case to this extent, that each case must depend on its own circumstances, when it is a question of intention or election, to be evidenced by facts. In the present case it seems to me that these are facts which do evidence an election, and that the plaintiff is therefore entitled to our judgment.

CHANNELL, B.—Like my brother Pigott, I have not been free from doubt in the course of this case, nor am I now altogether free from doubt, knowing that there is a difference of opinion upon the bench; but, upon the best consideration I can give to the case, I am of opinion that the plaintiff is entitled to the judgment of the court. This is a case stated for the opinion of the court without pleadings, and it provides that the court may draw such inferences as a jury might properly draw. Substantially, the question submitted to us is, whether 150*l.*, or any part thereof, can be recovered in any way or in any shape upon the facts as stated? Mr. Powell has contended that there was abundant evidence of an election on the part of the defendants, the assignees, to take, and that if it were so, the plaintiff was entitled to recover. But he submitted another point, not secondarily, but primarily, that notwithstanding there had been no election, the plaintiff was still entitled to recover as for use and occupation. The contest he made on that point was founded mainly, as I understand, on the case of *Goodwin* v. *Noble*. Upon this latter point, however, I feel it unnecessary to give any opinion, because I am of opinion, with my brothers Pigott and Cleasby, that there is here evidence of an election to take. Neither do I enter into the point that has been made at the bar, namely, that if there is an intention to take, or circumstance that may warrant us in thinking that there was an intention to take, for a limited period, namely, for a period not exceeding six months from the adjudication of bankruptcy, and that if there were no notice at the time that it was for a limited period that the assignees intended to take; or no notice, at the expiration of that limited period, that it was for a limited period only, and not *in futuro*, that they intended to take, that then they must be taken to have elected to take the whole term. I think it is unnecessary to decide that, being, as I have already stated, of opinion that there is evidence here of such an unequivocal intention to elect to take, as will fix the defendants in the present action. I agree in thinking that the payment of the rent due on the 8th March may be substantially left out of consideration. I do not say that it is to be forgotten altogether, but if that had been the only element in the case, it might have been explained away, because there was a distress put in for the rent, and the payment of that rent under that distress would not amount to an election to take. But I agree that if rent is paid afterwards, without any explanation as to the circumstances under which it is paid, and without anything to prevent its being taken as a payment of rent in the ordinary course, by which the assignees would show that they considered themselves entitled to possession, not possession merely for the purpose of disposing of the property, but as having a rightful possession of the property, that is strong evidence of an election to take, and would preclude the landlord, without explanation being given, and estop him from treating the assignees as tres-

passers—that is to say, as not entitled to the benefit of the remainder of the term. Here the defendants remained in possession, and the rent next became due in the ordinary course on the 8th June, and it was paid, as I understand, without any explanation, such as might arise from circumstances existing when the payment on the 8th March was made, or anything in fact to prevent its being taken to be paid as rent in the ordinary way; and when that payment is made the defendants are and continue still in possession of the premises. That payment, then, having been made, then comes the letter of the 12th June to which I attach great importance. It was a step which the plaintiff's attorney was not only justified in taking, but which it was proper in justice and fairness he should take. He says (his Lordship here read the letter of 12th June, and then proceeded as follows). The defendants give no answer to that; they remain in possession, the goods are afterwards sold; and they do, as speedily as may be considered reasonable, proper, or possible, endeavour to discharge themselves of the assets after the goods are sold. Having taken the time which they require for the disposal of the goods, on the 1st August they write the letter, in which they intimate that they have disclaimed, leaving, however, the inference that, down to that time, they had done no act which would disentitle them to retain possession of the premises, because on that day they gave notice of their intention to disclaim, although the preceding acts show that they had made an election. It would appear from the case that the lease had been pledged by the bankrupt. It does not appear that that fact was known to the defendants. The case, therefore, in that respect, so far as anything turns on it, differs from *Goodwin* v. *Noble*, in which case it was clear that the assignees were aware that the lease had been deposited, and that they were entitled to a beneficial interest in the property, and that if they elected to take, although they might have been entitled to any surplus, after satisfying the debt which might arise when the goods were disposed of, yet in that case it would have been for the benefit of others, and not for the benefit of the general estate of the bankrupt. In that respect this case differs from *Goodwin* v. *Noble*. I am, I think, warranted, having the power to draw inferences as a jury, in holding that there was in the present case an election to take. I say not whether for a limited period or for the whole term; upon that point the inference to be drawn is that they elected to take, and that therefore the bankrupt is entitled to recover. That renders it unnecessary to dispose of the point as to whether, having regard to the case of *Goodwin* v. *Noble*, an action for use and occupation can be maintained.

KELLY, C. B.—I regret to say that I am unable to come to any other conclusion in this case than that the defendants are entitled to the judgment of the court. The first question which arises is, whether upon the facts, which have been so accurately stated by my learned brothers, we are called upon to say that the defendants elected to take to this lease, and became the assignees of it as between them and the lessor. Now the first fact relied on by the plaintiff is, that the assignees took possession and remained in possession of the premises for the purpose of disposing of the goods. I gather that from the terms of the special case. The truth is, they found the messenger under the bankruptcy in possession, when they were appointed assignees on the 7th May, the bankruptcy having taken place some time before, and they accordingly proceeded to take possession of the bankrupt's effects which were within this house and upon these premises, and they may be taken to have either gone into or remained in possession, and that remaining in possession is held as, in the first place, some evidence of an election to take the premises. I think in a case like this, it is clearly no evidence at all; because it was an act necessary and indispensable to the discharge of their duties as assignees. There was property belonging to the bankrupt's estate on the premises, and it was their duty to take possession of it, which they could not do without entering on the premises on which it was. There they remained. Now, is the remaining on the premises under the circumstances of this case, any evidence of an election to take the premises as lessees? They remained until they sold and disposed of the bankrupt's property and effects, which were upon the premises, and no longer. It is not suggested that there was any want of due diligence or expedition in such disposal, between the 7th May, when they became assignees, and, I think, about the 20th June, when they had disposed of the whole of the property; and as soon as they had disposed of the whole of it they delivered up the key to the bankrupt. His residence was not known then for some time, but they endeavoured to find him out, and at last they heard of his being at Belfast, and they transmitted the key to him in a registered letter on the 21st July. Then on the 1st Aug. they gave notice to the lessor that they disclaimed any interest in the premises, and accordingly abandoned the election. I do not think, therefore, that the entering on the possession in order to take possession of the bankrupt's effects, which they were bound to do, nor the remaining in possession until they had disposed of them, which also they were obliged to do in the discharge of their duty, is any evidence justifying us in coming to the conclusion that they had elected to take the premises as lessees. The remaining fact is a very important one, and one which for a long time held my mind suspended on the question, and led me for a time to think that the plaintiff might be entitled to the judgment of the court; and that is, that on the 12th June, four days after the second quarter's rent had become due and had been paid, the attorney for the plaintiff wrote to the attorneys for the defendants the letter which has been so often referred to. [His Lordship here read the letter.] Now I do not at all deny that this letter really did call upon the attorneys for the defendants, in common courtesy, as well as a matter of business, to send a reply to say, as the truth was, "the assignees have not elected to take the premises; they have entered upon them in order to dispose of the bankrupt's effects; they are disposing of them as fast as they reasonably can, and, therefore, you must not take it that they have elected to become the assignees of the lease." This, however, they did not do. But the question is, looking to the principle of the law, and the authorities which bear on this case, does the omission of the attorneys to answer that letter, and to disclaim the suggested election, amount in itself to an election binding the defendants to be treated as the assignees of this lease? I think it does not. In the first place, though I do not rely much upon that consideration, it does not appear that the attorneys communicated this letter to the defendants, or that the latter ever heard of it, and it would be with reluctance that I should hold assignees to be bound to take a lease of this nature unless they themselves had really the opportunity of considering whether it would, on the whole, be for the benefit of the estate that they should do so. But, further, when the language of the letter is closely looked at, it is really very peculiar. It is not, as it has been assumed to be, a letter saying, "I take it for granted," or "I assume," or "I shall assume that you, the assignees, have taken to this lease, unless you intimate to me the contrary," but it is this,

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"I take it that, as the assignees have not disclaimed the lease of the premises, and are still in possession, they have elected to take the lease—*See sect.* 131 *of the Bankruptcy Act* 1861." In truth it is no more than an expression of opinion (the writer's), in point of law, of the effect of sect. 131. "I take it that, as the assignees have not disclaimed, &c., they have elected to take under sect. 131 of the statute." It may well be that the attorneys for the assignees did not feel themselves called upon to argue the matter in point of law with their correspondent. They may have thought, "it may be so, but we take it to be otherwise—in our opinion there has been no election, and therefore we shall take no notice of the matter." But it seems to me impossible, in reason and good sense, to hold that the omission by the attorneys to answer this letter, or even by the assignees themselves, is such an *unequivocal* act as binds them to a supposed election. That depends upon authority. It is true that although it was held in one of the early cases, *Turner* v. *Richardson and another*, 7 East, 334, that the taking, or being in possession of the premises, and, in one sense, treating them as the property of the assignees, and the putting them up for sale by auction, did not amount to an election to take the premises as assignees, yet there is no doubt that subsequently in the very important case of *Hanson* v. *Stevenson and another*, 1 B. & Ald. 303, which has been also referred to, Lord Ellenborough and the other judges of the Court of King's Bench in general terms stated, as a general proposition that the taking possession of the premises is of itself an irrevocable act, and an election, and conclusive evidence of an election, on the part of the assignees. I cannot myself assent to that doctrine, but I should have been bound by it if it had not been impeached by the case subsequently decided, and so much referred to in the present case, I mean the case of *Goodwin* v. *Noble*, in 8 E. & B. In that case there is a long string of facts on which the judgment of the court is founded. There was there not only a taking of possession, but an actual remaining in possession for a period of eighteen months, yet that was not deemed to be an *unequivocal* act amounting to election. Moreover rent had been paid during the whole of that time, or the greater part of it, some four or five quarters, and even that, coupled with the remaining in possession all that time, was not held to amount to an election. I do not hesitate to adopt what was said by Lord Campbell there as a direct declaration of the law on this subject. He says (at p. 692 of 8 E. & B.), "The result of the various cases upon this subject seems to be that the assignees of the bankrupt are not liable as assignees of the term unless they have done some act which *unequivocally* indicates to the lessor that they have elected to take the benefit of the lease." It is clear, therefore, on that authority, that the taking possession and remaining in possession, even for a period of time four times as long as that during which the assignees here remained in possession, does not of itself amount to an election. Neither does the payment of rent during that period amount to an election. Let us, then, see if there is anything in the payment of rent in the present case which distinguishes it from the case of *Goodwin* v. *Noble*. Here two quarters have been paid. The first was paid before the defendants became assignees, and in consequence of the landlord's putting in the distress. Under an arrangement the plaintiff himself, the landlord, remained in possession until the assignees were appointed, and then the assignees, in order to redeem the bankrupt's effects from the distress, under which they would have been sold, paid the rent. Mr. Powell, as I understand, does not rely much, or at all, upon that. Then there was a further payment of rent, when the next quarter became due, on the 8th June. It seems to be assumed that this was a mere voluntary payment, and in the capacity of tenants to the landlord, and therefore evidence of tenancy, and also of their having taken to the lease. But it appears to me, regard being had to the time of payment, that it was, like the first payment, in order to relieve the property of the bankrupt from distress, to which it was liable I think the reason of payment having been made on the 8th June was, because the assignees well knew that on the following morning, the 9th, if payment were not made, it would be competent for the landlord, as he had done on the previous quarter, to send in a distress and sweep away, perhaps, the whole of the effects. They therefore wisely and properly, in my judgment, paid the rent on the day it became due. It seems to me that there is no evidence of an election to which any weight ought to be given in this case. We next come to a third fact, which is of a different character, namely, that the plaintiff's attorney, having written to the attorneys of the defendants, no answer was sent to the letter; and it is contended, therefore, that the plaintiff, the lessor, had a right to assume that what had been suggested in that letter was the case, namely, that the defendants had elected, under sect. 131, to take to the lease, and had not disclaimed it at the expiration of the quarter. But, as it does not appear that the assignees themselves, whose duty it was to exercise their own judgment, with or without legal assistance, in the matter of taking to or disclaiming the lease, ever knew or heard of this letter, the argument founded on their silence is not entitled to the weight which otherwise, perhaps, might have attached to it. But even if they had been told of the letter, it is nothing more, as it seems to me, than a dissent from the spirit of the law which is stated, in that letter, to be the opinion of the attorney by whom it was expressed. I do not think that it amounts to an unequivocal act of election. The unequivocal act by which an election ought to be tested is that which must come within the principle and real meaning of the judgment of Lord Campbell in *Goodwin* v. *Noble*. But there is another ground, and one on which I feel less hesitation in coming to my present conclusion, and one which is adverted to by Lord Campbell in the before-mentioned case, and which, I think, should put that case beyond doubt in favour of the defendants, and it is this. Suppose, for a moment, the lessor and his attorney to have been under the impression that the defendants had elected to become assignees of the lease, it was competent to the lessor to have applied immediately to the Court of Bankruptcy to compel the assignees to at once elect whether they would take the lease or not; and we should not be justified, I think, in holding that there was an unequivocal election in this case, when it was open to the party who seeks to treat it as such to have put the matter beyond all doubt by resorting to that course of action which the law has pointed out and enabled him to take, and which, might enable the court at once and without delay to do justice between all parties. Sect. 145 of the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106) enables a lessor circumstanced as the plaintiff is here, at any time after appointment of assignees, to apply to the court to compel the assignees to elect; and the court, having power to do justice between the parties, would doubtless in this very case have forthwith determined whether the assignees should accept or reject the lease, or whether they should be allowed some short and reasonable time for disposing of the effects which had not been sold, allowing them to retain possession of the premises for that necessary

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and reasonable time, on the terms that they should compensate the lessor, who was entitled to the rent, for the use and occupation of the premises during that period. Now, that course was not adopted; and I think that that is a very important consideration in this case. Lord Campbell, in *Goodwin* v. *Noble*, at p. 604 of 8 E. & B., says, "At most the circumstances relied upon by the plaintiffs are equivocal; and under such circumstances we think it highly desirable that the lessor should avail himself of the power given by the statutory enactment in the 145th section of the Bankruptcy Act (12 & 13 Vict. c. 106) to apply to the Court of Bankruptcy that the assignees may be put to their election. The plaintiff might thus at once have got into possession of the demised premises, and this expensive litigation might have been entirely avoided." Now, I apply the whole of that sentence to the present case, and I am at a loss to understand why it was that the plaintiff here did not, when he found that his letter remained unanswered after a day or two, either cause another to be written begging a direct answer, or at once proceed to the court and resort to the remedy under the 145th section. Again, it certainly is an element in the case, not entirely to be disregarded, that it seems almost impossible to believe that these assignees could have intended to take this lease at a rent of not less than 600*l.* a year for a term of seven years, some four or five years of which had still to run. As soon as they had become assignees, a resolution was adopted to abandon the proceedings in bankruptcy, and at once to wind-up the bankrupt's affairs, and convert his estate into money; all they had to do therefore, before the bankruptcy and consequently their character and duties would be at an end, was to convert the effects into money, which could have been done within the space of a month, or six weeks at furthest. It seems impossible then that they could have contemplated taking to this lease under those circumstances. The plaintiff, too, is much in the same situation, for he had, upon sending in the distress in March, before the assignees were appointed, himself gone into possession of the premises under an arrangement, and so knew what the premises were, and what property and effects were on them, and why, as the case states, the assignees had gone into and remained in possession at all, namely, "for the purpose of realising the stock, fixtures, and furniture, and not otherwise." Could he then have possibly supposed that they were going to remain in possession, and that the not answering the letter of the 12th June testified their intention and determination to elect to become the assignees of the term? I think the plaintiff ought to have resorted to the course open to him under the statute, and that not having done so, and being fully aware of all the circumstances to which I have adverted, he was not justified in treating this as an election, and that, under the circumstances of this case, which ought to govern our decision, the facts stated do not amount to that *unequivocal* act of election that the law requires. But then it is said that the plaintiff is entitled to recover for use and occupation. Now, without doubt, it was held in *Goodwin* v. *Noble* that, although the assignees had not elected to take to the lease, yet the plaintiff was entitled to recover for use and occupation for the time the assignees had been in the actual possession of the premises. But there were some circumstances in that case—that is to say, there were some letters between the parties—from which possibly the court inferred an agreement constituting a tenancy. It may be so, and I hope that it was so, because, if it were not, I do not hesitate to say that the decision is contrary to the first princi- of the law, and cannot be maintained. The stances of the present case are that there is a lease under seal between the plaintiff, the lessor, and Robertson, the bankrupt, for seven years. We must assume, for this purpose, that that lease is in the bankrupt still—that the assignees have not elected to take to it, and have not become the assignees of it. They have been, say for three months, in possession, but does that give authority to the lessor to sue them for use and occupation? The lessor's tenant is the lessee, the bankrupt, and he alone is liable to the payment of the rent, unless there has been some collateral agreement between the lessor and the persons occupying, which would estop them from disputing that he was their landlord and they his tenants. The bankrupt is the only person liable under the lease to the payment of the rent to the lessor; and if the latter is entitled to recover in the action for use and occupation, he might recover the money against the assignees in this action for use and occupation, and over again against the bankrupt, the lessee liable under the covenant for payment of the rent during the period in question. Here again we must refer to the statute, which says that if the bankrupt's assignees elect to take the lease, the bankrupt shall not be liable to payment of rent from the time of his bankruptcy. If they take to the lease they are liable to the performance of all the covenants, but, as they do not elect to take it, the bankrupt still remains liable. Again, even if the assignees do not take to the lease, but expressly disclaim and reject it, if the bankrupt, within fourteen days of such disclaimer, surenders the lease to the lessor, he is no longer liable. But that has not taken place here. It is not stated that he has surrendered it, and if we are to draw inferences at all, we cannot infer that he has done so. Had he done so, it would have settled one point in this case; but the fact appears to be that the lease was not in his possession, so he had no power to surrender or do any other act in relation to it. It had been pledged by him for a debt, and therefore, not having availed himself of the provisions of the statute and surrendered the lease, he still remains liable to the rent. I am clearly of opinion that it is quite impossible, upon any principle of the law of England, that the lessor should be entitled to recover the same rent for the same premises and for the same period, under the covenant from his lessee, the bankrupt, and at the same time for use and occupation against the assignees. There is yet one more consideration to which I may also advert, though perhaps it is not necessary. I doubt, extremely, if the assignees *had* elected to take this lease, whether when it was discovered that instead of being in the bankrupt's possession, and so available or of any value or benefit to the estate, the lease itself had been pledged to a creditor, and was no longer under the bankrupt's control, or within their reach, they could not have at once repudiated the election, and set themselves free from the obligations of the covenants of the lease. I pronounce no opinion on that, however, because on the other points adverted to I am of opinion, though not without some doubt and difficulty, that no such *unequivocal* act has been done, testifying the election of the assignees to take the lease, as precluded them from disclaiming at the time they did so. I think, therefore, that the defendants are entitled to the judgment of the court; but as my learned brothers are of a contrary opinion, the judgment will be entered for the plaintiff.

Judgment for the plaintiff for a quarter's rent. (a)

Attorneys: *Cree* and *Last*, 13, Gray's-inn-square; *Reed*, *Phelps*, and *Sidgwick*, 3, Gresham-street, E.C.

(a) See now the B. A. 1869 (32 & 33 Vict. c. 171).

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CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, Nov. 13.

(Before Kelly, C. B., Martin, B., Blackburn, Lush and Brett, JJ.)

Reg *v.* Raudnitz.

Evidence—London Gazette—*Production.*

The mere production of a copy of the London Gazette *purporting to be printed by authority, containing an advertisement of adjudication of bankruptcy is sufficient proof of the adjudication of bankruptcy under the* 12 *&* 13 *Vict. c.* 106, *s.* 240.

Case reserved for the opinion of this court by the Recorder of the City of London.

At a session of the Central Criminal Court on the 19th Aug. 1869, Sidney Raudnitz was tried before me on an indictment charging him with obtaining goods on credit, within three months of adjudication of bankruptcy against him with intent to defraud.

To prove the adjudication of bankruptcy against him, there was tendered in evidence and admitted by me the annexed printed document purporting to be the *London Gazette*, and purporting to advertise the adjudication of bankruptcy. It does not upon its face purport to be printed by the Queen's printer.

Mr. Metcalfe, for the prisoner, objected that this document must be proved to be the *London Gazette* before it could be admitted as evidence of its contents or of the adjudication.

The prisoner was convicted, and there being no other evidence of the adjudication of bankruptcy, I reserved the question for the decision of the Court for the consideration of Crown Cases Reserved: Whether the above document was sufficiently proved to be the *London Gazette?*

If the court should be of opinion that the above evidence was insufficient, the conviction must be reversed.

The prisoner is in gaol awaiting judgment. See *R.* v. *Forsyth*, Rus. & Ry. 277 (*a*).

Russell Gurney.

Metcalfe for the prisoner. The evidence received was inadmissible. The objection to the reception of the evidence is based upon *Reg.* v. *Wallace*, 17 Ir. Com. Law Rep. 207, where the defendant was charged upon an indictment under the statute 11 Vict. c. 2, for the better prevention of crime and outrage in Ireland, for having a pistol and gunpowder within the proclaimed district of Shankhill, and a copy of the *Dublin Gazette* was tendered in evidence containing the proclamation of the district purporting to be printed and published at the *Dublin Gazette* Office, No. 87, A. street, by A. T. of, &c., and under the title were the words, "Published by authority," but it was held not to be evidence within the 11 Vict. c. 2, s. 21, which enacted that the production of the *Dublin Gazette*. purporting to be printed by the Queen's printers, containing the publication of any proclamation under the Act should be deemed and taken as conclusive evidence in all courts of justice in Ireland of all facts, &c. In that case there was nothing to show by what authority the paper was printed. So in this case all that appeared was a paper purporting to be the *London Gazette*. Surely that is not sufficient to let it in as evidence of the *London Gazette*. In *Rex* v. *Holt*, 5 T. R. 436, the *London Gazte* put in evidence purported to be printed by the King's printer. [Lush, J.—Sect. 240 of 12 & 13 Vict. c. 106, says that a copy of the *London Gazette*, and of any newspaper containing any such advertisement as by the Act directed, shall be evidence of any matter therein contained. The only question is, was this shown to be the *London Gazette?*] To show that it should have appeared to purport to be printed by the Queen's printer. [Brett, J.—If there is evidence on which the judge was reasonably satisfied that it was the *London Gazette*, was it not admissible?] More must be shown than the mere title *London Gazette*.

Giffard, Q. C. and *Besley*, for the prosecution, were not called upon to argue.

Kelly, C. B.—The conviction must be affirmed. In *Reg.* v. *Wallace*, the words of the statute which makes a copy of the *Dublin Gazette* evidence of the proclamation are, that the production of the *Dublin Gazette* purporting to be printed by the Queen's printers, containing the publication of any proclamation under the Act should be conclusive evidence of all such facts, &c., but there are no such words in sect. 240 of the Bankruptcy Act (12 & 13 Vict. c. 106) upon which the present question depends. *Reg.* v. *Wallace*, is in effect an authority against Mr. Metcalfe's contention, for the judges said if the paper had purported to be printed by the Queen's printers it would have been sufficient. The objection therefore fails, and the mere production of the paper purporting to be the *London Gazette*, and to be printed by authority, was sufficient proof of the adjudication of bankruptcy of the defendant.

The rest of the Court concurred.

Conviction affirmed.

(*a*) In *Rex* v. *Forsyth*, Rus. & Ry. 274, to prove notice in the *London Gazette* of issuing a commission of bankruptcy, a paper purporting to be the *Gazette* was put in but no evidence was given that it was bought at the office of the King's printer, nor any further evidence beyond the mere production. The judges seemed to think (*sic*) that the production of the *Gazette* would be sufficient without proof of its being bought of the *Gazette* printer, or where it came from.

CONSTANTINOPLE SUPREME CONSULAR COURT.

Dec. 16, 17, *and* 27, 1869.

(Before C. A. Cookson, Esq., Acting Judge.)

The Brothers *v.* The Fingal.

"Leaving port"—Tug lashed to vessel—Collision—Arrest of ship on voyage with cargo—Practice of the Consular Court—The law of England—Security for costs and damages of detention.

This court being constituted by sect. 41 *of the Order in Council of Nov.* 20, 1864, *a court of vice-admiralty, the only procedure which can be followed in it is that of the High Court of Admiralty in England.*

In a suit for damage by collision, a ship was arrested which was in the course of a voyage with a cargo of corn on board:

Held that the ship was not protected from the effects of its own wrong because it had cargo on board, and that as the law of England gave the remedy of arrest to the plaintiff, the registrar of the court had no discretionary power to refuse the warrant, but

Held, in opposition to the usual practice of the High Court of Admiralty in England, that the plaintiff must give security for the defendant's costs and the damages arising from detention.

The term "leaving port" is to be taken to include the whole time during which preparations were being made for leaving port.

A tug being lashed on to a ship is to be taken as part of

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the ship; and a defence which is open to the ship is also open to the tug.

This was an action for damages through collision, laid at 475*l.*, and brought by the *Brothers*, of which paddle-wheel steamtug Capt. James Kinnach was owner, against the *Fingal* (s.s.), of Leith, Captain R. Baines, under Admiralty arrest in the port, and bound to Barcelona, with a cargo of grain from the Danube.

The alleged collision occurred in the Horn about 4 p.m. on the 17th of November last, the *Brothers*, with fires banked up, being at the moment lashed alongside the *Mizpah*, near the Galata Custom-house, with the two steamers *Malvina* and *Fingal* at anchor ahead of her, and the *Mendoza* astern. An official survey was held on the *Brothers*, and her damages ascertained and reported upon The defendant refused to pay this sum, denying that his was the vessel which occasioned the accident.

The *Fingal* having been arrested, a motion was made by *Clifton*, as advocate for the defendant, to supersede the arrest, which was opposed by *Knight*, for the plaintiff.

His HONOUR:—This is a motion for a *supersedeas* of the arrest of the *Fingal*, which took place under the following circumstances: It appears from the affidavit of the master that on the 17th November last, while the steamtug the *Brothers* was lying in the harbour off Constantinople, a steamer which was leaving the port came into collision with her, from the effects of which she, the *Brothers*, received considerable damage. On the following day the master made an application to this court for a survey, in which he stated that the vessel which caused the damage was the *Fingal*. In consequence of this application a survey was ordered (at which the late agents of the *Fingal* declined to be present), and on this a report was made estimating the damage to the *Brothers* at a sum from 200*l.* to 250*l.*, and the time required for putting her in working order at one month. On the 30th Nov. the *Fingal* being still absent, the owner and master of the *Brothers* filed an affidavit, in which he swore that the ship which ran into his was the *Fingal*, and stated his damages at 475*l.*, and at the same time, or shortly afterwards, he made a request to this consulate that the papers of the *Fingal* on her return to Constantinople might be detained for a time sufficient to allow of an arrangement, if possible, being made between the parties. On the 13th December the *Fingal* arrived in Constantinople, and on the same day—the hope of arranging the case having proved illusory, from the fact that the master of the *Fingal* denied her identity with the vessel which came into collision with the *Brothers*—a petition *in rem* was filed in this court on behalf of the master of the *Brothers*, praying for the arrest of the *Fingal*, and on the following day, 14th Dec., the warrant of arrest was executed by the marshal of the court. Before this warrant was granted, according to the general practice of this court, security was required from the *Brothers* for the damage to the *Fingal* for detention, which was perfected on the 15th Dec., by a bond for 100*l.*, the sum agreed upon between the parties. The present motion on the part of the *Fingal* is, that the arrest be superseded, and that the *Brothers* be decreed to pay damages for the detention of the *Fingal*. The grounds on which this motion was supported are, that the *Fingal* is chartered from Galatz to Barcelona, and laden with grain to the value of 8500*l.*, and that it is contrary to the practice of this court and of the consular courts of the Levant to arrest a vessel in cargo in the course of her voyage, or anywhere except at the port of discharge. This rule the learned counsel for the *Fingal* stated to be one which has always been recognised in the consular court of the Levant; and to show this he referred to the instructions addressed to consuls in the Levant by the judge of this court in Nov. 1860, where, at page 7, it is said: "It is, moreover, a rule of the Supreme Consular Court never to stop a ship under charter while prosecuting a voyage;" and this principle, he contended, has been invariably acted upon since, and become a recognised rule of this court. Now, an argument of this kind may admit of three answers:—First. It may be shown that the caution as to not stopping ships in cargo never was intended to apply to such an arrest as that under this suit. Secondly. That, in fact, ships in cargo have been arrested in suits of the same nature as this. Thirdly. That no such rule, if it existed, would be binding on the court. And, in my opinion, on all these grounds, the argument for the motion before me can be shown to be defective. In the first place, as to the paragraph in the instructions issued while this court was presided over by Sir E. Hornby, it is quite clear to my mind that it was never intended to apply to an arrest which, like this, is a regular step in a suit of damage *in rem* in a vice-admiralty court. The whole section from page 4 to page 8 refers to exceptional cases, in which a court, on the application of a plaintiff, exercised a discretionary power of granting an order affecting the interest of a defendant in his absence. It is true that, as Mr. Clifton ingeniously argued against the objection of Mr. Knight, in the case of *The Laconia*, 33 L. J. N. S. 11 Ad.; 9 L. T. Rep. N.S. 87, establishes that the Order in Council of the 9th Jan., 1863, which first expressly constituted this court as one of Vice-Admiralty, "did not create a jurisdiction *in rem*, but only expressed more distinctly and with greater detail the authority already conferred by former orders." But still, at the time when Sir E. Hornby issued these instructions on which Mr. Clifton relies, it appears from the same case of the *Laconia* that even this court expressly disclaimed being an admiralty court, and, therefore the practice followed in the consular courts generally could not have been that of the High Court of Admiralty, and he cannot be supposed to have had in view any such case as an arrest under a warrant in a suit when he laid down the rule quoted by Mr. Clifton. Secondly. In point of fact I have discovered several instances in which a ship in cargo has been arrested by the marshal of this court. I will only now mention the case of the *Hebe*, arrested in a case of salvage on the 12th Feb. 1869, in cargo, under the warrant of this court. But, in the third place, I go further, and I say that even if it had been the practice of this court to refuse the arrest of vessels in cargo, I cannot (with every possible respect for those who have presided in this court) see how such a practice would establish a precedent, in the teeth of the plain instructions of sect. 7 of the Order in Council of Nov. 20, 1864, which makes it obligatory on this court to follow the procedure of the courts at home in all cases, where it is not especially superseded by the other provisions of the Order in Council or the rules framed under it. Now this being constituted, by sect. 41 of the Order in Council of Nov. 20, 1864, a court of vice-admiralty, the only procedure which can be followed in it is that of the High Court of Admiralty in England; and in that court an arrest of a ship is the most convenient and ordinary, though not the only, means of commencing a suit of damages for collision, and this arrest of the ship does as a matter of fact in many cases necessitate the detention of the cargo. Nor can I find any instance of such an objection as that now made being ever raised in the English courts. But an arrest and such an incidental detention are two quite distinct things. It is indeed clear from many cases (among which I need only cite *The Flora*,

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L. Rep. 2 A. & E. 45; 14 L. T. Rep. N. S. 192) that, according to English law, the cargo, not having in any way caused the collision, cannot be arrested except as security for freight already earned; but it by no means follows from this that the ship is protected from the effects of its own wrong because it has cargo on board. For any breach of this contract of affreightment or damage arising therefrom the owners of the cargo have their remedy against the shipowner, and the ultimate loss falls on the party who, in equity as well as in law, is responsible. For this reason, while I attach much weight to Mr. Clifton's arguments as to the possible loss to the owners or consignees of the cargo by the detention of the ship, I do not feel that it is possible for me to accede to his request; and the law of England giving this remedy to the plaintiff, the registrar of this court had, in my opinion, no discretionary power to refuse the warrant of arrest. Nor do I think that the court can supersede such an arrest, when once legally made, on the ground that this initiative step in the practice of the courts in England has not been usually taken here. It is not necessary for me to defend the policy of procedure objected to, though I think it follows logically from the peculiar nature of an action *in rem*, in which the ship itself is regarded as a defendant, and responsible for all the consequences of a collision. In fact, to make the exception contended for would, in the majority of cases, render the jurisdiction in admiralty of this court useless and nugatory, and so directly annul the intention of the Order in Council. The ship arrested can, of course, be arrested on a *caveat*, or a bail bond perfected according to a admiralty practice, but the motion for the *supersedeas* of the arrest must be now dismissed, though without costs.

Clifton moved that security for defendant's costs and damages, at 100*l.* per diem, should be given by the plaintiff; and he cited the case of the *Hebe*, in which the Supreme Consular Court had ordered such security about a year ago.

Knight said 100*l.* security for costs had been given already, and objected to any further security being required. He relied upon the practice of the High Court of Admiralty in England, the practice of which, he contended, should be now strictly followed by the Vice-Admiralty Court of Constantinople. The security of 100*l.* per diem, asked by Mr. Clifton, was far too much; as to the security for damages, it is always in law confined to an estimate only of the loss by additional wages and provisioning (Coote, 87, 2nd edit.); and not until the final decree in favour of a defendant is obtained will the court award demurrage for detention: (*Fortitude*, 2 Dods. 72.) In the case of the *Peri*, 1 Lush, 544; 32 L. J., N. S., 46, Adm., it was decided that "security for damages arising, and to arise, out of the detention of a defendant's vessel arrested and unbailed, will not be ordered." To give security at all, there must be a special reason (*Minerva*, 1 W. Rob. 72), such as being out of the jurisdiction.

The Sophie. 1 W. Rob. 369;
The Seringapatam, 5 No. Ca. 66;
The Frans et Elize, Lush, 377;
The Volant, Br. & L. 321.

But Capt. Kinnach resided within the jurisdiction, and was a resident for nearly twenty years last past.

His HONOUR.—Mr. Knight's argument would have great weight in the Admiralty Court of London; but, on examining the dossiers in this court —that of the *Hebe* for instance—I find security has been, and therefore should be, given. I shall call for it here.

Knight.—I object to 100*l.* per diem as too high.

His HONOUR.—I think that sum should, at least, be verified.

Dec. 27.—*Knight*, in opening the case, said that the plaintiff had stopped the *Fingal* pending the decision of his claim, but it should be remembered that he had stopped the vessel and not its cargo. In admiralty, cargo laden on board a vessel at the time of a collision was in no case liable to be sued for the damage: (*The Victor*, 1 Lush. 72.) The *Fingal* might transship her cargo to-day or to-morrow, if she liked. The plaintiff had given security for eventualities, security not required in the admiralty at home, but by custom security had been hitherto given here in Constantinople, and this had been followed in the present case. As to this collision, the plaintiff's case was that the *Fingal* was entirely in fault, and that, therefore, he was entitled to an entire compensation from the *Fingal*. What was entire compensation? It was compensation for the wrong, and for the loss, direct and consequential, which might have resulted from it: (Shee's Abbott, 11th edit., p. 614.) It was true that the defendants, in any case, might show that a collision was an inevitable accident, which meant, in law, one that could not possibly be prevented by the exercise of ordinary care, caution, or maritime skill: (*The Virgil*, 2 W. Rob. 205.) If the present collision might have been, by care and caution, avoided by the *Fingal*, the owner of the *Brothers* was entitled to a *restitutio in integrum*, which *restitutio* included, first, a complete repair (Coote, 2nd edit., p. 82) of all damage done, though the tug should be thereby rendered more valuable than before the collision:

The Pactolus, Swab. 173;
The Gaselle, 3 No. Cas. 79;

Secondly, in addition to the repairs rendered necessary by the damage, compensation should include all loss from the ship's detention resulting from the collision:

The Countess of Durham, 9 Law Mag. 279;
The Pensher, Swab. 1;
The Linda, Swab. 306.

Thirdly, in estimating the damage the *Brothers* had received, the loss through the collision of the benefit of any agreements—for towing, for instance—must legally be taken into account:

The Betsey and The Yorkshireman, 2 Hagg. 28, 30;
The Matchless, 10 Jur. 1017.

Fourthly, any expenses in the way of dues or otherwise which had been incurred and paid through and by reason of the collision were claimable: (Coote's Admiralty Practice 1868, 85, 86.) Such was incidental towage, for which we now claim 6*l.*, paid to Captain Ridley Whale. Another additional incident of damage was the wages and provisioning: (Coote, 87.) And, notwithstanding a judgment *in rem* in our favour, or even the sale of the *Fingal* under it, an action for the same cause may be maintained at law, if the damage actually done exceeds any amount that may be received by us as plaintiffs under the present proceedings in Admiralty:

The Ann and Mary, 2 Wm. Rob. 190.

Clifton having been heard for the defendant, and *Knight* in reply,

The COURT delivered the following judgment:—This is a case of collision, in which the plaintiff's petition charges that, on the 17th Nov., as the *Fingal* was leaving port, she came violently into collision with the steamtug *Brothers*, and did damage, for which compensation is claimed. It appears from the evidence that about two o'clock in the afternoon of the 17th Nov. the *Brothers* took up a position near the harbour office, lashed alongside of the *Mizpah*, and having other vessels near her, the *Mendoza* astern of her, and the *Malvina* a-head, and the *Fingal*, the defendants' steamer, on the port

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bow of the *Mizpah*, at a distance, according to the original place assigned to her by the captain of the port, of about a length and a half or two lengths of the *Fingal*. The wind was from the S.S.W., and a current was running after the ordinary rate of a Bosphorus current. About ten minutes after taking this position, the officer in command of the *Brothers* went ashore, and, later in the day, after the departure of the *Fingal*, he received notice that a collision had occurred. He went on board with the engineer and examined the vessel, and he found that both paddle-boxes had been injured; the port paddle-box had been driven in, and the starboard paddle-box had been driven out. [Having examined the evidence on both sides, the COURT concluded]:—We are of opinion, therefore, that the colliding vessel certainly was the *Fingal*. As to the question of identity we have no doubt whatever. Having delivered our joint opinion on that, it only remains for me to consider what is the weight to be attached to the legal objections which are raised by the defendants. The defendants objected, in the first place, that the petition alleged that this collision took place when the vessel was leaving the port, and contended, and with some force, that the evidence showed that if the collision did occur, it did not occur when the vessel was steaming out of port. On that point I must give my opinion that inasmuch as the terms of the petition were sufficiently loose—I may say—to allow the defendants an opportunity of disclosing the whole facts and of considering what their defence ought to be, the term "leaving the port" may be fairly extended to the whole time during which preparations were being made for leaving the port. There only remains for us to consider whether, under the circumstances of the position of the two vessels, there is any ground for the defence that the *Brothers* contributed to or was in any way the cause of this accident. We are of opinion that the position of the *Brothers*, lashed on to the *Mizpah*, being one which she might be considered to have rightly taken up, and that we may almost say that in that position she formed, as it were, a part of the *Mizpah*—that a tug lashed as she was to a vessel was very little different to being a large boat belonging to it, and that, therefore, any defence which would be open to the *Mizpah* would be open to the *Brothers*, and inasmuch as we believe that this collision was caused in consequence of some want of proper precaution on the part of the officers of the *Fingal* at the time when they made their preparations or when they were about to leave the port, the judgment of the court is that the *Fingal* alone is responsible, and she must be condemned in the amount of the damage, which will be settled in the usual way before the registrar.

Judgment accordingly for the plaintiff; damages to be assessed before the registrar.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

Wednesday, Jan. 5, 1870.

(Before the CHIEF JUDGE.)

Re A TRUST-DEED.

Trust-deed—Registration, right to—316th Gen. Rule Jan. 1, 1870.

A deed of composition executed by the debtor two days before the 1st Jan. 1870, the day upon which the Bankruptcy Act 1869 came into operation, but in respect of which no application had been made under the 3rd section of the Bankruptcy Amendment Act 1868 to enlarge the time for registration, is to be regarded "as in course of registration," within the meaning of the 316th General Rule of Jan. 1, 1870, and as such entitled to be registered.

This was an application on behalf of the debtor, *ex parte*, under the 20th section of the Bankruptcy Repeal and Insolvent Court Act 1869, and the 316th General Rule of Jan 1, 1870, for leave to register a deed of composition executed by the debtor on the 30th Dec. last, but not yet lodged for registration, upon the ground that the twenty-eight days allowed by the 192nd section of the Bankruptcy Act 1861 had not expired, and that the registrar at the registration office in Quality-court had refused to receive the deed without the order of the court.

By the 20th section of the Bankruptcy Repeal Act 1869, by which the Bankruptcy Act 1861 and the Bankruptcy Amendment Act 1868 are repealed, it is enacted that "this repeal shall not . . . interfere with the prosecution or affect the course of any legal proceeding pending in bankruptcy or otherwise under any such enactment before the commencement of this Act; but, subject to the provisions of the Bankruptcy Act 1869, and the Debtors' Act 1869, such proceedings shall be prosecuted as if this Act had not passed."

By sect. 3 of the Bankruptcy Amendment Act 1868, it is provided that, "notwithstanding anything in the Bankruptcy Act 1861, the time for the production and leaving of any such deed or instrument at the office of the chief registrar, as therein provided shall be twenty-eight days from the day of the execution thereof by the debtor, or such further time as the court may allow."

By the 316th General Rule of Jan. 1, 1870, it is provided that "the Chief Judge of the London Bankruptcy Court shall have and exercise all the powers, jurisdictions, and authorities of the old London Bankruptcy Court, and the judges of the local bankruptcy courts shall have and exercise all the powers, jurisdictions, and authorities of any district court of bankruptcy, or of any County Court, with respect to any trust-deed or deed of arrangement, composition, or inspectorship executed by a debtor, whether registered or in course of registration, on or before the 31st Dec. 1869, in the same manner as he or they may exercise jurisdiction, powers, and authorities with respect to any other legal proceedings pending on that day under any of the enactments repealed by the Bankruptcy Repeal and Insolvent Courts Act 1869, as provided by sect. 20 of such Act."

By the 317th Rule, "every such deed in respect of which an order has been made extending the time for registering the same to a date subsequent to the 31st Dec. 1869, shall be deemed to have been in course of registration within the meaning of the last rule."

By the 318th Rule, "the chief registrar of the Old London Bankruptcy Court shall complete the registration of any such last-mentioned deed in manner required by the Bankruptcy Act 1861, and the Bankruptcy Amendment Act 1868, and shall retain and exercise all necessary authority for that purpose."

Reed appeared in support of the application.—He referred to the 316th General Rule of Jan. 1, 1870, and contended that the words contained in the order, "whether registered or in course of registration" on or before the 31st Dec. 1869, must be read as complete or incomplete. He also referred to the case of *Wishart* v. *Fowler*, 9 L. T. Rep. N. S. 608, Q. B.

The CHIEF JUDGE.—I think you have undoubtedly the right to have the deed registered. The great importance of the case no one can doubt, considering the number of deeds that might have been inchoate when the Act passed. But I think the Act

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is free from all doubt and ambiguity upon the subject. The Bankruptcy Amendment Act 1868 is an Act of Parliament relating to proceedings in bankruptcy. No doubt it particularly deals with deeds only, but the recital is that it is expedient to amend the Bankruptcy Act 1861, which provides for the registration of deeds, and the 3rd section of that Act gives the court power to extend the time for twenty-eight days, or for such further time as the court may allow. The repealing bankruptcy clause of the Bankruptcy Repeal and Insolvent Court Act 1869, which repeals the Act of 1868, and all the others mentioned in the schedule, provides that this rule shall not interfere with the prosecution, or affect the course of any legal proceeding pending in bankruptcy. The deed, in my opinion, is a proceeding in bankruptcy, and I think that the Act of 1868, for all the purposes of the 3rd section of that Act, remains in full force as to any deed that was executed before that repeal takes effect, and the 316th Rule defines and points out the way in which the power of the court shall be exercised with respect to any trust-deed executed by a debtor, whether registered or in course of registration, in the same manner that its jurisdiction should be exercised with respect to any other legal proceeding on that day pending. Then a difficulty seems to be suggested by the 317th Rule, but I think that must be read as only introduced for greater clearness and explicitness so as to render it impossible that there should be any doubt that a deed for which the time had been extended should be deemed to be in the course of registration. It does explain that a deed for which the time has been extended shall be held to be in the course of registration; but it does not exclude from the operation of the Rule deeds in which no extension had taken place, but which were in every fair sense, in the course of registration. I think, therefore, it must be registered.

Ordered accordingly.

Solicitors: *Appleby, Wright,* and *Crowther.*

Monday, Jan. 10.

Ex parte BENNOCK; *Re* A PETITION FOR ADJUDICATION.

Practice—Petition for adjudication—Form of in schedule to Form No. 10—*Gen. Rules* 29 *and* 32.

In the petition for adjudication, according to the form specified in the schedule of forms annexed to the General Rules of Jan. 1, 1870, *No.* 1, *the party against whom the adjudication is sought must be described at length, as of, &c., adding his occupation.*

It is no objection to the validity of a petition that the affidavit filed with the petition is not made by a person who can depose to the facts as within his own knowledge, under the 29*th General Rule, but it is sufficient if it be made by the petitioning creditor, and the petition be proceeded with under the* 32*nd rule.*

Phelps (solicitor) applied for leave to file a creditor's petition, the officer in the Chief Registrar's office having refused to file it upon the ground that although the petition was in the form specified in Form No. 10, annexed to the General Rules of Jan. 1, 1870, yet he was not so described as to enable the Chief Registrar to comply with the requirements of the 240th General Rule, and to fill up the description in the petition book, to be kept by the Chief Registrar, as in Form No. 102.

The petition stated that "A. B. carried on business within the district of this court, that is to say, at , in the city of London," following the form specified in Form No. 10; an allegation was also added in the body of petition that the debtor was a trader.

The case came before one of the registrars, but by consent and by leave it was submitted for the decision of the Chief Judge.

The CHIEF JUDGE decided that it was necessary to insert the particulars of the debtor's trade, so as to enable the Chief Registrar to insert a proper description in the petition book.

Leave was for that purpose given to amend the petition by inserting such particulars under the 27th General Rule.

A further objection had been raised by the officer in the Chief Registrar's office to the filing of the petition, upon the ground that, although the petitioning creditor had verified all the statements contained in the petition that were "within his own knowledge as true," in the Form No. 11 to the General Rules annexed, yet he had not, in accordance with the 29th General Order filed any affidavit made by any person who could depose to such statements as were not within the petitioning creditor's knowledge being true. It was submitted that it was impossible to obtain any such affidavit, as the persons able to depose thereto as required were unwilling to do so, and that it would be requisite to subpœna them to give evidence. This objection was waived at the suggestion of the court, and it was held to be sufficient to file the petition and affidavit of the petitioning creditor, and to proceed under the 32nd General Order.

Solicitors, *Reed, Phelps,* and *Sidgwick.*

Wednesday, Jan. 12.

Re A DEBTOR'S SUMMONS.

*Practice—Debtor's summons—Dismissal of—Notice of hearing—*22*nd Gen. Rule of Jan.* 1, 1870.

Three clear days' notice, pursuant to the 23*rd General Rule of Jan.* 1, 1870, *of an application by the debtor for the dismissal of a debtor's summons upon the ground that the debt is not due is sufficient.*

It is of importance that no unnecessary delay should be placed in the way of the hearing of a debtor's summons.

An application was made *ex parte* under the following circumstances: On the 3rd Jan. a debtor's summons was granted under the 17th General Rule, and in the Form No. 4 thereto annexed upon the application of a creditor. The summons was duly served upon the debtor the same day. On the 10th the debtor appeared before the registrar and filed an affidavit pursuant to the 22nd General Rule in the Form No. 8 in the schedule annexed disputing the debt. The registrar thereupon appointed the 24th for the hearing of an application by the debtor for the dismissal of the summons, and the point was whether an early day should not be fixed if the business of the court would admit of it.

Bagley, for the creditor, contended that under the 23rd General Rule it was necessary only to give three days' notice of the day being fixed for the hearing of the application.

The CHIEF JUDGE decided that as it was most important that no delay should be placed in the way of a petitioning creditor, and as the 23rd General Rule specifies three days as the necessary time for notice to be given in all cases, as early a day as possible should be appointed after the lapse of three days as the business of the court would allow, but his Lordship expressed an opinion that the time of notice should be three clear days.

Solicitors, *Parker, Lee,* and *Haddock*

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Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Friday, Nov. 12.

Re THE JOINT-STOCK DISCOUNT COMPANY (LIMITED); *Ex parte* THE WARRANT FINANCE COMPANY (LIMITED).

Company—Winding-up—Bills of exchange—Double proof against drawers and indorsees—Winding-up order—Satisfaction of debt up to—Interest subsequently.

The W. Company held bills of exchange drawn upon and accepted by the C. Company, and indorsed by the J. S. D. Company. These two last mentioned companies went into liquidation, and the W. Company proved against them for the amount of principal and interest due at the commencement of the windings-up, and received from the one company 4s. 6d., and from the other 15s. 6d. in the pound.

The Master of the Rolls having decided, on the authority of Re The Humber Iron Works Company, 20 *L. T. Rep. N. S.* 859, *that the W. Company were excluded from the further dividends for the interest which accrued after the winding-up order, until the other creditors of the J. S. D. Company had been paid in full, on appeal,*

Giffard, L. J. reversed the decision, being of opinion that the case was not governed by the authority mentioned, and that the rule in bankruptcy applied.

This was an appeal by the Warrant Finance Company (Limited) against an order of the Master of the Rolls, whereby his Lordship decided that the appellants were not entitled to participate in any further dividends of the Joint-Stock Discount Company (Limited), now in course of winding-up, until all the other creditors of that company had been paid 20s. in the pound upon the amount of the debts which they had proved.

The circumstances are sufficiently stated in the report of the hearing at the Rolls (21 L. T. Rep. N. S. 345).

Sir *Richard Baggallay*, Q. C., *Eddis*, Q. C. and *Langley*, supported the appeal, relying on

Kellock's Case, Re Barned's Banking Company, L. Rep. 3 Ch. App. 769; 18 L. T. Rep. N. S. 671;
Ex parte Waring, 19 Ves. 345;
Ex parte Rushforth, 10 Ves. 109;
Bower v. *Marris*, Cr. & Ph. 351.

Jessel, Q. C. and *Locock Webb* supported the decision of the Master of the Rolls, and contended that the case was governed by *Re The Humber Iron Works Company, Ex parte The Warrant Finance Company*, 20 L. T. Rep. N. S. 859.

In order that the court might be accurately informed as to the practice of the Court of Bankruptcy in similar circumstances, the following certificate from Mr. Graham, the official assignee in bankruptcy, was produced: "I, George John Graham, certify as follows: I have for thirty-eight years and upwards been an official assignee, and am now the senior official assignee of the Court of Bankruptcy in London. I have never known an instance of an application in bankruptcy to expunge a proof upon a bill of exchange, on the ground that the creditor had been fully paid his full claim upon the bill for principal and all interest, whether accrued before or after the bankruptcy. The practice in bankruptcy is when the estate of a bankrupt acceptor having paid to the holder 4s. 6d. in the pound, and the estate of the bankrupt drawer having paid to the holder 15s. 6d. in the pound, that the holder retains his proof on the two estates until the first of them pays the full sum that his interest in the said bill amounts to. Supposing that the drawer's estate is the first to pay the full amount, the holder remains trustee for all future dividends for the assignees of the drawer, but what is generally done is to hand the said bill to the drawer's assignees, with orders from the holder directed to the official assignee of the acceptor's estate authorising him to pay all the future dividends to the official assignee of the drawer. Thus it remains unless some creditor of the acceptor's estate shows to the commissioner ground for concluding that the drawer's estate has no claim upon the acceptor's."

Without calling for a reply,

Lord Justice GIFFARD said:—I am clearly of opinion that this case is not governed by the *Humber Iron Works Company's* case, and that the order of the Master of the Rolls must therefore be discharged. It certainly is in principle, though not in form, like *Kellock's* case—the other estate being equivalent to having a separate security, and the rule in bankruptcy, not only as appears from the certificate of the official assignee, but from what one has understood the practice to be, is quite clear, certain and definite, and the only ground on which the argument to the contrary could be put is the ground which Mr. Jessel has urged, namely, that there has been appropriation. But that is a mistake, for there has been none. There has been a rule made and adopted, because in point of fact it is a just and proper rule for the distribution of assets under the particular bankruptcy on the particular winding-up, but that rule is not meant at all to interfere with the rights of the creditor if he can get them from other sources combined, to bring together from all these sources he can get, and retain from all those sources everything that he can until he is paid not only his principal, but all his interest also—indeed, till the debt is entirely satisfied.

The order will therefore be discharged, and I suppose that the costs of both parties in the court below and here will come out of the estate.

Solicitors for the official liquidator, *Lawrance, Plews*, and *Boyer*.

Solicitors for the official liquidator of the Warrant Finance Company, *Flux, Argles*, and *Rawlins*.

Nov. 12 *and* 19.

(Before Lord Justice GIFFARD.)

Re THE HUMBER IRON WORKS COMPANY (LIMITED); *Ex parte* THE WARRANT FINANCE COMPANY (LIMITED).

Winding-up—Appeal from chambers—Practice—Creditor with security—Security on the estate of the debtor—Proof—Principal—Subsequent dividend—Interest.

When a case has been disposed of in chambers by the judge in person, an appeal from his order will not in future be heard unless upon a certificate from him that the case has been argued before him so fully that he does not wish to have it re-argued before himself in court.

The H. company being indebted in the sum of 23,000l. to the W. company, assigned as a security (inter alia) all calls then in arrear to trustees, who were to receive the same, and, if default were made in payment of the debt, were to pay what they might so receive in or towards satisfaction of the debt, or the unpaid part thereof, and to pay the surplus to the H. company. And it was further agreed that in the case of default in payment of the debt, or any part thereof, the H.

company should pay interest at the rate of 20 per cent. on the debt, or the unpaid part thereof. The H. company was ordered to be wound-up, and by means of receipts and payments of the trustees, and of the dividends declared in the liquidation, the W. company received a sum exceeding the principal of their debt, which excess the Master of the Rolls ordered the W. company to refund, but on appeal from that order, it was

Held, that, although upon the construction of the assignment the calls were assigned to the trustees upon trust to pay the principal only, yet that in accordance with Re The Joint-Stock Discount Company, *ante p. 626, the W. Company, notwithstanding that they had received in full the principal of the debt due at the commencement of the winding-up, were entitled to participate in all dividends which might be declared by the H. Company, until they had received principal and interest to the time of payment.*

The fact that the security is on the estate itself, against which the proof is made, is immaterial.

This was an appeal by the Warrant Finance Company (Limited) against a decision of the Master of the Rolls in person in chambers, that the appellants must refund to the official liquidator of the Humber Ironworks Company (Limited), which is being wound-up, a sum of 1195*l.* 8*s.* 10*d.*, being the amount by which dividends paid to them exceeded the principal of their debt, although, even allowing them to retain the whole amount paid, the amount due for principal and interest was not satisfied.

Upon the case being called on, and it being represented to the Lord Justice that the matter had been so fully argued by counsel in chambers that the Master of the Rolls was unwilling to allow it to be re-argued before him in court,

Lord Justice GIFFARD consented to hear the case, but said that he must make it a rule that when matters were to be brought before the Court of Appeal direct from chambers, the judge must certify that it had been so fully argued there before himself that he did not wish to have it again argued in court.

The hearing of the appeal was then proceeded with, and the following were the circumstances of the case —

In Dec. 1865 the Warrant Finance Company accepted for the Humber Iron Works Company bills for an aggregate amount of 25,000*l.*, which was secured by three promissory notes for that amount of the latter company, by a debenture bond of that company for 25,000*l.*, and by a document assigning to trustees for the Warrant Finance Company certain arrears of calls due on the shares constituting the capital of the Humber Iron Works Company.

By an agreement dated the 22nd Dec. 1865, made between the Humber Iron Works Company of the first part, the Warrant Finance Company of the second part, James Alexander Mann of the third part, and William Knapp Henderson of the fourth part (Mr. Mann and Mr. Henderson being the trustees of the above-mentioned assignment), after reciting the loan and the securities given for the same, it was declared between and by the parties thereto, and especially the Humber Iron Works Company thereby agreed and declared that they the said Humber Iron Works Company should pay to the credit of the said trustees all moneys then already received or thereafter to be received on account of calls in arrear, and that such trustees should stand possessed of such moneys upon trust, in the event of default being made by the Humber Iron Works Company in payment of the 25,000*l.* on the appointed day, or any part thereof, to pay the arrears of calls which should have been so paid in to their account to the Warrant Finance Company in or towards satisfaction of the moneys so remaining unpaid, and to pay over any surplus to the Humber Iron Works Company. And it was also agreed and declared that in case of default in such payment by the said Humber Iron Works Company of the sum of 25,000*l.*, or any part thereof, interest at the rate of 20 per cent. per annum should be paid on the said 25,000*l.*, or the unpaid part thereof.

In Feb. 1866 resolutions were passed and confirmed for the voluntary winding-up of the Humber Iron Works Company, and on the 13th March an order was made for winding-up that company by the court.

Amongst the claims which were brought in under the winding-up was one by the Warrant Finance Company for 27,583*l.* 8*s.* 6*d.*, being the amount of the loan, together with interest at 20 per cent. per annum, and this amount was duly certified by the chief clerk, after deducting the sum of 854*l.* 10*s.* 1*d.*, which had been, previously to the certificate, received by the trustees under the assignment in respect of arrears of calls, and by them handed over to the Warrant Finance Company. Subsequently, and before the 19th Jan. 1869, a further sum of 10,250*l.* was handed over to them in respect of arrears of calls, and the official liquidator of the Humber Iron Works Company paid to the creditors dividends on their debts, namely, early in 1867 4*s.* in the pound, later in the same year a further 2*s.* 6*d.* in the pound, and later a further 6*s.* in the pound—in all 12*s.* 6*d.* in the pound. By these payments the whole of the principal of the debt was paid off, together with a further sum in excess of that principal of 1195*l.* 8*s.* 10*d.*, and by the order appealed from this last-mentioned sum was ordered to be repaid to the official liquidator of the Humber Iron Works Company, the Master of the Rolls being of opinion that the security covered the principal only of the debt, and not the interest.

From that order the official liquidator appealed.

Sir *Richard Baggallay*, Q. C., *Eddis*, Q. C., and *Langley* supported the appeal.

Southgate, Q. C. and *Wickens* supported his Lordship's order.

The authorities referred to were:

Re the Humber Iron Works Company, 20 L. T. Rep. N. S. 859;
Re The Joint Stock Discount Company; Ex parte The Warrant Finance Company, 21 L. T. Rep. N. S. 626;
Re the Xeres Wine Shipping Company; Ex parte the Alliance Bank, L. Rep. 3 Ch. App. 769; 18 L. T. Rep. N. S. 671;
Ashwell v. *Staunton*, 30 Beav. 52;
Bower v. *Marris*, Cr. & Ph. 351.

At the conclusion of the appellant's argument,

Lord Justice GIFFARD said that he was of opinion that the appropriation question was conclusively in the respondent's favour, but that if his counsel desired it, he would hear him as to the construction to be put on the agreement.

Sir *R. Baggallay*, Q. C. thought it unnecessary to trouble his Lordship,

Lord Justice GIFFARD said:—I quite agree with the Master of the Rolls in this case as to the construction he has put upon the agreement, namely, that it really is an assignment of the principal sum to two trustees, upon trust to pay a certain sum of money, and not upon trust to pay a principal sum of money and interest, and therefore those rules which apply when you come into court to redeem a mortgage, have no application here, and you must take the assignment in its strict form. But I do

not think that is conclusive on this question; on the contrary I think this case is concluded entirely by the case I decided the other day (*Re The Joint-Stock Discount Company; The Warrant Finance Company's case*) which I decided in accordance with the well known rule in bankruptcy, and which has been acted on for many years. I take that rule to be very simple. You prove in bankruptcy (and you prove in the same way in a winding-up), for whatever the debt may be up to a particular date. But that is for the purpose of convenience in the administration of the winding-up, and it is not to affect any other rights the parties may have, or to amount to an appropriation of the dividends in any shape or form. The result of that is, as in many cases you may have two, three, or four estates to go against, you prove against each of those two, three, or four estates, for what is due up to the date of the winding-up, but you may take, after proof, from each of those estates every single sixpence you can get, until the debt is extinguished in the proper sense of the term. That is the rule which has been adopted in bankruptcy, and which has been acted upon for a series of years. The whole notion of proving up to a particular date is, in fact, more or less, one can hardly call it a rule of principle, but it is at least a rule of convenience, and a rule which must be taken now to be the law. Applying those rules to this case, I can see no distinction whatever. This case stands exactly as the case would have been in bankruptcy, provided there had been proof against the joint estate, and the security had been on the separate estate. In winding-up it makes no difference that the security is on the estate against which the proof is made. That being so, although the proof in terms is in respect of principal, that does not amount to any appropriation at all, or preclude the party who has proved from dealing with that proof so as in point of fact as to be a sum which can be appropriated for the payment of interest so long as interest is due. That being so this order must be discharged.

The official liquidator to have his costs of the appeal out of the estate.

Solicitors for the Warrant Finance Company, *Flux, Argles,* and *Rawlins.*

Solicitors for the official liquidator of the Humber Iron Works Company, *Davidson, Carr,* and *Bannister.*

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Wednesday, Dec. 8.

FENWICK *v.* BULMAN.

Demurrer — Improper parties — Agreement and sub-agreement — Bill for specific performance by sub-purchaser — Original vendor a party — Demurrer overruled.

B. agreed to sell certain property to W., who, before the completion of the agreement, contracted to sell a portion of the property to F. Subsequently F. filed a bill against B. and W., praying for the specific performance of his agreement, and of so much of the agreement between B. and W. as related to the property comprised in his agreement:

Held, on demurrer, that B. was a proper party to the suit.

This was a demurrer. The facts were shortly these:—

By an agreement, dated the 4th Sept. 1868, the defendants, the Messrs. Bulman, trustees for sale, agreed to sell to the defendant William Wilson, a builder, certain freehold lands, situate near Newcastle-upon-Tyne, for the sum of 1200*l.*, the purchaser having the option of purchasing at 300*l.* an acre certain adjacent land.

On the 3rd March 1866 the defendant Wilson, who had been put into possession of the property, for the purpose of carrying on building operations, exercised his right of purchasing the adjacent lands, by entering into an agreement with the plaintiff Fenwick to sell to him two acres of the same for 600*l.* Thereupon the plaintiff was let into possession of that portion of the property, and had since expended nearly 3000*l.* in the erection of a house.

Subsequently the solicitor of the plaintiff prepared a draft conveyance which was settled and approved of both by the solicitor of Wilson and the solicitors of the defendants Bulman, but in consequence of differences arising between the plaintiff and Wilson, the latter refused to execute the conveyance until the former had paid him certain moneys. The engrossment, however, had been executed by the defendants Bulman, and had since remained in their possession.

In June 1868, the defendant Wilson was adjudicated bankrupt, and the defendant Stephenson was appointed creditors' assignee.

In May 1869, the plaintiff tendered to the defendant, Bulman the purchase-money (678*l.*, principal and interest) in respect of the two acres, but they declined to accept it on the ground that they had not been paid the purchase-money under their agreement with Wilson.

Subsequently negotiations took place with a view to a settlement of the differences, but they having failed, Fenwick, on the 22nd Oct. 1869, filed this bill aghinst the Messrs. Bulman, Wilson, and Stephenson, praying that the agreement of the 3rd March 1866, and so much of the agreement of the 4th Sept. 1866, as related to the piece of land comprised in the agreement of March 1866, might be specifically performed, and that the defendants Bulman might be ordered to deliver to the plaintiff the conveyance of the two acres.

To this bill the defendants Bulman demurred, on the ground that they were improper parties to the suit.

It appeared, and it formed one of the allegations in the bill, that the Messrs. Bulman had, on the 19th Nov. 1869, filed a bill against Stephenson and Wilson, and afterwards, by amendment, against Fenwick, praying for the specific performance of the agreement of the 4th Sept. 1863, as against all the defendants, or some or one of them, or, in default, that the agreement might be rescinded.

Greene, Q. C., and *Davey,* in support of the demurrer, contended that as the Messrs. Bulman were no parties to the plaintiff's contract they had been improperly brought before the court. It had been distinctly laid down by Lord Cottenham in *Tasker v. Small,* 3 M. & Cr. 64, that a stranger to a contract could not be made a party to a suit for the specific performance of that contract. Of course there were exceptions to this rule, in cases of fraud, for instance, but it was good in all ordinary suits for specific performance. The facts of the present case, however, showed that it could not be taken out of the general rule, and that the defendants were strangers to the plaintiff's contract. The defendants' rights and liabilities were regulated by their own contract, and in filing their bill against the plaintiff, they had prayed either for the performance or the rescission of their contract. The difference between a suit for specific performance, and one to rescind a contract was obvious. In the one case only those bound by the contract could be made parties, but in the other new equities might arise involving the rights of persons not directly interested under the contract, and necessi-

tating their being brought before the court. This distinction was recognised by Lord Cairns in the case of the *Aberaman Iron Works* v. *Wickens*, L. Rep. 4 Ch. App. 110; 20 L. T. Rep. N. S. 89. Moreover the bill was demurrable on another ground. It prayed that so much of the agreement of the 4th Sept 1863, as related only to that portion of land which the plaintiff had agreed to purchase from the defendant Wilson, might be performed. The plaintiff's equity (if any) consisted of the performance of the contract *in toto*, and he could not, consistently with the rule of the court, ask for a part performance. They also cited

Chadwick v. *Maden*, 9 Hare, 188;
Dyer v. *Pulteney*, Barnard, C. C. 160.

Dickinson, Q. C. and *Marten*, for the bill, were not called on.

The VICE-CHANCELLOR.—This bill is filed by a sub-purchaser of property purchased from a Mr. Wilson. It appears that Wilson, after contracting with the defendants, Messrs. Bulman, for the purchase of the property comprised in the agreement of the 4th Sept. 1863, contracted with the plaintiff for the sale to him of a portion of the same property, viz., that comprised in the agreement of the 3rd March 1866. Both of the contracts remain unperformed, and in that state of things the plaintiff files his bill against Messrs. Bulman and Mr. Wilson for the specific performance of his contract, and the Messrs. Bulman also file a bill for the specific performance of their contract with Wilson, in which the plaintiff is made a defendant. With regard to the first bill (which forms the subject of the present demurrer) it is said that as the contract of the Messrs. Bulman was only made between them and Wilson, to whom they sold the whole of the property, they are not proper parties to the plaintiff's suit. In support of the demurrer the judgment of Lord Cottenham, in *Tasker* v. *Small* (*sup.*), has been referred to as an authority for the proposition that a stranger to a contract cannot be brought before the court in a suit for the specific performance of that contract. But that is not only a well-known rule of equity, but of common sense; Lord Cottenham, however, took especial care to point out that a stranger to a contract could only be described as a person who was neither entitled to the rights, or subject to the liabilities of it. Now, as the Messrs. Bulman are subject to the liabilities under this contract, they cannot be said to come within Lord Cottenham's definition of strangers. But a dictum of Lord Cairns in the case of *Aberaman Iron Works* v. *Wickens* (*sup.*) has also been relied on, as showing that Lord Cairns considered that the decision in *Tasker* v. *Small* applied to every case of a sub-purchaser, and that there was a distinction between a bill to rescind a contract, and a bill for specific performance, but with all due respect to so learned a judge, I think this dictum, if intended to convey the meaning suggested, is founded on a misapprehension. The dictum was not necessary for the purposes of the decision of that case, and I consider that it is hardly doing justice to Lord Cairns, whose attention could not have been sufficiently called to the question, to refer to it as an authority in the present instance. I know of no such distinction. A bill for specific performance which says nothing about rescinding the contract, has no other force or effect, when dismissed, than a rescission of the contract; and, on the other hand, where a bill filed to rescind a contract is dismissed, the parties remain bound by the contract, and the result is specific performance. But if there could be any doubt about the question it would be dispelled by the authority of Lord Hardwicke, in *Dyer* v. *Pulteney* (*sup.*), which has been cited in support of the demurrer. That was a suit for specific performance instituted by a sub-purchaser, and Lord Hardwicke, while deciding the case against the plaintiff on other grounds, distinctly pointed out the obvious equity which a sub-purchaser had. The present case, moreover, is in my opinion further relieved from all doubt by the fact that the demurring defendants have made the plaintiff a party to their suit for the performance of their contract. The demurrer must be overruled with costs.

Solicitors: *Cookson, Wainwright*, and *Co.*, for *J.* and *N. G. Clayton*, Newcastle-upon-Tyne; *Theodore Waterhouse*, for *J.* and *R. S. Watson*, Newcastle-upon-Tyne.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Thursday, Nov. 18.

Re HEATON STEEL AND IRON COMPANY (LIMITED); SIMPSON'S CASE.

Joint-stock Company—25 & 26 Vict. c. 89, s. 35—Summary application not in a winding-up.

A contract was entered into by the H. Company to purchase the L. Company for 34,000l., with a proviso for rescinding by either party in case 2500 preference shares were not taken by a day fixed. S., chairman of the L. Company and a director of the H. Company, also undertook that if the shareholders did not take 2500 shares according to the proviso, he would take 1708. The 2500 shares were not taken, and the contract was rescinded, and S.'s name put on the register for the 1708 shares.

A motion by S., under the summary powers conferred by the 35th section of the Companies Act 1862, to rectify the register, by striking out S.'s name, refused, without prejudice to filing a bill.

Cotton, Q. C. and *C. T. Simpson* moved in this matter under the summary power conferred on the court by the 35th section of the Companies Act 1862 (24 & 25 Vict. c. 85), to rectify the register of shareholders in this company by striking out the name of John Simpson in respect of 1708 preference shares. The facts were these:—On the 4th Nov. 1868 the Heaton Steel and Iron Company (Limited) was incorporated, with a nominal capital of 400,000*l.*, in 30,000 ordinary and 10,000 preference shares, the ordinary shares being treated as fully paid-up. A contract was entered into between the Heaton Steel and Iron Company (Limited) and the Langley Mills Steel and Iron Works Company (brought out about the same time) for the purchase of the Langley Mills Company by the Heaton Company for 34,000*l.* This contract contained this proviso:

Provided always that in case on or before the 1st July 1869 there shall not be allotted to and registered in the books of the said Heaton Iron and Steel Company (Limited), in the names of responsible parties, as members of the same company, according to the statutes in force in that behalf, at least one-fourth of the said 10,000 preference shares of the said company, it shall be lawful for either of the said companies, or their successors, by notice in writing, to the other of them, given on or within ten days after the said 1st July 1869, to determine these presents, without prejudice nevertheless to any existing right of action on either side, but otherwise these presents shall remain and be in full force and virtue, notwithstanding that the whole of the said shares of the said company should not be subscribed for or allotted.

Upon the arrangement for this contract, the directors and promoters of the respective companies came to an agreement that in case the contract was carried out, such of the shareholders as choose to do so, might take shares in the Heaton Company of the same nominal value as the shares held by them calculated as paid-up. Such shares to be taken as part of the 34,000*l.* purchase-money

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under the contract. This was proposed to be carried out by signing the following form:

I, the undersigned, as a shareholder of the Langley Mills Steel and Iron Works Company (Limited), do hereby consent to the directors of the company negotiating and completing the sale and transfer of the effects and assets of the company to a new company about to be formed, upon the terms that such new company shall either discharge the liabilities of the company, or pay a sum sufficient to enable the directors to do so, and allot to the shareholders in the above-mentioned company, shares in the new company equivalent in nominal value and calculated as paid-up to the same amount as the shares held by them in the above company, or upon such modification of the above terms as the directors may think reasonable. And upon such shares being allotted to me, I undertake to execute such transfer of my shares in the said company as shall have been agreed upon between the directors and the new company or the directors thereof.

Dated this 21st day of July 1869.

All the shareholders of the Langley Mills Company signed this document, and John Simpson, who was chairman of that company, also signed the following separate one:

4th Nov. 1868.

Gentlemen,—In consideration of your agreeing at my request to affix the seal of your company to a provisional contract dated this day, and made between the Langley Mills Iron and Steel Company (Limited) of the one part, and the Heaton Steel and Iron Company of the other part (such contract providing for the purchase of the last-mentioned company of the whole of the freehold hereditaments, plants, tools, utensils, and manufacturing implements and effects of the Langley Mills Iron and Steel Company for the sum of 34,000*l.*, payable at the times and in manner mentioned in such contract), I hereby undertake and agree that the persons mentioned in the schedule to this undertaking who are respectively at the present time shareholders in the Langley Mills Company, shall apply for preference shares in the Heaton Steel and Iron Company (Limited), to the same nominal amount as their present holdings. And for the consideration aforesaid, I hereby undertake and agree in the event of the shareholders to whom I have referred, not making such applications, I will myself apply for and take an allotment of the said shares, it being understood that 644 of such shares are, when issued, to be credited with the sum of 10*l.* per share, and 1064 when issued to be credited with the sum of 6*l.* per share. And that the Langley Mills Steel and Iron Works Company (Limited) shall give credit to the Heaton Steel and Iron Company (Limited) for the aggregate amount of the said preference shares so to be allotted as aforesaid as against the balance of the sum of 34,000*l.* being the purchase-money hereinbefore referred to.

John Simpson being a director of the Heaton Company, on the 20th June 1869, received the following notice from that company:

Sir,—I have the honour to inform you that the directors have, in pursuance of the terms and stipulations contained in your undertaking, given to the directors of this company, dated 4th Nov. 1868, allotted to you 1708 preference shares in the above-named company, upon 644 of which you are credited with 10*l.* per share; and I am instructed to request that you will pay the amount of 4*l.* per share upon 1064, being the remainder of the shares in respect of which you are credited with 6*l.* per share into the hands of the company's bankers, Messrs. Ransome and Co., Pall Mall East.

(Signed) James Malley, Secretary.

Due notice will be given when the bankers' receipts will be discharged for share certificates.

On the 27th June 1869 John Simpson, through his solicitor, refused to accept this allotment, or pay the money demanded, insisting that he had never applied for shares, and that the directors had no right to do as they had done. On the above letter being written, the name of John Simpson was entered on the register for 1708 shares. It appeared that 4178 shares (including the 1708 so purported to have been allotted to John Simpson) had been registered in all. On the 8th July the Langley Mills Company gave notice of rescinding the contract, reciting it, and that one-fourth of the 10,000 preference shares, or 2500, had not been taken. Under these circumstances this motion was made by John Simpson. There were therefore three points, first, an undertaking by Simpson, under which he could not be put on the register so long as the contract of the 4th Nov. was not positive; secondly, when he was put on the register on the 20th June 2500 preference shares were not in existence; and, thirdly, that the contract was not absolute, it being a mere guarantee by Simpson, that at a certain time shareholders should be placed with shares, and that there was no application by him to take shares, and no contract until other shareholders had failed. Even if the provisional contract was absolute, it did not follow that it was complete; it might fail, either from the inability or unwillingness of the Heaton Company to carry it out. The contract was made up of two sums, 6440*l.* and 6384*l.*, contingently payable, and not until all these questions were settled was the contract complete.

30 & 31 Vict. c. 131, ss. 24, 25.

Glasse, Q. C. and *Cracknall* for the company, insisted that the 1708 shares were included in the 2500 (or one-fourth of the 10,000 preference shares). If not, it was an ingenious contrivance to prevent the contract being carried out by excluding them. Simpson was the chairman of the Langley Mills Company, and a promoter of the Heaton Iron and Steel Company; he was to help to carry on the purchase of the company of which he was chairman; but, having received 6000*l.* into his own pocket, and the contract being rescinded, and his name put on the register, he now asked to have it taken off by excluding the 1708 shares, which would render the contract impossible of completion, and release him from his undertaking. This was not a case for a summary application, it was a subject for a bill:

Parker's Case, L. Rep. 2 Ch. App. 685;
Ward's Case (*ibid*), 431;
Bullock v. *Chapman*, 2 De G. & S. 211;
Re British Sugar Refining Company, 3 K. & J. 408.

The Vice-Chancellor.—This is an application by John Simpson to take his name off the list of contributories in respect of 1708 shares in the Heaton Iron and Steel Company (Limited). It is a summary application under the 35th section of the Companies Act 1862, relating to a company not arranged to be wound-up, or having anything to do with winding-up, on the ground that John Simpson's name is improperly on the list of contributories. Now no doubt this section confers great powers as far as the language goes, but the authorities have now settled the construction of it to be, that it can only be applied in cases that are clear and free from doubt. Is this a case that can be so described? The transaction under which the question arises is this. On the 3rd Nov. 1868, Heaton's Steel and Iron Company (Limited) was formed for the purpose of working Heaton's process of manufacturing steel, with the usual memorandum and articles of association, consisting of seven persons who each took one share and signed those documents for those shares. John Simpson was a director of the Heaton company. There was another company called "The Langley Mills Iron Works Company," which I must regard as part of the same transaction, being constituted by a document dated the next day, and it impossible not to see that the arrangement for the purchase of the Langley Mills Company by the Heaton Company and the formation of those companies was all one and the same transaction. By a contract dated on the 4th Nov. 1868, the Langley Mills Company were to sell their concern to the Heaton Company for a considerable sum of money—34,000*l.*; and the Heaton Company being formed only the day before, the contract would be an absolute nullity, unless they got the shares taken; and therefore the provision was not unreasonable that if by a certain time, 1st July 1869, there should not be allotted to the Heaton Company, in respect of responsible parties according to the statutes in force, one-fourth of 10,000 preference shares, it should be lawful for either company or their successors, by

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notice within ten days, to withdraw. This was on the 4th Nov., and on the same day John Simpson gave this undertaking to the Heaton Company, that is, to the directors, that in consideration of their agreeing, at his request, to affix the seal of the company to a provisional contract between the companies, such contract providing for the purchase by the Heaton Company of the Langley Mills Company for 34,000*l.*, he agreed that the persons mentioned in the schedule of that undertaking, then shareholders of the Langley Mills Company, should apply for shares in the Heaton Company (Limited) to the same nominal amount as their then holdings, and he undertook and agreed, for the consideration aforesaid, that in the event of the shareholders not making such application he would himself apply for and take an allotment of the shares, 644 to be credited with 10*l.* per share, and 1064 with 6*l.* per share, the Langley Company to give credit to the Heaton Company for the aggregate amount of the shares as against the 34,000*l.* purchase-money. This was signed by John Simpson. On the 26th of June, very close indeed upon the time mentioned in this undertaking with reference to the power of rescinding the contract if 2500 shares were not applied for, the Heaton Company finding the shares not taken, and being anxious that the Langley Mills Company should not rescind the contract (the Langley Mills Company having received 7000*l.* odd for deposit), put John Simpson's name on the list for 1708 shares; and if it was rightly put on, 2500, the shares mentioned in the proviso, were made up; if not, there was a right to rescind on the part of the Langley Mills Company. The Langley Mills Company I must regard as put in action by Simpson, and the requisite number not being made up on the 8th July, they therefore rescinded the contract, reciting that one-quarter of the shares had not been applied for. I cannot sever Simpson from these proceedings of the Langley Mills Company as to the non-taking of the 2500 shares, of which the 1708 shares were to form part. I think this is a most unfair attempt to vitiate the contract on the proviso in case the 2500 shares were not taken, and to regard his shares as not to be reckoned in addition to those applied for, which would be the case if Mr. Simpson and the Langley Mills Company have taken a right view of the contract. Is it so clear that Simpson was not to take the shares? I cannot on this summary application decide that he was right to take his name off in the absence of the Langley Mills Company. They may be wrong, or they may file a bill, and succeed in sustaining the contract. The interest of the Langley Mills Company is to have as many shareholders as they can procure; and, therefore, can it be said to be a question in which the Langley Mills Company have no interest? They are not here, and I had rather not express an opinion; but if I were dealing with the whole transaction, I should be of opinion that the true meaning of the affair was that Simpson himself, who was the moving spirit, was to put the company in possession of a valuable contract by contributing 1708 shares, and an attempt to vitiate that is unsustainable. The motion cannot succeed, and, so far as I have heard, my opinion is against Simpson. It is a complicated, difficult, and doubtful question, and not one in which I am justified in acting on the decisions in *Ward's* and *Parker's* cases (*supra*). In *Musgrave's* case, L. Rep. 5 Eq. 193, I was obliged to come to a conclusion, contrary to my own judgment, which was that the 35th section ought to receive a liberal interpretation; I thought that Messrs. Musgrave ought to be taken off and Mr. Hart put on. I am bound to leave the parties to file a bill. This is a case which I could not think of deciding, and if I were to do so, it would be against Simpson. It must be without prejudice to filing a bill.

Solicitor for the motion, *W. Coates Stoker.*

Soliciior for the company, *Manning.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET, and R. T. BOULT, Esqrs., Barristers-at-Law.

Wednesday, Dec. 8.

FINNEY *v.* GODFREY.

Practice—Exceptions to bill—Scandal.

The plaintiff's bill charged that a certain bill of exchange ought to be delivered up to be cancelled, on the ground of fraud, and that "A. B., one of the defendants, had knowledge that another of the defendants, C. D., had been mixed up with irregular transactions connected with bills of exchange."

Held to be not scandalous, and that such defendant was bound to answer.

This was a bill filed by the plaintiff, John Finney, against three defendants, Godfrey, Turner and McCraw, and it prayed that a certain bill of exchange, particularising it, might be delivered up to be cancelled, on the ground of fraud, as therein alleged. It was stated that the plaintiff had indorsed such bill for the accommodation of one James, not a party to the suit, and the bill also alleged that the bill of exchange had come into the possession of the defendant Godfrey, who had commenced an action at law on such bill, and which was intended to be supported by a fraudulent contrivance between the defendants before mentioned, without any consideration having been given for the amount of such bill of exchange.

The bill had been amended, and contained the following additional charge: "That the defendants Turner and M'Craw were in concealment, and that plaintiff had been unable to ascertain where they were to be found. That both such defendants were and are to the knowledge of the other defendant Godfrey men of no means, and each or one of them had been declared bankrupt. That defendant M'Craw has in particular to the knowledge of the defendant Godfrey been mixed up with several irregular transactions connected with bills of exchange." The defendant Godfrey excepted to the latter part of this charge for scandal.

E. E. Kay, Q.C., and *Horsey*, for the exceptant.

G. Hastings for the bill.

The VICE-CHANCELLOR said, that in his opinion there did not appear anything in this particular chagre in the bill of which the defendant Godfrey was entitled to complain. What ground of complaint the defendant M'Craw might have was a different matter. A general ground had been advanced that "the court was bound to keep the records of the court clean." He, the Vice-Chancellor, did not, however, require the assistance of the defendant Godfrey to effect this. The whole as respects this rested with the discretion of the court. The defendant must consequently answer, and the exceptions disallowed with costs.

Order accordingly

Solicitors for the plaintiff, *Deane* and *Chubb.*

Solicitor for the defendant, *T. Apps.*

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Saturday, Dec. 11.

BAKER *v.* WAIT.

County Courts Equitable Jurisdiction Act 1865, *ss.* 8, 10—*Transfer of plaint to Court of Chancery.*

Where all the substantial defendants to a County Court plaint resided out of the district of the court, the plaint was ordered to be transferred to the Court of Chancery.

This was an application by adjourned summons that a plaint might be transferred from the Bristol County Court to the Court of Chancery.

The plaint stated that the defendant, J. W. R. Brooks, was a customer of the plaintiff (an ironmonger at Bristol), and was largely indebted for goods supplied by the plaintiff to him, and to a company of which Brooks was promoter. That in payment of the amount due to the plaintiff, the defendant gave him acceptances which turned out to be valueless. That the defendant Brooks then stated that the defendant Alice A. W. Wait was in his debt to a considerable amount, and promised to obtain a bill of exchange from her to secure the amount of his debt to the plaintiff. That shortly afterwards the defendant Brooks handed to the plaintiff a bill of exchange for 300*l.*, accepted by the defendant Mrs. Wait, and a few days after the defendant as further security for the amount due from him to the plaintiff, handed to the plaintiff a promissory note for 500*l.* signed by Mrs. Wait.

Both the bill for 300*l.* and the note for 500*l.* were payable to the order of Brooks, and indorsed over by him to the plaintiff.

The plaint alleged that both the bill and the note were due, but that the defendant Mrs. Wait had refused to meet them.

The plaint then set out a marriage settlement, by which certain real and personal property was settled to the separate use of Mrs. Wait.

The plaint stated that the defendant Brooks had left Bristol, but that the plaintiff was unable to find out where he had gone to, or where he then was.

The plaint alleged that the plaintiff was willing to give up the bill of 300*l.* in lieu of and in substitution for which the note for 500*l.* was given him, and prayed (*inter alia*) that the trustees of the settlement, who were made defendants, might be ordered to pay out of the trust property what might be found due in respect of the bill and the note.

The plaintiff stated in his affidavit that the defendant Brooks, though at present absent from Bristol, had a residence at West Clifton-terrace, Bristol.

The defendant Mrs. Wait stated, in an affidavit, that she and her husband resided at Bournemouth, in Hampshire, which was more than ninety miles from Bristol; that one of her trustees resided at Plymouth; and that the other resided at Chew Stoke, within the County Court district of Temple Cloud.

Locock Webb appeared for the defendants in support of the application.

Ford, for the plaintiff, opposed.

The VICE-CHANCELLOR said that the intention of the Legislature was that the County Courts should only dispose of matters *bonâ fide* within their jurisdiction. Here none of the substantial defendants were in the jurisdiction, the only one residing in the County Court district being a sort of pocket defendant of the plaintiff, and in his interest. He should make a simple order for transfer. The order to be subject to any order the court might hereafter make as to costs.

Solicitors for the plaintiff, *Robins* and *Burges.*

Solicitors for the defendants, *Jones, Blaxland,* and *Son.*

ROLLS COURT.

Reported by HENRY PRAT, Esq., Barrister-at-Law.

Dec. 18 *and* 20.

Re THE HEYFORD COMPANY (LIMITED); FORBES'S AND JUDD'S CASES.

Company — Contributory — Winding-up — Subscribing memorandum of association — Allotment of shares to nominee of vendor—Fully paid-up shares—The Companies Act 1862, *ss.* 18, 23.

P., F., J., and I. subscribed the memorandum of association of a company for 1350, 50, 50, *and* 50 *shares respectively in the ordinary way, there being nothing to show that the shares were to be treated as fully paid-up. In the articles of association an agreement was embodied, and thereby ratified, by which P. was to transfer certain property to the company, and was to accept* 1500 *fully paid-up shares in part payment of the purchase-money. He transferred the property to the company, and* 1350 *shares were allotted to him, fifty shares apiece (the remainder of the* 1500 *shares) being allotted to his nominees F., J., and I., who made no payment at all in respect of the shares.*

On a summons by F. and J. to have their names removed from the list of contributories of the company which had been ordered to be wound-up on a creditor's petition:

Held, that their names must remain on the list of contributories.

Re South Blackpool Hotel Company, Migotti's Case, 16 *L. T. Rep. N. S.* 271; *L. Rep.* 4, *Eq.* 238, *and* Evans's Case, 16 *L. T. Rep. N. S.* 252; *L. Rep.* 2 *Ch.* 427 *followed.*

Pell's Case, 21 *L. T. Rep. N. S.* 412; *L. Rep.* 9 *Eq.* 11; *and* Drummond's Case, 21 *L. T. Rep. N. S.* 317; *L. Rep.* 4 *Ch. App.* 772, *held to be irreconcileable with* Migotti's *and* Evans's Cases.

Adjourned summons.

This was an application on behalf of Messrs. William Forbes and Clarence H. Judd, to have their names removed from the list of contributories of the above named company, on which they had been placed by the official liquidator, in respect of fifty shares each.

The circumstances of the case were as follows:

The Heyford Company (Limited) was registered on the 26th Aug. 1865. It was formed for the purpose of carrying on the Heyford Iron Works, and of adopting a certain agreement, dated 1st Aug. 1865, and made between George Pell, the promoter of the company, of the one part, and the company of the other part. By this agreement, which was embodied in the articles of association of the company, and thereby ratified and confirmed, it was agreed that Pell should sell to the company the goodwill of the business carried on by him at the Heyford Iron Works, together with the stock-in-trade, &c., and that the price or consideration to be paid by the company to Pell should be as follows:—The company to issue to the said George Pell, his nominee or nominees, 1500 shares in the company of the nominal value of 20*l.* each, which shares should be respectively credited in the books of the company as fully paid-up, and the said George Pell to accept the same in part payment of the purchase or consideration-money for his interest in the premises sold to the company. The company were, moreover, to issue to Pell debentures of the value of 45,000*l.*, and to pay him 7000*l.* in cash within the next six months.

There were at no time any other members of the company than the following seven persons who subscribed the memorandum of association: Judd,

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who subscribed it for fifty shares; Samuel Isaac for fifty shares; Forbes for fifty shares; H. W. Cresswell for twenty shares; J. Percivall for one share; Pell for 1350 shares; and Charles Barratt for one share. There was nothing on the memorandum of association to show that the shares subscribed for by Pell, Forbes, Judd, and Isaac, were to be treated as fully paid-up, but by an arrangement made with the company in Dec. 1865, 1350 shares, credited in the company's books as fully paid-up, were allotted to Pell, and by his direction, fifty shares apiece were allotted to Forbes, Judd, and Isaac (which shares were also credited in the company's books as fully paid-up), making, together, 1500 shares, which was the number of fully paid-up shares to which Pell was entitled under the agreement of the 1st Aug. 1865 with the company.

No money payment was ever made in respect of these 1500 shares, the only consideration given for them being the property handed over to the company by Pell. The company incurred debts to the extent of some 11,000*l.*, in the purchase of coals and other materials for the purposes of their works, and in Dec. 1866 a petition was presented by one of the creditors for the winding-up of the company, which was accordingly ordered to be wound-up. The official liquidator placed Pell's name on the list of contributories in respect of the 1350 shares for which he had signed the memorandum of association; and he also placed on the list the names of Forbes, Judd, and Isaac in respect of the fifty shares each, for which they had respectively signed the memorandum of association.

On a summons by the official liquidator to have Pell's name fixed on the list in respect of the 1350 shares, it was held by the Master of the Rolls that he must be fixed on the list, but that he would only have to pay the balance found due from him after deducting the value of the property transferred by him to the company: (See *Pell's case*, 21 L. T. Rep. N. S. 320; L. Rep. 8 Eq. 222.) On appeal, it was held by Giffard, L. J. that Pell's shares, so long as the agreement set forth in the articles of association was not impeached, could only be treated as fully paid-up shares. The case on appeal is reported in 21 L. T. Rep. N. S. 412.

Forbes and Judd, in consequence of the decision of the Lord Justice in *Pell's* case, took out the present summons to have their names also removed from the list on the ground that they had signed the memorandum of association on the understanding that the shares for which they signed it should be allotted to them out of the 1500 fully paid-up shares agreed to be issued to Pell and his nominees. The summons was now adjourned into court.

It appeared that Pell had resumed possession of the iron works under a clause in the agreement of the 1st Aug. 1865; that Cresswell, who had signed the memorandum of association for twenty shares, had become bankrupt; and that, consequently, if the present applicants were removed from the list there would be nothing to meet the liabilities of the company, and the costs of liquidation, except the two shares of 20*l.* each, for which Percivall and Barratt had subscribed the memorandum of association.

Westlake, in support of the summons.—This case is governed by Giffard, L. J.'s decision in *Pell's case* (*sup.*), in which his Lordship followed *Re The China Steamship and Labuan Coal Company* (*Limited*), *Drummond's Case*, 21 L. T. Rep. N. S. 317; L. Rep. 4 Ch. App. 772. The distinction between this and the cases in which it has been held that persons who had signed the memorandum were contributories notwithstanding the fact that fully paid-up shares had been allotted to them, is that here there was an agreement of the applicants directly with the company to take the shares as fully paid-up, while in those cases the agreement was not with the company, but with one of the shareholders. In the present case there was what the Lord Justice calls "direct action" between the applicants and the company, which clearly distinguishes this from

Re The South Blackpool Hotel Company, Migotti's case, 16 L. T. Rep. N. S. 271; L. Rep. 4 Eq. 238;
Re South of France Wine Company, Baron de Beville's Case, L. Rep. 7 Eq. 11.

Roxburgh, Q.C., for the official liquidator. It is impossible to distinguish this case from *Migotti's*, which is thus stated by Lord Justice Giffard in his judgment in *Drummond's Case*, L. Rep. 4 Ch. 778: "Where M. subscribed the memorandum of association of a company for five shares, and, eight months afterwards, five fully paid-up shares, which the company had agreed to allot to C. as part of the purchase-money for property sold to them by C., were, by C.'s direction, allotted to M., and the company was wound-up: Held, that M. was a contributory in respect of five shares, upon which nothing had been paid." And his Lordship continues:—"I take that case to decide this, and to decide no more; that Migotti, by signing a memorandum of association, contracted as between himself and the company, to take five shares, and that taking the five paid-up shares which did not belong to the company, but which did belong to C., was, in reality, taking the shares from C., and not from the company, and therefore that he had never fulfilled that contract with the company which he had entered into by signing the memorandum of association." So in the present case Forbes and Judd, by taking the fifty fully paid-up shares apiece which did not belong to the company, but to Pell, have never fulfilled the contract with the company which they entered into by signing the memorandum of association, and, therefore, their names must be fixed on the list. This case is on all fours with *Migotti's case*, which, in Lord Justice Giffard's opinion, was "most correctly decided," and which your Lordship is, I submit, bound to follow. He also referred to

Re The London Hamburgh and Continental Exchange Bank, Evans's Case, 16 L. T. Rep. N. S. 252; L. Rep. 2 Ch. 427.

Westlake replied.

Dec. 20.—Lord ROMILLY.—I have considered this case very carefully, and I cannot in any way distinguish it from *Migotti's case* (*sup.*), and therefore I must follow that case, and keep these gentlemen on the list. It is impossible, however, to say this without adding a few words of explanation. *Evans's case* (*sup.*) was decided by me (not reported below), and went to the Lords Justices, who affirmed my decision; but *Pell's case* (*sup.*) and *Drummond's case* (*sup.*) appear to me to be quite irreconcilable with it and with *Migotti's case*, although Lord Justice Giffard seems to have distinguished them; but the distinction which he draws between taking fully paid-up shares under an agreement with the company and taking them under an agreement with somebody else appears to me to be much too fine to be acted upon. The question appears to me to depend on this, What is the meaning of the 8th and 23rd sections of the Act (Companies Act 1862)? Do they mean this, which is the construction I have put on them—that they require that a person who subscribes the memorandum of association for shares shall, in order to satisfy that agreement, take separate and distinct shares from those which are mentioned in the articles of association, to be given in payment of any contract which he may have entered into; in other words, that the shares

subscribed for by the memorandum of association cannot be satisfied by any relaxation of any then existing or antecedent debt, and that they must be paid for after the memorandum of association has been signed, and after the company has been registered, and that no antecedent debt can in any way be applied in payment of those shares? Of course I assent to the remark made by Giffard, L. J., that they may be paid for either in meal or in malt (to quote the expression used in his judgment), because unquestionably they may be paid for afterwards in goods delivered for the benefit of the company. If the company wants goods they may say, "Instead of paying us 100*l.* for four shares of 25*l.* each, deliver to us goods wanted for the company, and we will take them in discharge of your shares." I do not doubt the accuracy of that; but I do consider that the statute does not allow the memorandum of association to be signed in respect of a then existing debt. This is exceedingly important for one or two reasons, and it is necessary that I should call attention to them. In the first place, it is be observed that the statute is exceedingly precise about it. Why is a memorandum of association directed, and why are persons directed to subscribe the memorandum of association unless it is to inform the public that it is a *bonâ fide* concern, and that there is something really to be acted upon? Observe that the 8th section of the Act requires that the memorandum of association shall contain the following things. [His Lordship stated the effect of the 8th section, and continued.] Then after specifying various matters it is subject to these regulations, that no subscriber shall take less than one share, and that each subscriber to the memorandum of association shall write opposite to his name the number of shares that he takes. I do not think that that is consistent with this, that the taking of shares is merely nominal, and that the shares may be paid-up shares without being so expressed in the memorandum of association. The next section is the 23rd, which is as follows: "The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members upon the register of members hereinafter mentioned, and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members shall be deemed to be a member of the company." Is it possible, consistently with the object of this Act, to hold that that means that he is to be a member of the company to receive profits, but not to pay debts? That is what it literally amounts to. I wish also to point out what the effect of this is. I think they were 20*l.* shares in the company. I mention what has happened in the case of this company merely as an illustration of what may take place, without at all meaning to impute to anybody the intention of committing any fraud of any kind. This company was formed for the working of an iron mine. The owner of the mine agrees to sell it to the company for (amongst other things) 1500 fully paid-up 20*l.* shares. Thereupon he subscribes the memorandum of association, and this agreement is stated in the articles of association, so that nobody can complain of it. He subscribes the memorandum of association for 1350 shares, and the two gentlemen, who are now applying to me to have their names struck off the list of contributories of the company, also subscribe the memorandum of association for fifty shares, which fifty shares each are given to them by Mr. Pell (the vendor of the mine) out of the 1500 fully paid-up shares which are taken for the mine. It so happens that there are upon the memorandum of association the following persons who subscribed the memorandum of association—namely, Mr. Pell for 1350 shares, Mr. Judd for fifty shares, Mr. Isaac for fifty shares, Mr. Forbes for fifty shares. All these are supplied by Mr. Pell, and make up together the 1500 shares. Then there is Mr. Cresswell for twenty shares, Mr. Percivall for one share, and Mr. Barratt for one share. Those twenty-two shares are the only shares not paid up. It so happens that the gentlemen who subscribed the memorandum of association are the only shareholders of the company; there is not another shareholder belonging to the company, so I am assured by counsel on the one side, and it is not contradicted by counsel on the other side. The consequence is one of a very singular description. The facts are these: Mr. Pell gives up this mine to the company; they incur debts to the extent of upwards of 11,000*l.* in the supply of coals and other material for the working of the mine; the creditors are not paid, and thereupon a petition is presented to have the company wound-up, and accordingly the company is ordered to be wound-up. A result occurs which it is difficult to mention seriously. The very persons who had signed the memorandum of association and who, in their character of individuals, are liable to take the shares in the company, in their character of the company agree that the shares for which they have signed the memorandum of association shall all be taken to be the 1500 paid-up shares; so that the identical same persons having agreed to form a company, and having incurred debts to the amount of 11,000*l.* in their character of company agree that they shall not pay them. Nobody can touch them. I hold that the statute does not allow that. The statute says that these 1500 shares mentioned in the articles of association cannot be applied to the shares taken upon the memorandum of association. They must be separate and distinct shares. That was intended for the benefit and security of the public. Giffard, L. J. has held the contrary. In this company the poor man who signed the memorandum of association for twenty shares has become bankrupt, so that the consequence of Giffard, L. J.'s decision would be that there would be only two shares of 20*l.* each to pay the whole debt of 11,000*l.*, and all the cost of the liquidation. That may be the true construction of the Act of Parliament, but it does not appear to me to be so. It seems to me to be a most monstrous result, and to be a most extraordinary premium upon every possible species of, I was almost going to say, swindling, but certainly fraud. Although I do not mean to accuse these gentlemen of having intended to do anything fraudulent, yet what they have done is this: They have determined to form a company upon these conditions—that if it succeeds they are to receive the profit, and if it fails they are to pay nothing. The probability is that that state of circumstances the company would fail, and it has failed. I think this is a matter of great importance, and it is very important that it should be set right, and that the public should really know what they are doing when dealing with companies of this description. It would be a very different thing if the memorandum of association said "paid up shares"—shares already paid; but the public has no notice further than this, that there was 150 times 20*l.*, which they believed to be the assets of the company applicable for the purposes of the company; that is to say, they believed there was 30,000 subject to deductions, applicable to the payment of the expenses of the company, and then this is the result. I am very anxious that this should go further and be settled. I must say that I cannot distinguish this case from *Migotti's case* (*sup.*), a case

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which Lord Justice Giffard seems to have distinguished and approved of in another case (*Drummond's case*, L. Rep. 4 Ch. 778, and *sup.*) Therefore I shall keep these persons on the list, and shall dismiss the summons with costs, which is absolutely necessary. If this case goes further I should very much wish it to be mentioned that I should request the Lord Chancellor to consider it, and that he would be one of the judges to hear it, in order that it may be finally settled what the real construction of these sections of the Act is, for really the sole question upon these sections is, whether the shares subscribed for by the memorandum of association can be satisfied by an existing or antecedent debt, whether the paid-up shares mentioned in the articles of association to be given for the purchase of the mine, which is only another mode of stating it, can be applied in payment of the shares subscribed for in the memorandum of association? I am of opinion that they cannot, and that these gentlemen's names must be placed on the list of contributories.

Solicitors for the applicants, *Elmslie, Forsyth*, and *Sedgwick*.

Solicitors for the official liquidator, *Denton, Hall*, and *Barker*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Monday, Nov. 8, 1869.

RICHARDSON *v.* DU BOIS.

Husband and wife—Husband a lunatic—Authority of wife to pledge husband's credit—Repairs to house.

Where necessary repairs were done to the house of a lunatic by a tradesman taking orders from the lunatic's wife, she being in the receipt of an allowance sufficient for all domestic purposes, including the repairs, the Court

Held, that the wife had no authority under these circumstances to pledge the credit of her husband, and that his estate was not liable.

This was an action for work and labour done, and materials supplied and goods sold and delivered by the plaintiff to the defendant, to which the defendant pleaded never indebted.

From the facts as proved in evidence at the trial it appeared that the plaintiff is a house decorator and builder, carrying on business in Sloane-street, and that the defendant is a proctor, and was at the time the work was done a lunatic and in an asylum. The plaintiff did not, however, know till after a portion of the work had been done that the defendant was a lunatic, and after he discovered that such was the case, he continued to perform the work under the directions of the defendant's wife, who had given the orders in the first instance.

The house to which the repairs were done was held by the defendant on a long lease. The whole of the defendant's income, which amounted to 350*l.* per annum, was, after payment of the expenses of his maintenance in the lunatic asylum, paid over to the defendant's wife, who continued to reside in the house with her children. Further sums of money had also been paid to the wife of the defendant by his partner and others, amounting altogether in the space of two years and four months to 2219*l.*

The learned Judge, Hannen J., at the trial left it to the jury to determine (1) whether credit was given by the plaintiff to the husband; (2) whether the repairs were reasonable and proper to be done, having regard to the defendant's estate, and such as would be proper irrespectively of any allowance to the wife; and (3) whether the allowance made to the wife was sufficient for all purposes, including the repairs done to the house. The jury found that the wife acted as agent for her husband, that the repairs were reasonable and necessary, and that the allowance made to the wife was sufficient for all purposes, including the repairs. On these findings the learned judge directed the verdict to be entered for the defendant, giving the plaintiff leave to move to enter the verdict for him.

O'Brien, Serjt., having obtained a rule *nisi*, calling on the defendant to show cause why the verdict should not be entered for the plaintiff,

Keane, Q. C. and *Robins*, now showed cause against the rule. The defendant is entitled to have the verdict entered for him, the jury having found that the allowance to his wife was sufficient for every purpose, including the repairs done to the house. The estate of a lunatic is no doubt bound to pay for necessaries supplied to the lunatic's wife; but the present is not such a case. The class of cases in which a wife is enabled to pledge her husband's credit is stated by Alderson, B. in *Read* v. *Legard*, 6 Ex. 642, "If she is compelled by his misconduct to procure the necessary articles for herself, as for instance if he drives her from his house, or brings improper persons into it, so that no respectable woman could live there, according to the decided cases, he gives her authority to pledge his credit for her necessary maintenance elsewhere, which means that the law gives that authority by force of the relation of husband and wife. So if a husband omit to furnish his wife with necessaries while living with him, she may procure them elsewhere, otherwise she would perish. Then if, as here, the husband becomes lunatic by the visitation of God, and therefore unable to provide his wife with necessaries, he is in the same situation as a husband omitting to furnish them; and as by the relation which he originally contracted, he undertook to provide her with them himself, he becomes liable to any person who does it for him."

The Court here called on

O'Brien, Serjt., and *Beasley*, to support the rule. The ordinary doctrine applying to the case of a wife who lives apart from her husband has no application to a case like the present. The expense was here incurred for the benefit of the husband's estate, and not for the personal benefit of the wife. There might be a lease of the house, which would become forfeited for non-repairs. In *Williams* v. *Wentworth*, 5 Beav. 325, it was laid down that the law will raise an implied contract, and give a valid demand or debt against a lunatic or his estate for moneys expended for the necessary protection of his person and estate. The jury have found that the defendant's wife acted in this matter as his agent. [COCKBURN, C. J.—Simply in the sense of being his wife, and as such ordering necessary things. MELLOR, J. And the jury have found that she had money enough to pay for these repairs.] How can that consideration affect the plaintiff? [COCKBURN, C. J.—In this way, that the wife's implied authority to bind the husband is limited to cases where the expenses are necessary and the allowance to the wife is not sufficient.] There is no living apart from her husband by the wife in this case; neither has she a separate allowance in the ordinary sense. [LUSH, J.—If you give your servant or anybody else money to pay for a certain thing, can he pledge your credit for it?]

COCKBURN, C. J.—I do not think it is necessary to add anything to what we have said in the course

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of the argument. Where a man's wife has sufficient means allowed her for defraying all necessary expenses connected with the house, there the law will not imply any authority on her part to pledge his credit. And I do not think that the lunacy of the husband makes any difference. The rule must be discharged.

MELLOR, LUSH, and HANNEN, JJ., concurred.

Rule discharged.

Attorney for plaintiff, *J. Wright.*

Attorney for defendant, *J. Aldridge.*

Nov. 1 *and Dec.* 13, 1869.

THE COMMISSIONERS FOR ADMINISTERING THE LAWS FOR THE RELIEF OF THE POOR FOR IRELAND (apps.) *v.* THE SELECT VESTRY OF THE PARISH OF LIVERPOOL (resps.)

Poor law—Order of removal—Removal of a married woman to the place of settlement in Ireland, without her husband.

A woman born in Ireland, married an Irishman, whose place of settlement was unknown. They came to England, and the husband having deserted his wife she became chargeable to the parish of L., which parish obtained an order for her removal to the union in Ireland within which she was born:

Held, that there was no jurisdiction to make such an order, which was therefore bad.

This was a case stated as follows, under sect. 11 of the 12 & 13 Vict. c. 45.

At a petty sessions of Her Majesty's justices of the peace for the borough of Liverpool holden on the 28th May 1868, a warrant for the removal of one Ellen Keating by mistake called in the said warrant Ellen Caton, and her two children Margaret and John, from the parish of Liverpool to the union of Fullamore, a copy of which order is hereunto annexed, marked B, was granted by Thomas Darnley Anderson and John Woodruff, Esqrs., the justices present at the said petty session. The said warrant was made upon the examination of the said Ellen Keating, taken before the said two justices, according to law, hereunto annexed and marked A.

And whereas the appellants have given due notice of appeal against the said warrant to the court of quarter sessions for the said borough of Liverpool, pursuant to the 7th section of the stat. 26 & 27 Vict. c. 89, on the grounds set forth in the notice of grounds of appeal hereunto annexed, and marked C.

And whereas it has been agreed by and between the appellants and respondents, that pursuant to the 116th section of the stat. 12 & 13 Vict. c. 45, the facts of the said case should be stated in the form of a special case for the opinion of the Court of Queen's Bench.

And whereas, in pursuance of the said agreement and the said statute, an order has been made by Master Manley Smith, and such order is as follows:

"Upon hearing the attorneys, or agents, on both sides, I do order that the facts of this case be stated in special form for the opinion of the Court of Queen's Bench pursuant to the statute.

"Dated 4th Jan. 1869. "C. M. SMITH."

The facts of the case are as follows:—

That owing to the peculiar manner in which the said Ellen Keating pronounced her name, and her inability to write the same, the said Ellen Keating's name was by mistake spelled Caton in the said examination and order of removal. Ellen Keating, by mistake called Caton in the warrant of removal is the lawful wife of John Keating, and the said Margaret and John, in the said warrant mentioned, are their legitimate unemancipated children.

On Sept. 30, 1867, Ellen Keating and her said two children, Margaret and John, were admitted into the Liverpool Workhouse as the wife and children respectively of the said John Keating, and there remained until removal to Fullamore Union, Ireland, by warrant, dated 28th May 1868.

The said John Keating, the husband, was born in Ireland, but not within the district of the union of Fullamore, nor has he ever resided for three years within the district of the said union.

The said Ellen Keating was born within the district of Fullamore Union, and both of the said said children, Margaret and John, were born in Ireland.

On the 31st Oct. 1867, the respondents laid an information on oath before the magistrates against the said John Keating, the husband, for having, on the said 30th Sept. 1867, run away from the parish of Liverpool, leaving and deserting his said wife Ellen Keating, and his two children, Margaret and John, chargeable to the said parish of Liverpool, and a warrant was granted thereon; and on the 17th Sept. 1868, being after the appeal in this cause was entered at the court of quarter sessions for the borough of Liverpool, and after the same was respited to the next quarter sessions of the said borough, he was brought before Thomas Stamford Raffles, stipendiary magistrate for the said borough, and convicted of his said offence.

The warrant of removal was issued in the absence of the said John Keating, and without any summons having been issued requiring his attendance before the magistrates for the said borough at the sessions at which the said warrant was granted.

At the time of the granting of the said warrant of removal, viz., 28th May 1868, and up to and until the time of his apprehension, viz., on the 17th Sept. 1868, the said John Keating, the husband, was living and residing in Hull, in the county of Yorkshire, and not in and within the said parish of Liverpool; but the respondents did not at the time such order was made, know where the said John Keating, the husband, was, or where he was to be found.

The examination of the said Ellen Keating, the warrant of removal, and the notice and grounds of appeals hereunto annexed, and marked A, B, and C respectively, are to be taken as admitted, and the court is to have the same powers of amendment and otherwise as might have been exercised by the court of quarter sessions.

The questions for the consideration of the court are, first, whether the warrant of removal under the above facts should have been granted by the magistrates; and, secondly, if so, whether it was rightly granted for removal to the union at Fullamore.

If the court shall be of opinion in the affirmative of both the above questions, then the appellants agree that a judgment in conformity with such decision and for such costs as the court may adjudge may be entered on motion by the respondents at the sessions next or next but one after such decision shall have been given. If the court shall be of a contrary opinion on either of the above questions, then the respondents agree that a judgment in conformity with such decisions and for such costs as the court may adjudge may be entered on motion by the appellants at the sessions next or next but one after such decision shall have been given.

A—COPY OF EXAMINATION.

The examination of Ellen Caton, taken on oath before us, the undersigned, two of Her Majesty's justices of the peace in and for the said borough of Liverpool, in petty sessions assembled this 28th May 1868, who on her oath saith that she hath become and is now chargeable to the parish of Liverpool, in the said borough; that according to the best of her knowledge and belief she is about thirty years of age, and was born in Ireland, in the parish or town of Fullamore, in the King's County, now contained in the union of Fulla-

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more, in the county of Westmeath and King's County, in Ireland aforesaid; that she hath not a settlement in England, and is not otherwise exempt from removal from the said parish of Liverpool; that she hath two children, named Margaret (of the reputed age of thirteen years) and John (of the reputed age of two years), which children are not exempt from removal from the said parish of Liverpool; and that the said Ellen Caton and her said children are in such a state of health as not to be liable to suffer any bodily or mental injury by removal to Ireland.

The × mark of Ellen Caton.

Sworn the day and year first above written, before us at Liverpool, in the said borough. T. D. ANDERSON.
J. WOODRUFF.

B.—COPY OF WARRANT OF REMOVAL.

To the Select Vestry of the parish of Liverpool, in the borough of Liverpool, in the county of Lancaster, and the guardians of the poor of the Fullamore Union, in the county of Westmeath and the King's County in Ireland.

Borough of Liverpool to wit.—At a petty sessions of Her Majesty's justices of the peace for the borough of Liverpool, holden in and for the said borough at the police-court in the said borough, on the 28th May 1868, before us, the undersigned, Her Majesty's justices of the peace for the said borough.

Whereas complaint is now made by the Select Vestry of the parish of Liverpool, in the borough of Liverpool, in the county of Lancaster, as guardians of the poor of the said parish, that Ellen Caton hath become and is now chargeable to the said parish of Liverpool; and whereas the said Ellen Caton having been brought before us, application having been made to us in petty sessions assembled, by James Alexander McImnes, an officer of the said select vestry, on their behalf, we have made due examination on oath and find that the said Ellen Caton is of the reputed age of thirty years, and was born in Ireland in the parish or town of Fullamore, in the King's county now contained in the same union of Fullamore, and she hath not a settlement in England, and is not otherwise exempt from removal from the said parish of Liverpool, and that she hath two children, named, Margaret, of the reputed age of thirteen years, and John, of the reputed age of two years; which children are not exempt from removal from the said parish of Liverpool; and we have seen the said Ellen Caton, and are satisfied that she and her said children are respectively in such a state of health as not to be liable to suffer bodily or mental injury by removal to Ireland.

These are therefore to require you, the said select vestry of the said parish of Liverpool, as such guardians as aforesaid, to cause the said Ellen Caton with her family to be safely conveyed to the said union of Fullamore, and to be delivered at the workhouse of such union.

Given under our hands and seals at the session aforesaid.
J. D. ANDERSON.
J. WOODRUFF.

By sect. 2 of the 8 & 9 Vict. c. 117, it is enacted—

That if any person born in Scotland or Ireland, or in the Isle of Man or Scilly, or Jersey or Guernsey, not settled in England, become chargeable to any parish in England by reason of relief given to himself or to herself, or to his wife, or to any legitimate or bastard child; such person, his wife, and any child so chargeable shall be liable to be removed respectively to Scotland, Ireland, the Isle of Man, Scilly, Jersey, or Guernsey; and if the guardians of such parish or of any union in which the same may be comprised, or where there are no such guardians, if the overseers of such parish complain thereof to any one justice of the peace, such justice may, if such person do not attend voluntarily, summon him to come before any two justices of the peace at any time and place to be named in the summons and at such time and place, or on the attendance of such person, any two justices may hear and examine into the matter of such complaint, and if it be made to appear to their satisfaction that such person is liable to be so removed as aforesaid, and if they see fit, they may make and issue a warrant under their hands and seals to remove such person forthwith at the expense of such union or parish.

By sect. 1 of the 24 & 25 Vict. c. 76 it is enacted that—

No application for a warrant ordering the removal from any place in England to Ireland of any poor person who shall have become chargeable in such place, shall be heard and determined except by two or more justices in petty sessions assembled, or by a stipendiary magistrate, or metropolitan police magistrate sitting in his court, which justice or magistrate (as the case may be) shall see such poor person, or the person who is the head of the family proposed to be removed, and shall be satisfied that every person who is proposed to be removed by the warrant is in such a state of health as not to be liable to suffer bodily or mental injury by the removal.

Sect. 2 enacts that—

Such warrant of removal shall be granted only on the application of the relieving officer, or other officer of the guardians of the union or parish where such poor person shall become chargeable, and shall contain the name and reputed age of every person ordered to be removed by virtue of the same, and the name of the place in Ireland where the justice or magistrate shall find such person to have been born, or to have last resided for the space of three years, and a statement of such examination having been made as to the state of health of every person ordered to be removed as aforesaid; and such warrant shall be addressed to the party applying for the same, and to the guardians of the union or parish to which such poor person is to be removed, and a copy shall be given by and at the cost of the person applying for such warrant to the person or the head of the family about to be removed by virtue of it.

Francis (*Higgin*, Q. C. with him) appeared for the respondents (*a*).—The question is a novel one; and turns upon whether, when a wife who has a birth settlement in Ireland becomes chargeable in England, she having a husband living whose place of birth settlement in Ireland is unknown, she can be removed without him to such settlement? He submitted that she could be under the provisions of the 8 & 9 Vict. c. 117, s. 2.

Mellish, Q. C. (*Temple* with him) for the appellants, contended that there was no power to remove a wife without her husband, if living, and that the order of removal was bad.

Cur. adv. vult.

Dec. 13.—HANNEN, J.—This was a case stated by consent under the stat. 12 & 13 Vict. c. 45, upon an appeal against an order or warrant made by two justices of the peace for the borough of Liverpool, on the 21st May 1868, for the removal of Ellen Keating and her two children from the parish of Liverpool, where they had become chargeable to the union of Fullamore, in Ireland, the birthplace of the said Ellen Keating. The pauper Ellen Keating, was the wife of one John Keating, who was an Irishman. Neither of them had acquired any settlement in England. The children were the issue of the marriage, and were both born in Ireland, they were infants and unemancipated, one being aged thirteen, and the other two years. At the time when Ellen Keating and the children became chargeable, and also at the time of making the warrant of removal and of executing it, John Keating was not living in the parish of Liverpool, he had some time previously deserted his wife, and was living at Hull, in Yorkshire, but the respondents did not then know where he was or could be found. He was consequently not summoned or brought before the removing magistrates, nor does it appear from the examinations, warrant of removal, or any statement in the case, that inquiry was made as to him, or as to his place of birth; in point of fact, he was not born in Fullamore, nor had he resided there for three years. Under these circumstances it was contended on behalf of the appellants that the warrant of removal of the wife and the two children to Fullamore, the place of the wife's birth, was invalid, and ought not to have been granted, and we are of that opinion. The statute under which the removal of Irish paupers is now regulated is the 8 & 9 Vict. c. 117, as amended by the 10 & 11 Vict. c. 33, the 24 & 25 Vict. c. 76, and the 26 & 27 Vict. c. 89; the material clause is the 2nd section of the first mentioned statute. The language of the section, according to its plain natural meaning, appears to require that where there is a husband as well as a wife and children liable to be removed, they are all to be removed together. With regard to the place to which the removal is to be made, by the 4th section of the 8 & 9 Vict. c. 117, the justices of a county or borough were empowered to make regulations for the removal of such poor persons, their wives, and children, but this section is now repealed, and by

(*a*) The case had proceeded some time when the court called the attention of counsel to the fact that the practice as now established is, that the counsel for the appellants should begin in every case

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stat. 24 & 25, Vict. c. 76, sect. 2, the warrant of removal was required to contain, amongst other things, the name of the place in Ireland where the removing justices shall find such poor person to have been born, or to have last resided for three years, and a copy of the warrant was thereby required to be given to the person or "the head of the family" about to be removed by virtue of it. This shows that the Legislature intended that where there was a head of the family the removal was to be to his or her place of birth or place of residence, and the 26 & 27 Vict. c. 89, which makes further regulations concerning these removals, and gives the right of appeal by the Poor-Law Commissioners of Ireland, prescribes the particular form of warrant issued in this case. No provision is made in any of these Acts or in any of the former statutes which were repealed by the 1st section of the 8 & 9 Vict. c. 117, where a woman has been deserted by her husband, for her being removed without him, or being removed to any other place than the husband's settlement if he were living; and, upon a review of the statutes and the decisions upon them, we think that such a case in left unprovided for. In *Rex* v. *Cottingham*, 7 B. & C. 616, which case arose on the construction of a former Act (the 59 Geo. 3, c. 12) which is now repealed, but which in its enactments closely resembled the 8 & 9 Vict. c. 117, s. 2, it was held that the wife of an Irishman who had no settlement in England and had deserted her, might be removed without him to her own maiden settlement which revived on her desertion by her husband; but it was there laid down by Bayley, J. in delivering the judgment of the court, that the statute of the 59 Geo. 2, c. 12, s. 83, which in this respect is undistinguishable from the present, did not authorise the removal of the wife alone to the place of birth of her husband, and that as the husband had quitted the parish, she could not be removed there without him, and the case was therefore not within the Act. It had been previously held in *R.* v. *Leeds*, 4 B. & A. 498, that the wife and unemancipated children of a Scotchman who had not deserted his wife but was living with her, could not, even with his consent, be removed to her maiden settlement, but that all were removable with the husband to Scotland. In *R.* v. *All Saints, Derby*, 19 L. J. 14, M. C., the question of the construction of the present Act arose in the case of the children of an Irish father by an Irish mother. The mother had died and the children had been deserted by the father. It was there decided that they were removable to the parish of their birth in England, and not to Ireland, under the 2nd section of the statute. Coleridge, J., there laid down that, according to the Act, the father must be dealt with as the subject of removal, and Wightman, J., said that the statute, for the purpose of removal, applied directly to the father only, and to the children not otherwise than incidentally as a part of his family, and that if the father cannot be removed, there is no power over the child. Coleridge, J., also observed that the section might mean that if the father were summoned, the order might be made at the time and place named, whether he appeared or not, or at any time when he did come, and that if he were absent, service of a summons upon him must be shown, so that, at all events, the proceeding should relate to him. This case, which recognised the previous case of *Rex* v. *Cottingham*, appears to make it clear that the wife and children cannot be removed except with the father, and, at all events, as a part of the father's family, and in a proceeding having reference to him, and, therefore, at all events, a warrant of removal, which ignores the father and the father's place of birth, and removes to that of the mother, must be considered as unwarranted by the statute. The subsequent case of *R.* v. *Much Hoole*, 17 Q. B. 548; and *R.* v. *St. Giles Cripplegate*, 17 Q. B. 636, are substantially in accordance with the cases previously mentioned, as showing that neither a wife deserted by her husband, an Irishman, nor a daughter, though unemancipated and becoming chargeable in a different parish from that in which her parents, who were Irish without a settlement, resided, can be removed to Ireland under the statute now in question. And as we have had no instance brought to our notice of such a removal having been made, and having been unable to discover any such case, we consider that this order of removal ought to be reversed as illegal, and that the respondents should, according to the 7th section of the 26 & 27 Vict. c. 89, pay the expenses at the preliminary inquiry and appeal, and also those of maintaining the persons removed, and of conveying them back to Liverpool.

Judgment for the appellants.

Attorneys for the respondents, *Monckton* and *Monckton*, Gray's-inn.

Attorneys for the appellants, *Solicitors to the Irish Poor Law Board.*

Monday, Jan. 17.

Ex parte H. M. TRENCHARD.

Articled clerk—Former service under expired articles——Fresh articles—Computation of former service.

Where an articled clerk served two years under his articles, and then ceased to serve any longer, and the articles expired, and he then desired to enter into fresh articles, and obtain the previous consent of the court to such two years' service being computed in the period of service under such new articles: the court refused such consent, leaving it open, however, to the applicant to apply to have such period computed when he shall have served a sufficient time under such new articles.

This was an application on the behalf of a Mr. Henry Montagu Trenchard that he may now be at liberty to complete service as an articled clerk under articles dated the 22nd Oct. 1856, without paying any further stamp duty, and that the time during which he did serve under the said articles may be allowed in computing the period of five years, and that he may be exempted from passing any intermediate examination, he having been originally articled before the Act 23 & 24 Vict. c. 127, and the regulations made thereunder came into operation, and that production of the original articles may be dispensed with, the same being lost.

The affidavit upon which the rule was moved was as follows, made by Henry Charles Trenchard, attorney and solicitor of Taunton, which stated,

1. My son, Henry Montagu Trenchard, was on the 22nd Oct. 1856, then being eighteen years of age, by articles of clerkship of that date articled to me for a term of five years to learn the profession of an attorney and solicitor.

2. That the stamp duty of 80l. was duly paid for the said articles of clerkship, and the stamp duty imposed thereon, and the same were filed on the 22nd Dec. 1856.

3. That the said articles of clerkship have been by accident mislaid and lost; that diligent search has been made for the same, and that no trace or copy of them can be found.

4. That the said Henry Montagu Trenchard served me faithfully for the term of two years and eighteen days, from the 22nd Aug. 1856 to the 9th Nov. 1858, and then became out of health and unable to follow his intended profession. That he was placed under the care of several medical men, who urged his seeking some other occupation which would lead him into more active life.

5. That accordingly, but with great regret, as he was becoming of great assistance to me, and with the approval of the said medical advisers, I obtained a commission for him in the army on the 3rd June 1859.

6. That he is now a captain in the 51st Regiment (King's Own Light Infantry); that he has served his whole service in that regiment, having during such service served five years and some months in India.

7. That his health is now completely re-established, and I

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am desirous of having him again in my office, and he is willing and ready to resume his original profession, and assist me therein.

8. That for this purpose he is desirous, of and from the date of his selling out of the army, to complete his service under his articles of clerkship of the 22nd Oct. 1856, if he may be permitted to do so.

9. That while he was in my office he showed great aptitude for business; and that in his regiment he has, at different times, filled different acting appointments (such as acting adjutant at home), and that he would, in my judgment, resume the study of his profession with aptitude and earnestness.

10. That it would be of the utmost importance both for him and me that he should be enabled to get admitted at the earliest possible period, and for that purpose that he may be permitted to return into my office under his original articles, and that the term of two years and eighteen days already completed, may be reckoned as part of the original five years.

By sect. 3 of the 6 & 7 Vict. c. 73, it is enacted—

That except as hereinafter mentioned no person shall from and after the passing of this Act be capable of being admitted and enrolled as an attorney or solicitor, unless such person shall have been bound by contract in writing to serve as clerk for and during the term of five years to a practising attorney or solicitor in England or Wales, and shall have duly served under such contract for and during the said term of five years, and also unless such person shall after the expiration of the said term of five years have been examined, and sworn in the manner hereinafter directed, &c.

By sect. 13 it is enacted—

That if any attorney or solicitor to or with whom any such person shall be so bound shall happen to die before the expiration of the term for which such person shall be so bound, or shall discontinue or leave off practice as an attorney or solicitor, or if such contract shall by mutual consent of the parties be cancelled, or in case such clerk shall be legally discharged before the expiration of such term by any rule or order of the court wherein such attorney or solicitor shall have been admitted, such clerk shall and may in any of the said cases be bound by another contract, or other contracts, in writing to serve as clerk to any other practising attorney or solicitor, or attorneys or solicitors, during the residue of the said term; and service under such second or other contract in manner hereinbefore mentioned shall be deemed and taken to be good and effectual, provided that an affidavit be duly made and filed of the execution of such second or other contract or contracts within the time and in the manner hereinbefore directed, and subject to the like regulations with respect to the original contract and affidavit of the execution thereof.

Lopes, Q. C. now moved accordingly. The court has power to comply with this gentleman's request, for he is only desirous of not losing the benefit of the time he has already served. If his original articles had not expired he might clearly, under the 13th section, have been permitted to enter into fresh articles and have had the benefit of his former services. [LUSH, J.—In *Ex parte Keddle*, 4 Best & Sm. 993, which was a very similar case, this court refused the application.] That case would hardly be followed in the present instance. The equity of the case is clearly with the applicant. [LUSH, J.—In *Ex parte Keddle* it was held that where the time of the articles of clerkship had expired, and the service under them had not been completed, the court would refuse an application for leave to enter into fresh articles, and to serve under them to complete the service under the original articles, and so overruling the previous case of *Ex parte Smith*, 1 E. & E. 928. COCKBURN, C. J.—You desire to enter into fresh articles and to have the benefit of the service under the old articles. There is nothing to prevent your entering into fresh articles, but as you must come to the court again before you are admitted, we cannot bind ourselves by anticipation; it will hereafter be the proper time to take the former service into consideration.] I submit, if the court has power to permit the former service to count hereafter, it can permit it now; and it is certainly more desirable that this gentleman should know at once what time he has to serve than to be left in uncertainty, especially as it may determine his future conduct with reference to selling out of the army. If the court were now to say that the former service shall be considered, that will be binding hereafter. [COCKBURN, C. J.—We certainly cannot say that the old service shall be taken into account. You will have to come to the court again, and then will be the proper time for such consideration. I cannot distinguish this case from *Ex parte Kiddle*. LUSH, J.—You are asking us to decide now that he has properly served for the two years; we cannot do that, for that is a proper subject for the consideration of the examiners.]

COCKBURN, C. J.—We are sorry we cannot assist this gentleman, especially as I know him to be the son of a gentleman in practice on the Western Circuit of great respectability; but we must see that there has been such a service as the Act requires, and this we cannot do by anticipation. I agree that it is to some extent a hardship upon this gentleman to give up his present profession upon the uncertainty of being permitted to avail himself of his former articles, but we must be guided by what we deem to be the law upon the point.

Application refused.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Monday, Nov. 15, 1869.

HOOPER v. MARSHALL.

Departure in pleading—Composition-deed—Sureties—B. A. 1861, *s.* 192.

In an action by drawer against acceptor of a bill of exchange, the defendant pleaded a composition-deed executed by him before the bill was due. The deed contained a clause reserving the rights of creditors against sureties. In the declaration the bill was stated to be payable to the plaintiff, without suggesting that it was a negotiable instrument. The repliction alleged that the said bill was payable not to the plaintiff only, but to the plaintiff or order, that plaintiff had indorsed the bill, that the holders of the bill, at the time of the making and registration of the deed, presented the bill for payment, and it was dishonoured by the defendant. The plaintiff never assented to the deed, and was compelled to pay the amount of the bill to the holders, upon which he became the holder. The replication concluded that "the plaintiff, except as in the replication mentioned, was not a creditor of the defendant in respect of his claim on the said bill:"

Held, on demurrer to this replication, that there was no departure from the declaration, but that the replication was bad, because the plaintiff was a creditor within the 192*nd section of the B. A.* 1861, *and was barred by the deed.*

This was a demurrer to a replication.

The declaration consisted of common counts, and also a count upon a bill of exchange by drawer against acceptor as follows: "For that the plaintiff, on the 7th Feb. 1868, by his bill of exchange now overdue, directed to the defendant, required the defendant to pay to the plaintiff 24*l.* 4*s.* 3*d.*, two months after date, and the defendant accepted the said bill, but did not pay the same."

The pleas, which applied to the whole declaration, were:—

1. Except as to 5*l.* 10*s.*, that after the accruing of the plaintiff's claim, and after the 11th Oct. 1861, the defendant was indebted to divers persons, and thereupon a deed, bearing date the 26th March 1868 was made and entered into in the words and figures following, that is to say:

This indenture, made the 26th March 1868, between the creditors of one Marshall (the defendant), of, &c., and hereinafter called "the creditors," of the one part, and the said Marshall, of the other part, witnesseth that in con-

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sideration of the covenant of the said Marshall, hereinafter contained, the creditors of the said Marshall do hereby release and for ever absolutely discharge the said Marshall from all actions, suits, debts, sums of money, accounts, reckonings, contracts, agreements, promises, bills, notes, judgments, claims, and demands, which they the creditors, or any or either of them, now have, or at any time had, against the said Marshall. Provided always, and it is hereby agreed and declared, that nothing herein contained shall in any wise prejudice or affect any lien, or other security, held by any creditor who would not have been prejudiced or affected by proceedings in bankruptcy, if the said Marshall had been duly adjudicated a bankrupt; and that no creditor shall, by or in consequence of these presents, be prejudiced or affected as to his right or remedy against any person or persons, other than the said Marshall, whose names shall appear on any bond, bill of exchange, guarantee, or other document, held by such creditor. And the said Marshall, in consideration of the aforesaid release, doth hereby for himself, his executors and administrators, covenant with the creditors, severally and respectively, and their several and respective executors and administrators, that the said Marshall, his executors or administrators, will or shall pay to the creditors, severally and respectively, their several and respective executors or administrators, a composition of 5*s.* in the pound sterling upon the several debts now owing from the said Marshall to the creditors, within two months from the registration of this deed. In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

The defendant then averred performance of all the statutory requirements; and that at the time of the execution of the said deed the plaintiff was a creditor of the defendant in respect of the claim herein pleaded to within the meaning of the Bankruptcy Act 1861; and that the plaintiff was bound by the deed as if he had been a party thereto, and had duly executed the same.

2. As to 5*l.* 10*s.*, the amount of the composition due to the plaintiff under the deed, payment into court.

There was a replication as follows to the defendant's first plea, so far as it related to the bill of exchange in the declaration mentioned;—"That the said bill was payable not to the plaintiff only, but to the plaintiff or order, and that before the making of the said deed, and before the said registration thereof, he, the plaintiff, endorsed the said bill for value to Herring, Dewick, and Hardy, who, at the time of the making and registration of the said deed, were the holders thereof in their own right and for value; that the said bill was duly presented for payment while the said Herring, Dewick, and Hardy were the holders thereof, and was dishonoured by the defendant, of all which the plaintiff had due notice; that the plaintiff never assented to or executed the said deed; that after the registration of the said deed, and before suit, the plaintiff was compelled to pay, and did pay, to the said Herring, Dewick, and Hardy, the amount of the said bill, in discharge of his liability, as drawer thereof, whereupon the said bill was returned to the plaintiff, and he became, and was, and until and at the commencement of the action continued to be, and still was, the owner of the said bill; and that the plaintiff, except as in the replication mentioned, was not a creditor of the defendant in respect of his claim on the said bill."

This was the replication demurred to.

Barnard argued for the defendant in support of the demurrer: First, the allegation in the replication is a departure from that in the declaration; the replication states that the bill sued upon was a negotiable instrument, whilst the declaration avers only that it was payable to the plaintiff, without any suggestion of its being also payable to his order. Secondly, although at the time the deed was made, the bill had not become due, yet the plaintiff was then a creditor of the defendant in respect of the bill, within the meaning of that word as laid down by the Exchequer Chamber in *Wood* v. *De Mattos*, L. Rep. 1 Ex. 91; 10 L. T. Rep. N. S. 142. The case of *Ex parte Petrie*, L. Rep. 3 Ch. App. 232; 18 L. T. Rep. N. S. 169, which may at first appear to be against this contention, really only decides that the assent by an indorser, who is not at the time the holder of a bill, is inoperative, although he may become the holder after the registration of the deed.

Raymond, contra.—First, there is in the deed an express reservation of the rights of creditors against sureties, and this implies at common law, and it appears from *Solly* v. *Forbes*, 2 B. & B. 38, and other cases, that the rights of the sureties against the principal debtor are also reserved. The Bankruptcy Acts do not affect the interpretation of the deed on this point, and the deed does not release the plaintiff's claim against the defendant in respect of the debt which he has paid as his surety. It would be unreasonable if the debtor and creditors had the power to alter the liability of the sureties without their consent. Secondly, the plaintiff was not a creditor of the defendant at the time the deed was made. [WILLES, J.—Would he not come within the provision for proof by sureties contained in the 173rd section of the Act of 1849?] That relates only to a bankruptcy, and could not apply to a deed with such a condition as this concerning sureties. The plaintiff, unless he paid, could never become a creditor, and at the time of the execution of the deed he had no claim as a creditor under the 192nd section:

Ex parte Petrie, L. Rep. 3 Ch. App. 232; 18 L. T. Rep. N. S. 169.

Barnard was not heard in reply.

BOVILL, C. J.—The first point argued by Mr. Barnard for the defendant was that the replication was a departure from the declaration. I think, however, that it is not, but that it merely fortifies the declaration. The plaintiff claimed as holder of the bill, and the replication states how he became so. The only other question is whether the plaintiff's rights are excepted from those released by the composition deed. It is true that the rule of law is that the release of a principal is a release of the surety, and that if the principal agrees, as he may do, that the right of the creditor against the surety shall continue, the surety is entitled to recover against him anything that he is compelled to pay. This deed, however, if binding on the plaintiff at all, is so by statute, and the question is therefore what is the effect of the Bankruptcy Acts? Under the general law of bankruptcy there is no doubt that the subsequent parties to a bill would remain bound, notwithstanding the discharge of the acceptor, and composition-deeds are intended to have very much the same effect as bankruptcy. And the special provision in this deed, reserving the rights of creditors against sureties, seems designed to put all parties in the same position as they would have been under a bankruptcy. There is no doubt much difficulty in placing a construction on the exact terms of the Bankruptcy Acts; and in the case of *Ex parte Petrie*, it was certainly held that persons in the position of the plaintiff ought not to be taken into account in reckoning the amount of the assents to a composition-deed; that decision turned mainly on the words of the 200th section of the Bankruptcy Act 1861, and seems to leave untouched the question whether the plaintiff is bound by such a deed under the 192nd section. But looking at the case of *Wood* v. *De Mattos*, it seems to me that the plaintiff's claim is barred by sect. 192, though he paid the amount of the bill after the registration of the deed, and such deed contained a reservation of rights against sureties.

WILLES, J.—I am of the same opinion. The plaintiff sues on the bill, and so far as the replication goes, he does not rely on the count for money paid;

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in this he is right, for there would be a clear answer to a claim on that ground, in that as the defendant was not liable to the holder, there would not have been a payment on request. Now on the bill the plaintiff was primarily liable, and the plaintiff, if he paid in default of the defendant, on payment might have sued the defendant, and on the bill getting into the hands of third parties, if the holder, who had the sole control over it, simply released, then the defendant would be discharged and the defendant also; but if he reserved the rights against sureties, then according to *Solly* v. *Forbes* such release would be a covenant not to sue, and would not prevent the holder bringing an action against the plaintiff, the drawer, who, if he paid, could then go against the defendant, the acceptor and original debtor. This would be the result under the common law, and therefore the defendant must resort to statute. The statute is no doubt applicable to discharge the plaintiff, if he is to be considered a creditor; and the question is whether the word includes not only those who at the time of the registration of the deed have against the compounding debtor a debt *in præsenti*, but also includes persons who might on a future contingency become so, *i. e.*, whether the word also extends to persons who are in a position which may result in a subsequent debt against him; and if it includes the latter the plaintiff is bound by the deed, which operates as a release by him. Now the case of *Wood* v. *De Mattos* decided that the word "creditor" in 24 & 25 Vict. c. 134, s. 192, is used in the sense of a person having a claim provable in bankruptcy, and decided, therefore, that the having a contingent debt so provable constituted such a man a creditor for a composition-deed; and, indeed, that such a deed applied not only to a contingent debt so provable, but also to claims provable under sect. 173 of 12 & 13 Vict. c. 106. I am, therefore, of opinion that the deed which has been pleaded is an answer to the plaintiff's claim, and our judgment must be for the defendant.

KEATING, J.—I am of the same opinion. At the time the deed was made, the plaintiff had indorsed away the bill, and was then a party only contingently liable; but the case of *Wood* v. *De Mattos* decides that as he could prove in bankruptcy, he is bound by the deed. Mr. Raymond says that by the words of the deed, the effect of the statute is got rid of, but the words do not affect the statute which applies, and, therefore, the defendant is entitled to our judgment.

BRETT, J.—The question of departure was but faintly pressed on behalf of the defendant, and requires little notice. As to the other question, Mr. Raymond says that the replication discloses facts which, if stated in the declaration, would show that the deed reserved to the plaintiff a right to sue; and he says that such right is reserved on the ground that the defendant, without the plaintiff's consent, reserved to the holder of the bill the right to sue the plaintiff, and, therefore, is to be taken to have reserved a right to the plaintiff to sue the defendant. This contention is ingenious but is not sound, because, according to the statute as interpreted by the case of *Wood* v. *De Mattos*, the plaintiff was a creditor of the defendant, and his claim, by the terms of the deed and force of the statute, was released.

Judgment for defendant.

Attorney for plaintiff, *J. Craven.*

Attorneys for defendant, *Phillips* and *Willicombe.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Saturday, Nov. 13, 1869.

MANN v. HARBORD AND ANOTHER.

Costs—Taxation—Review of—Commission to examine witnesses abroad—Legal advice—Letter of instruction to commissioners.

A commission was obtained by defendants to examine witnesses abroad. The commissioners were empowered by the commission to put questions vivâ voce in addition to the written interrogatories to be administered:

Held, that the costs of a letter of instruction sent to each of the commissioners by the plaintiff's attorneys stating the nature of the case and the points in dispute ought to be allowed to the plaintiff as costs in the cause, he having subsequently obtained judgment.

This was an application for a review of taxation. The defendant had obtained an order for a commission to examine witnesses in India. The commission empowered the commissioners to put *vivâ voce* questions to the witnesses in addition to the written interrogatories to be administered. In order to assist the commissioners in the discharge of their duties, the plaintiff's attorneys sent them each a letter of instructions, stating the nature of the case and the points in dispute between the parties to which the evidence should be directed. On the return of the commission the defendants withdrew their pleas, and judgment was signed by plaintiff for an agreed sum in respect of the claim in the action, and costs. On taxation the master refused to allow the plaintiff the costs of the letters of instruction.

Lord showed cause against the rule for review of taxation.

Herschell supported it.

The Court (CHANNELL, PIGOTT, and CLEASBY, BB.), expressed a desire to see the letters of instruction before deciding whether it was proper or not to allow the costs of them, and the court not being prepared to deliver their decision on the last day of term, the parties, to avoid postponement of the matter, consented to be bound by an intimation of the opinion of the judges, without waiting for a formal judgment till the next term. It was subsequently intimated to them that the court were of opinion that the costs of the letters of instruction ought to be allowed.

Plaintiff's attorneys, *Chester* and *Urquhart.*

Defendants' attorneys, *Lyne* and *Holman.*

EXCHEQUER CHAMBER.

Reported by J. SHORTT, Esqr., Barristers-at-Law.

ERROR FROM THE QUEEN'S BENCH.

Monday, Nov. 29, 1869.

(Before KELLY, C. B., WILLES and KEATING, JJ., CHANNELL, PIGOTT, and CLEASBY, BB.)

HUDDART v. RIGBY.

Trespass—Right of way.

To a declaration for breaking and entering the plaintiff's close (which was set out by abuttals) and breaking the plaintiff's gates, hedges, and fences standing thereon, and destroying the grass growing thereon, the defendant pleaded the existence of a common and public footway over the plaintiff's close, and justified the pulling down and destroying the plaintiff's gates, hedges, and fences as obstructing the

said right of way and preventing the convenient use thereof. To this plea the plaintiff replied by joining issue in the statutory form. At the trial the plaintiff admitted the existence of the right of way, but tendered evidence to show that there were no gates, hedges, or fences across the admitted footway, but that there were such gates, &c., on another portion of his land by which the defendant passed, and that they had been pulled down by the defendant. This evidence having been rejected, and a verdict directed to be entered for the defendant:

Held (affirming the judgment of the Queen's Bench), that the evidence was rightly rejected, and that to render it admissible the plaintiff should have new assigned.

This was an appeal by the plaintiff under the provisions of the Common Law Procedure Act 1854, against the decision of the Court of Queen's Bench given on the 5th Nov. 1868, in refusing to grant a rule to show cause why the verdict found for the defendant in this cause should not be set aside, and a new trial had between the parties upon the ground of misdirection.

Declaration. For that the defendant broke and entered certain land of the plaintiff, called the Moor Croft, otherwise the Maiden Croft, situate at Ribbleton, in the county of Lancaster, abutting on the northerly side thereof, in part upon the land of Richard Holden; and on the easterly side thereof in part upon land of Sir Thomas George Hesketh, Bart.; and in other parts upon land used as a public cemetery, by and belonging to the Burial Board of the borough of Preston, and broke open, damaged, broke to pieces, and destroyed the plaintiff's gates, hedges, and fences standing and being upon the said land of the plaintiff, with his feet trod down, damaged, and destroyed the grass and other herbage there growing, and thereby interfered with the plaintiff in the enjoyment of his said land, and prevented him having the use and benefit thereof, and of the said hedges and fences in so ample a manner as he would otherwise have done.

Pleas: 1. Not guilty. 2. That at the time of the alleged trespass there was, and of right ought to have been, a common and public footpath over the said land of the plaintiff for all persons to go and return on foot at all times of the year, at their free will and pleasure, and the defendant having occasion to use the said way, then entered into and upon the said land of the plaintiff and along the said footpath, then using the same as he lawfully might for the cause aforesaid, and because the said gates, hedges, and fencing had been erected, and were wrongfully in and across the said highway, and obstructing the same, and preventing the convenient use thereof, the defendant necessarily pulled down and destroyed the said gates, hedges, and fences for the purpose of using the said footpath, doing no unnecessary damage in that behalf, which are the alleged trespasses.

The plaintiff joined issue upon defendant's pleas.

The cause came on to be tried before Hannen, J., at the summer assizes 1868, held in Lancaster, in and for the county palatine of Lancaster.

The defendant's counsel proposed to give evidence at the trial of a common public footpath running east and west over the said land of the plaintiff in the declaration mentioned.

The plaintiff's counsel admitted such common public footpath, but offered to prove that the trespasses complained of were committed elsewhere.

The plaintiff's counsel offered to prove that there were no gates, hedges, or fences erected upon or across the said admitted footpath, or obstructing the same, or preventing the convenient use thereof; but that there were such gates, hedges, and fences on the plaintiff's said land, across the track by which the defendant so passed as aforesaid, and that some of such gates, hedges, or fences were pulled down by the defendant.

Upon the admission that a common public footway did exist over the said land, the learned judge ruled that the defendant, without further evidence, was entitled to a verdict, and he accordingly directed the jury to find, and the jury did accordingly find, a verdict for the defendant.

Within the time in that behalf allowed, namely, on the 5th Nov. 1868, the plaintiff, by his counsel, applied to the Court of Queen's Bench for a rule, calling upon the defendant to show cause why the said verdict should not be set aside, and a new trial had between the parties, on the ground that the learned judge misdirected the jury.

The Court of Queen's Bench decided against the said application, and refused to grant any rule to show cause, but gave the plaintiff leave to appeal.

Plaintiff's points: First, that the defendant having admitted the acts alleged to be trespasses, cannot justify the same by proving a right of way elsewhere; secondly, that the trespass complained of is specified in the declaration, namely, breaking gates, and the defendant having pleaded a right to do the act specified, must prove what he has alleged; thirdly, that the defendant has in his plea identified the highway alleged as one obstructed by gates, and cannot prove his plea by giving evidence of a highway which is not so obstructed.

Defendant's points: First, that the common public footpath of which the defendant proposed to give evidence at the trial, having been admitted by the plaintiff, it was not open to the plaintiff to give evidence of trespasses committed elsewhere; secondly, that upon the admission that a common public footpath did exist, as proposed to be proved by the defendant, the defendant was entitled to a verdict without any further evidence; thirdly, that the direction given to the jury by the learned judge at the time was correct; fourthly, that the plaintiff's replication puts in issue every material allegation in the plea of the defendant, and that defendant was therefore bound to prove that the gates in the declaration mentioned had been erected and then were wrongfully in and across the highway in the plea mentioned; fifthly, that as the plaintiff had no cause of action against the defendant different from that which the plea professed to justify, or for an access over and above what the defence set up in the said plea justified, the plaintiff was forbidden by the 87th section of the Common Law Procedure Act 1852 to plead a new assignment.

Gorst (*Holker*, Q.C., with him) for the plaintiff.—There are two trespasses alleged in the declaration, and the defendant, by pleading to both, has made them both matter of substance, though otherwise the breaking of the gates, hedges, and fencing might be regarded as matter of aggravation only. The joinder of issue puts the justification of both trespasses in issue; and as the place where both were committed is identified by the declaration and plea, there was no need of a new assignment, as there was in *Glover* v. *Dixon*, 9 Ex. 158. It is stated in the notes to *Taylor* v. *Cole*, 1 Sm. L. C. 122 (5th edit.) that "if the defendant necessarily state in his plea some fact on the existence or non-existence of which the question whether he be a trespasser *ab initio* or not depends, there it will be sufficient, as the plaintiff might have replied, *de injuriâ*, to take issue in the statutory form." The present case falls within that rule. Before the Common Law Procedure Act 1852, the proper replication would have been the replication *de injuriâ*.

Bracegirdle v. *Peacock*, 8 Q. B. 171;
Boyd v. *Danton*, 2 A. & E. 26;
Ellison v. *Isles*, 11 A. & E. 665.
1 Wms. Saunders, 299

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But sect. 79 of the Common Law Procedure Act, 1852, now provides that "either party may plead in answer to the plea or subsequent pleading of his adversary that he joins issue thereon . . . and such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleadings of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant." The breaking of the gates and fences in the present case was a substantial trespass. In *Bush* v. *Parker*, 1 Bing. N. C. 72, where the plaintiff declared for an assault in seizing and laying hold of him, pulling and dragging him about, striking him, forcing him out of a field into and through a pond, and there imprisoning him, it was held that the dragging of the plaintiff through a pond was a distinct and substantive trespass, and therefore that a plea justifying the assaulting, seizing, and laying hold of the plaintiff and pulling and dragging him about, was not a sufficient answer to the entire charge in the declaration. "How much do the defendants justify?" asked Tindal, C. J. "The assaulting, seizing, and laying hold of the plaintiff, and a little pulling and dragging him about, altogether omitting to notice the allegation in the declaration that the plaintiff was forced through a pond. The question is, whether this was a separate and distinct trespass, or a mere aggravation of the original assault; and it is plain that this was one link in a chain of trespasses following each other, and not a mere aggravation of the first assault." So in *Noden* v. *Johnson*, 16 Q. B. 48, where a count in trespass alleged that defendant assaulted, beat, and ill-treated the plaintiff, and then knocked him down on the deck of a ship, and the defendant justified as to the assaulting, beating, and ill-treating, it was held that the plaintiff must recover for the knocking down, that being alleged as a distinct trespass from the assaulting, beating, and ill-treating, and not covered by the justification. *Webber* v. *Sparkes*, 10 M. & W. 485, and *Phillips* v. *Howgate* 5 B. & A. 220, were also referred to.

Quain, Q. C. (with whom was *Kemplay*) for the defendant.—In the case of an action of trespass to land all beyond the entry on the close is matter of aggravation merely, and affects only the question of damages: (*Taylor* v. *Cole*, *ubi sup.*) The cases cited on behalf of the plaintiff were not cases of trespass to land, and are distinguishable on that ground. In *Pratt* v. *Pratt*, 2 Ex. 413, it was held that in trespass for breaking and entering the plaintiff's dwelling-house, and seizing, taking, and converting his goods, the conversion was mere matter of aggravation, and that a plea which only justified the seizing and taking was good on special demurrer, though it did not in its commencement except the conversion. *Robertson* v. *Gantlett*, 16 M, & W. 289, is also in favour of the defendant's contention. [WILLES, J. —Is not the declaration divisible; and must not the plea furnish an answer to the whole declaration?]—No doubt the plea must answer the whole declaration, but the substance of the plea is the right of way, and the old replication *de injuriâ* only put in issue the material portion of the plea; the plea here is the ordinary plea of a right of way: (See sched. B. 46, C. L. P. A. 1852.) It is still necessary for the plaintiff to new assign, wherever he must have done so before the Common Law Procedure Act 1852. In *Glover* v. *Dixon*, 9 Exch. 158, it was distinctly held that the general form of replication by way of traverse given by the Common Law Procedure Act 1852 puts in issue those facts only which the plaintiff could have traversed before the Act, and that all matters which must have been pleaded by way of new assignment must still be so pleaded. "The new form," said Parke, B., "merely enables a party to traverse what he might have traversed before the Act, but does not do away with the necessity of pleading in confession and avoidance." And Pollock, C. B., "Such matters as before the Act must have been replied specifically, must still be so replied." And that before the Common Law Procedure Act the proper form of replication was by new assignment is shown decisively by *Webber* v. *Sparkes*, 10 M. & W. 485. There to a declaration in trespass for breaking and entering the plaintiff's close, and pulling down certain posts and bars standing thereon, the defendant pleaded the existence of a public footway over the close, and that because the posts and bars obstructed the way he pulled them down; to which the plaintiff replied, traversing the footway; and it was held that on these pleadings the defendants were entitled to a verdict on proof of a right of footway in any direction over the close, and were not bound to prove a way over the place where the posts and bars stood. "On this replication," said Parke, B., "the only question is, whether there is a right of way over the close—the piece of land—described in general terms in the declaration. If there be, but the trespass was committed out of the way, there should have been a new assignment." And during the argument the same learned judge says of the plaintiff, "He might have traversed and new assigned; then the question on the first issue would have been only whether there was a right of way across the close at all; if there was, but the defendants beat down the posts and rails in another part of the close, they would be liable on the new assignment." In *Monprivatt* v. *Smith*, 2 Camp. 175, where the trespass was breaking in a house and remaining there three weeks, it was held that if the plaintiff desired to justify the excess he must do so by a new assignment. The plaintiff new assigned in both *Bracegirdle* v. *Peacock*, 8 Q. B. 174; and *Ellison* v. *Isles*, 11 Ad. & E. 665.

Dean v. *Taylor*, 11 Ex. 68;
Pritchard v. *Long*, 9 M. & W. 666; and
Norman v. *Westcombe* 2 M. & W. 449,
were also referred to.

Holker, Q. C., in reply.—The plaintiff is not bound to new assign where there is only a single trespass. Chitty on Pleading, pp. 483 and 720, and *Monprivatt* v. *Smith* (*ubi sup.*) were referred to. If the plaintiff had new assigned he must have proved two trespasses. *Pratt* v. *Groome*, 15 East, 235, and *Taylor* v. *Cole*, 3 T. R. 292, were also referred to.

The judgment of the court was delivered as follows by

KELLY, C. B.—In this case we are of opinion that the judgment of the Court of Queen's Bench should be affirmed. My brother Willes certainly entertained some doubts upon the case, and, but for the high authority of the late Baron Parke and the other judges who decided the cases which have been referred to, the cases of *Glover* v. *Dixon* and *Webber* v. *Sparkes* (*ubi sup.*), the case would have raised a question which might well have been otherwise decided. I must venture to say for myself, that, but for the doubt thus entertained by my very learned brother Willes, J., I should have thought this case entirely free from difficulty. The plaintiff here sues by a count in the ordinary form, in which he alleges that the defendant broke and entered his close—that is, that he, in fact, entered upon his land, and there broke down and destroyed certain gates and fences. Now if to that declaration there had been a plea of not guilty, and of not guilty alone, it would have been quite sufficient for the plaintiff to prove that the defendant broke and entered his close without justification.

and if it had turned out that there were no gates and fences upon the close at all, or that if there were any they had never been broken or touched by the defendant, the plaintiff would still have been entitled to maintain the action, and to a verdict with damages greater or less upon that count. If he had proved that upon the spot on his land upon which the defendant had committed the trespass there were a gate and a fence, and the defendant had destroyed the gate and the fence, he would have been entitled to maintain an action, and likewise entitled to damages in respect of the value of the gate and of the fences thus destroyed. But it appears upon this record that there is a plea which, again I must observe, is in the usual and common form, where it is an action in which the defendant sets up a claim to a right of way. He admits, for the purpose, the trespass complained of, and the whole of the trespass complained of, and alleges, by way of defence, that there was a right of way over the land in question, that is, over the land thus admitted to belong to the plaintiff, and that before the trespass there were certain fences and gates across that way and obstructing the way, so that he by reason of that obstruction was unable to exercise the right of way which he was entitled to do, and that he destroyed and pulled down the gates and fences in question. Now to this, under the statute, there is a general replication taking issue upon the whole of that plea. When the parties came to trial the defendant might no doubt have proved a right of way over the close in question; but the plaintiff very properly (as it seems there was no dispute about the existence of the right of way over that close) at once admitted it, and I suppose what he admitted was a right of way over the close in question from spot A to spot B. He then proposed to go further, and there it is that it will be necessary to see what is the form of the case and what raises these questions, and what it was proposed to prove. Having admitted a right of way over the close in question (and I again assume from A. to B.) the plaintiff offered to prove that the trespasses complained of were committed elsewhere; in other words, although there was a right of way from A. to B. which he did not dispute, he said that the trespasses of which he really complained were committed at another spot on his land within that same close, and not upon any part of that portion of the land upon which he had admitted the existence of the right of way. If the case rested there is it really open to an argument? It is not the common case which has existed for centuries in pleading, as I observed in the course of the argument, in which the plaintiff brings an action for a trespass in entering upon his land, and the defendant pleading a right of way, the plaintiff proposes to admit a right of way; or the defendant having proved it, the plaintiff could no longer dispute it, and proceeds to insist that the real trespass of which he complains was committed, not upon the land or that portion of the land on which he had admitted the right of way to exist, but upon another spot in another portion of the land, as stated in the declaration. This is not in fact the common case of a new assignment, and in which the evidence tendered can only be given upon the new assignment. It is only necessary to look at what is relied upon on the part of the defendant, and the 87th section of the Common Law Procedure Act, and no doubt can be entertained. Sect. 87 of the Common Law Procedure Act 1852, provides that "one new assignment only shall be pleaded to any number of pleas to the same cause of action, and such new assignment shall be consistent with and confined by the particulars delivered ion (if any), and shall state that the ceeds for causes of action different from all those which the pleas profess to justify." What the plea in the present case professed to justify, taken together with the plaintiff's admission, was a right of way over the plaintiff's close from A to B, and what the plaintiff proposed to establish his claim to was damages for the committing of trespasses, not upon that portion from A to B, but upon another portion of his land. That would clearly be a case for a new assignment. Now for this, the two authorities to which I have adverted, the case of *Glover* v. *Dixon*, and the other case of *Webber* v. *Sparkes*, are, I think, absolutely conclusive. It may indeed be said that the observations of Parke, B. in *Webber* v. *Sparkes* are mere dicta, and not applicable to the present case; but the case of *Glover* v. *Dixon* is identical with the present case. In *Glover* v. *Dixon* it is expressly laid down that all matters that must have been pleaded by way of new assignment before the Common Law Procedure Act must still be so pleaded. Pollock, C. B. in his judgment says, not exactly in these terms, but in language which is equivalent, that such matters as before the Common Law Procedure Act must have been replied specially in a case like that, by way of new assignment, must still be so replied. If the case rested there we have this authority clearly and directly in point, but I must say for myself I need no authority. This case does not stand in need of authority to show that there must be a new assignment, when the plaintiff claims to show after an admission or proof of a right of way which *prima facie* would justify the trespasses complained of that they were, in fact, committed not in or upon the land over which the right of way existed, but upon another portion of his land. Then it is said that the breaking of the gates and fences is a substantive trespass. We must consider what is the meaning of these words. I think it will appear manifest on a moment's consideration that we may really lay out of the question altogether the breaking of the gates and fences. First of all, let us see how it was proposed to raise the question. It was thus. The plaintiff offered to prove that there were no gates and fences upon the way which he (the plaintiff) had admitted. That evidence was rejected, and I should say was properly rejected, not so much because it was inadmissible as because it was wholly irrelevant. The very substance and gist of this action was the committing of the trespass on the plaintiff's land, and he proposed to show, when the right of way was established or admitted, that the trespass had been committed on other lands, which he could not do except by way of new assignment. Then he wished to raise the question whether on the land over which there was a right of way, there happened to be any gates or any fences. That was perfectly immaterial; the plaintiff had admitted that there was a right of way upon his land from A to B, and if there were fences and gates upon that land the defendant had a right to break them down in the exercise of that right of way. If there were no such gates and fences upon the right of way, then the only result of this action would be that although the plaintiff might have proved the rest of his case he could not recover damages for the breaking and destroying of these gates and fences. When we look at what the real substance of the whole action is, we find the declaration is for breaking and entering the close of the plaintiff, and entering upon the land of the plaintiff: and the plea is that there was a right of way over that land, and the reply to that, in point of fact, and that which the plaintiff proposed to show, is this, that although there was a right of way upon his land, by which the defendant had a perfect right to pass, and which was obstructed by gates and fences, and the defendant had a right, in order to

pass, to destroy and break down the gates and fences, still that the trespass was, in fact, committed upon a different part of his land. That could only be shown by way of new assignment. By that he could have shown the trespass to have been committed on other land, and if there were gates and fences on that other land which were broken and destroyed by the defendant, he would be entitled to damages in respect of the value of the gates and fences so broken. But the destroying of the gates and fences is merely a matter of aggravation, in an action of this kind. It is a matter of substance in one sense to the plaintiff if he establishes that the trespass was committed upon his land, and that the gates and fences were upon his land, and there was no justification; for he would then be entitled to recover damages for the injury done to the gates and fences. But in no other sense could the breaking of the gates and fences be treated as matter of substance, or otherwise than as mere aggravation of the trespass complained of as having been committed. We have heard a very learned argument, and a great variety of cases have been referred to, but the result of the whole is this, that where the plaintiff has admitted a right of way upon his land, and then proposes to show that the trespass complained of, and the breaking of the gates and fences, were committed on another portion of his land, over which there was no right of way, it is common learning to say, he can only be permitted to give that in evidence under a new assignment. On these grounds we are of opinion that the judgment of the court below ought to be affirmed.

Judgment affirmed.

Attorneys for the plaintiff, *Morris, Allen*, and *Carter*, agents for *Plant* and *Abbott*, Preston.

Attorneys for defendant, *Shaw* and *Tremellen*, agents for *J. Forshaw*, Preston.

JUDGES' CHAMBERS.

BOSTON ELECTION PETITION.

Tuesday, Dec. 21, 1869.

(Before MELLOR, J.)

JONES (petitioner) *v.* MALCOLM AND COLLINS (resps.).

Parliamentary Elections Act—Withdrawal of petition—Costs.

A judge ordered a petition against the return of two members to be withdrawn on payment of costs. Twelve months after the presentation of the petition, and eight months after the order for withdrawal, application was made for the discharge of the sureties, and the payment to the petitioners of the money deposited as security in the Bank of England:

Held, that the fact that certain questions affecting costs were pending before the Common Pleas was no ground for refusing the application. The bill of costs incurred by the respondents ordered to be delivered within a fortnight.

In this case a petition had been presented by Mr. Mason Jones against the return of the present members, and in April last it was withdrawn, on which occasion Mr. Collins, M.P. complained that persons were permitted to make charges which were not supported, and afterwards to withdraw the petition. On that occasion Willes, J. made an order for the withdrawal, on the payment of costs to the sitting members. No bill of costs had been delivered, and on the part of the petitioner, Mr. Mason Jones, a summons had been taken out for payment of the deposit money.

Rickard (*Wyatt* and *Hoskins*) attended for the petitioner.

Buck (*Baxter, Rose*, and *Norton*) for Mr. Malcolm, one of the sitting members.

Rickard, applied to his Lordship for an order for the withdrawal of the sum of 500*l.* paid into the Bank of England under the Parliamentary Elections Act, and that the recognisances entered into by two persons for 250*l.* each, making up the 1000*l.* required to be deposited on an election petition, should be discharged.

Buck opposed the application, on the ground that certain questions connected with costs on election petitions were now pending before the Court of Common Pleas relating to preliminary charges before particulars were delivered. He had to ask the Lordship to allow the matter to stand over until his questions he had referred to had been decided.

Rickard stated that nearly twelve months had elapsed since the presentation of the petition, and eight months since the withdrawal, so that ample time had been afforded, and no sufficient reason had been given why the money deposited should be kept any longer; the only plea was that the respondents had not thought proper to deliver their bill of costs.

MELLOR, J., made an order that the bill of costs incurred by the respondents should be delivered to the petitioner within a fortnight, and adjourned the summons for that period.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Nov. 6, *and Dec.* 14.

(Before Lord PENZANCE.)

GRANT *v.* GRANT.

Will—Doubtful description of executor—Nephew—Parol evidence.

A testator by his will appointed as his executor "my nephew Joseph Grant." There were two persons of that name, nephews of the deceased, one his brother's son, the other his wife's nephew. The court, on demurrer,

Held, that evidence was admissible to ascertain which of the two the testator intended to appoint, and being satisfied from the facts that it was the wife's nephew, granted probate to him.

John Grant died in 1869, leaving a will duly executed, of which he appointed a person whom he described as "my nephew Joseph Grant" executor. He also left a legacy of 500*l.* to the same person. Two persons answering to the description claimed probate, one being Joseph Grant, the son of the deceased's brother, and the other Joseph Grant, the deceased's wife's nephew. The question now before the court on demurrer was whether the court could admit evidence to show the person intended by the testator was his wife's nephew, or whether the court was bound to exclude that evidence and grant probate to Joseph Grant the brother's son.

The point was argued before the court Nov. 6.

Field (Dr. *Middleton* with him) on behalf of the wife's nephew.

Dr. *Swabey* (*Chapman* with him) on behalf of the brother's son.

Cur. adv. vult.

Dec. 14.—Lord PENZANCE.—The question in this case is the proper construction of a will. The facts to be found in the affidavits make the testator's real meaning abundantly clear. The question is,

how far and to what extent these facts can be properly used by the court to aid in construing the will. The words to be construed are, "I appoint my said nephew Joseph Grant, executor," &c. In the former part of the will "my nephew Joseph Grant" is named as a legatee. To construe this provision and apply it to the proper individual, some evidence is necessary to ascertain whether the testator had a nephew named Joseph Grant. It turns out that there was living at the date of the will a son of the testator's brother, whose name was Joseph Grant. It further appears that there was also living another Joseph Grant, who was a nephew of the testator's wife, and consequently in ordinary parlance a "nephew" of the testator. If the word "nephew" can be properly construed by the court to include his wife's nephew, so that there are two persons to either of whom the words of description might be applied, it is not denied that some further parol evidence would be admissible to ascertain which of the two the testator meant; and it is clear that if this field of inquiry is once entered upon the facts will abundantly show that his wife's nephew, who lived with him, and not his own nephew, with whom he had no intimacy, was the person intended. But here it is contended that the word "nephew" cannot possibly be construed to include the nephew of the testator's wife. It is said that the court is bound by the primary signification of words used in a will, and that nothing but the primary signification in its strictest sense can be resorted to, unless that signification would produce some absurdity or render the meaning insensible. A proposition of this kind is, no doubt, to be found in Sir James Wigram's book; but a great deal turns upon the question what is meant by the expression "primary signification." It will not do to carry it too far. When a man makes a will, it is right to presume that he uses ordinary language in its ordinary sense; and if the original signification of a word is scrupulously followed in all cases, to the exclusion of that which by the common consent and use of mankind it had in process of time acquired, the court would be carried in some cases a long way from the testator's intention in the endeavour strictly to follow it. Furthermore, the use and custom of particular counties and places affix to certain words and terms particular meanings. Evidence of such meanings has always been permitted in the construction of written contracts, and why not in that of a will? Thus, in the case of *Richardson* v. *Watson*, 4 B. & A., 799, the testator had devised "the close in the occupation of Watson." Watson occupied two closes. It was contended that the word "close," though primarily and strictly applicable to an inclosure or field, was popularly applied to a farm; and Lord Wensleydale, a great authority on niceties of construction, said: "No doubt evidence might be given to show that Watson occupied two closes, and, generally speaking, evidence might be given to show that the testator used the word 'close' in the sense which it bore in the county where the property was situate, as denoting a farm." Now, if the popular use of a word in a particular locality may be proved and accepted, why is the popular use of the word all over the country to be rejected? Another thing has to be considered when the court is dealing with a personal description. It may be that the testator has been in the habit of applying a particular designation to an individual. And if the evidence may be referred to, it is plain in this case that the testator did constantly use the word "nephew" to designate his wife's nephew. If this designation, then, so used, is not at variance with its ordinary and popular meaning, it seems unreasonable to reject it wholly in favour of some primary meaning which excludes that individual. The strength of such evidence ought, no doubt, to determine whether the court can act upon it or not in each particular case; but what I am now considering is, not its effect, but its admissibility. It may be that the word "nephew," when used as the sole description of a class who are to take benefit under a will, must be construed to include only the sons of brothers or sisters of the testator, and in one of the cases cited; it appears to have been so construed. But this does not appear to me to preclude a wider signification being attached to the word when used as an additional description of a person specified by name, to whom the word is in an ordinary and popular sense applicable. Upon the whole, then, I am of opinion that so much of the evidence as shows the relation and circumstances in which the respective parties stood to the testator, and the sense in which he habitually used this word "nephew" when referring to Joseph Grant, his wife's nephew, is admissible as placing the court in the position of the testator, and thus enabling it to understand the meaning of his language. And the court construes the appointment of executor to have been intended to apply to Joseph Grant, the nephew of testator's wife.

Solicitor for plaintiff, *Shepherd.*

Solicitor for defendant, *Dubois.*

Tuesday, Nov. 16, 1869.

SMITH *v.* FLETCHER.

Testamentary suit—Probate of previous will revoked—Contentious proceedings discontinued—Costs.

A widow having taken out probate of her husband's will, dated three years before his death, on the supposition that it was his last will, a subsequent will was discovered and propounded by the executor. The widow brought in her probate, and gave notice that she did not mean to contest the suit further.

The court, in ordering contentious proceedings to be discontinued, refused to condemn the widow in costs.

T. Fletcher died May 13, 1868, at Iroquois, in Canada, and on June 14, 1869, his widow took out probate in this country of a will dated Oct. 1865, of which she was appointed sole executrix. Subsequently a will was discovered of later date, viz., May 1868, of which James Aspinall was appointed sole executor. On July 31, 1869, John Smith, the attorney for James Aspinall, took out a citation in this court, calling on the widow to bring in the probate granted to her, for the purpose of having it revoked; and on Aug. 10 she entered an appearance and brought in the probate. The plaintiff Smith then propounded the will of May 1868, and on the 14th Oct. last the widow served him with formal notice that she would not proceed further in the suit.

Dr. *Swabey* now moved the court to decree probate of the later will, and to condemn the widow in costs.

Inderwick, for the widow, submitted that she ought not to be condemned in costs, as she had a right to put the executor to proof in solemn form.

The COURT ordered contentious proceedings to be discontinued, but declined to make any order as to costs.

Attorneys for plaintiff, *Edwards, Layton,* and *Jacques.*

Proctor for defendant, *A. Ayrton.*

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Tuesday, Dec. 21, 1869.

RAYSON v. PARTON AND PAGE (JOHNSON intervening).

Testamentary suit—Issues found partly for the will, partly against—Executors condemned in all the costs.

The executors propounded a will which was opposed by the next of kin, who pleaded incapacity, that the testator did not know and approve of the contents, undue influence, and fraud. The heir at law, an infant, obtained leave to intervene, though the executors opposed it. The jury found against the executors on the two first issues, but for them on the two last:

The court, on the ground that the evidence was not separable, condemned the executors in the costs of all the issues, and also in the costs of the intervener.

The defendants propounded the will of Charles Johnson, late of Sheerness, bearing date March 20, 1867, who died Feb. 1868, at upwards of 80 years of age. He was a retired baker, and by his will, after some small annuities to his nieces, he left the bulk of his property, which was principally realty, and was of the value of close upon 12,000*l.*, to the defendants, millers in partnership at Sheerness, with whose firm he had had dealings. The plaintiff contested the will as one of the next of kin, and pleaded incapacity, that the testator did not know and approve of the contents of the will, undue influence and fraud. The heir-at-law, who is an infant, had obtained leave to intervene, against the opposition of the defendants, and gave notice that he merely intended to cross-examine.

There had been a former suit, which had been compromised by an arrangement between the parties; but the court, in the absence of the heir-at-law, had declined to grant probate in solemn form.

This case was tried before the court with a special jury on Dec. 10, 11, 15, and 16.

Sir *J. Karslake* (*M'Intyre* and *Bayford* with him) for the defendants.

Serjt. *Parry* (*Inderwick* and *Turner* with him) for the plaintiff.

Chambers, Q.C. (*Searle* with him) for the heir-at-law intervening.

The jury found for the plaintiff on the issues of incapacity, and that the testator did not know and approve of the contents, but they found the issues of undue influence and fraud for the defendants. The court pronounced against the will, and condemned the executors in costs, subject to argument on the next motion day.

Dec. 21.—*Bayford*, on behalf of the executors, now showed cause against the order. He submitted that they ought not to be condemned in the costs of the two issues of undue influence and fraud, on which the verdict was for them. [Lord PENZANCE.—How can you draw a distinction when the evidence went altogether?] Most of the evidence was given specially to prove the two issues of fraud and undue influence. With regard to the heir-at-law, the defendants ought not to be condemned in his costs, since he had not been compelled by them to intervene, for they had opposed his intervention; and as he had given notice only to cross-examine witnesses, if he had failed the executors could not have got costs out of him. The effect of his intervention had been materially to increase the costs of the trial.

Lord PENZANCE.—As to the first point, if there were any substantial part of the evidence given with respect to the pleas of fraud and undue influence which differed from the rest of the evidence, the executors ought not to be cast in the costs of it; but, applying all the facts to the issues as they stood, I should say that the whole evidence applied to all the issues as they stood, and that no part was separable from the rest. As to the heir-at-law, I think it is not a fair view of his position to say that he has created these costs. You did not seek to bind him, and he was not, therefore, bound to have come in at the trial at all. He might have stood aside and have said, I will let you take your verdict as to the personalty, and at the proper time I will come in and bring my action on the realty, so that the whole will, as regards the realty, would have had to be gone through again, and you would have had to pay the costs of both proceedings. It seems to me that it would be setting a bad example if this court were to say to an heir-at-law, If you choose to come in and litigate the realty at the same time as the personalty, and so make it one, and therefore a less expensive proceeding, you shall not have your costs; but you shall have them if you stand aside and make the executors go over the same ground again. It seems to me that the heir-at-law has done that which is most desirable in your clients' interests. He has carried on the contest with you in much the least expensive way. The order, therefore, is confirmed, condemning the executors in the costs of the suit, with the costs of this motion.

Solicitor for the plaintiff, *Sismey*.

Solicitor for the defendant, *Jennings*.

Solicitor for the intervener, *Crosse*.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Dec. 21, 1869.

YEATMAN v. YEATMAN AND RUMMELL.

Dissolution suit—Costs of former suit not paid—Stet processus refused.

A husband having failed in one suit for dissolution, brought a second, but charged the adultery with a different co-respondent. The court held that it was not the same cause of action, and refused a motion to stay proceedings until the husband had paid the costs of the former suit.

This was a husband's suit for dissolution of marriage, on the ground of adultery with the co-respondent. The petitioner had brought a former suit for dissolution with a different co-respondent, in which he had failed, and his wife had also brought a suit against him for judicial separation on the ground of cruelty, in which she had succeeded.

Searle, on behalf of the respondent, now moved to stay proceedings until the petitioner had paid the costs of the former suit. He submitted that the cause of action was the same, and cited,

Plows v. *Locksley*, 32 L. J. 227, Q. B.;
Hoare v. *Dickson*, 7 C. B. 164;
Colbet v. *Warner*, L. Rep. 2 Q. B. 108.

Lord PENZANCE, J. O.—I have looked into the authorities, and I find that where a plaintiff having failed in one action brings another for the same cause, the court will order him to pay the costs of the former proceedings before he goes further. That is not the case here. The petitioner is asking for the same remedy—to get rid of his wife, but it is with a different co-respondent, and it cannot be said, therefore, that the cause of action is the same.

Petitioner in person.

Attorney for respondent, *Edwards*.

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UNITED STATES DISTRICT COURT—IN ADMIRALTY.

EASTERN DISTRICT OF NEW YORK.

Tuesday, Nov. 23, 1869.

(Before BENEDICT, J.)

THE UNITED STATES *v.* THE STEAMER MISSOURI.

Lien on ship—Maritime law—Revenue laws—Penalty—Jurisdiction—Proceedings in rem and in personam in admiralty.

By the revenue laws of the United States no goods, wares, or merchandises shall be imported in a ship or vessel belonging in whole or part to a citizen or citizens without having a proper manifest or manifests on board, under a penalty equal to the value of the goods not included in the manifest or manifests. To enforce payment of the penalty the vessel may be seized and proceeded against summarily by libel in any court having jurisdiction:

Held, that the seizure of the vessel referred to by the statute meant a seizure by the marshal of the Admiralty Court in the ordinary course of a proceeding in rem, and not by the Government; and that the penalty forming a maritime lien upon the vessel, a proceeding in rem in the Admiralty Court, and not a suit in a court of law, was the proper course to adopt, that being the only proceeding known to the law which is competent to determine the rights which are liable to be involved by an attempt to enforce a lien upon a ship.

Held, further, that it was not necessary to postpone proceedings against the ship until proceedings had been taken against the master or owner.

BENEDICT, J.—This is a proceeding *in rem*, instituted in behalf of the United States against the steamer *Missouri*, to recover the sum of 2998 dollars, for which sum it is claimed that this steamer is holden to the United States under the laws thereof. The averments of the libel are, that at a certain specified time certain goods, wares and merchandise, which are particularly described, were imported and brought into the United States from a foreign port in this vessel, which were not included in her manifest, contrary to the Act of Congress, passed 2nd March, 1799, and which belonged to, or were consigned to the master, mate, officers, and crew of said vessel; that the value of said merchandise was 2998 dollars, and by reason of the premises, and by force of the statute in such case made and provided, the said vessel, her tackle, apparel and furniture, became liable to the United States for the payment of the sum of 2998 dollars as a penalty. Wherefore it was prayed that process *in rem* issue against said vessel, her tackle, apparel and furniture, to enforce the payment of said penalty, and that the vessel might be arrested, and the said penalty pronounced for by the court, and the vessel condemned and sold to pay the same. Under this libel the usual process *in rem*, according to the course of the admiralty, was issued against the vessel, by virtue of which she was duly seized in waters within the jurisdiction of this court; whereupon the claimants duly appeared and filed their claim, and at the same time excepted to the libel, which exceptions are now to be disposed of. The question raised as to the jurisdiction is first to be considered. A statement of the provisions of law under which this libel is filed, is necessary to show the precise questions which the case presents. The Act of 2nd March, 1799 (sect. 24, 1 stat. 646), which is referred to in the libel, provides as follows:—"If any goods, wares, and merchandise, shall be imported or brought into the United States in any ship or vessel whatever, belonging to the whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from any foreign port or place, without having a manifest or manifests on board agreeable to the directions in the foregoing section, or which shall not be included or described therein, or shall not agree therewith; in every such case the master or other person having the charge or command of such ship or vessel shall forfeit and pay a sum of money equal to the value of such goods not included in such manifest or manifests." Subsequently it was by statute enacted (see Act of 18th July, 1866, sect. 8, Laws of 1866, 180):—"That in any case where a vessel, or owner, or master, or manager of a vessel shall be subject to a penalty for a violation of the revenue laws of the United States, *such vessel shall be holden for the payment of such penalty*, and may be seized and proceeded against summarily by libel to recover such penalty in any district court of the United States having jurisdiction of the offence." Under these two provisions of law, it is here contended, on the part of the Government, that by reason of the facts set forth in the libel a lien has been created upon this steamer for the sum of 2998 dollars, which lien may be enforced by ordinary proceedings *in rem* upon the instance side of the court, and that such proceedings may be taken in any district where the vessel may be found without previous seizure thereof; all which propositions the claimants deny. The Act of 18th July, 1866, under which this libel is filed, is an instance of incorporating into the revenue laws that marked feature of the maritime law which treats a ship as a person, and makes her personally responsible for the acts of those who own or control her; such legislation is but the offspring of that necessity out of which sprung the rule of the maritime law. It was long ago found necessary, in order to regulate the business and conduct of ships, which wander everywhere, and are the efficient agents, both for good and evil, of persons often entirely unknown, or impossible to be found—as between man and man, to charge the ship—which is always known, and can always be found, not only with the contracts, but the torts of her master and her owners. The same necessity has been felt in respect to the dealings of the shipmaster and shipowner with the Government, and accordingly the Act of 1866, in order to secure obedience to the revenue laws, causes the unlawful acts of the shipmaster and shipowner to charge the ship herself with the penalties prescribed for the violation of those laws. The legal effect of this statute, therefore, taken in connection with the Act of 2nd March, 1799, is to cause the unlawful transportation by the master contrary to the Act of 2nd March, 1799, to charge the ship with the penalty there prescribed, in the same manner as according to the maritime law a violation of the sailing rules by the master, which causes a collision, charges the ship with the damages ensuing. In construing such a statute—milder as it is than many statutes—it should be borne in mind that it is a revenue law, and like all revenue laws, to be so construed as effectually to accomplish the intention of the Legislature, and not necessarily with great strictness in favour of the defendant: (*Taylor v. United States*, 3 How. 210.) Let it be noticed, then, that the Act does not declare a forfeiture, but simply creates a charge upon the ship, and that the case made by the libel is not one of seizure, but of lien. Property forfeited to the Government may be seized, but I am not aware that a seizure is ever permitted except when the title to the property has changed by operation of law. A seizure is an assertion of title in the Government, and the subsequent proceedings in court are proceedings to try the title so asserted. When the object of such a seizure is a ship, the subsequent proceeding is in substance a petitory suit, and within the admiralty and maritime juris-

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diction of the United States. The Act, therefore, would not support a seizure, for it does not declare a forfeiture. But it is said this cannot be so, because the Act expressly provides for a seizure when it declares that the ship "may be seized, and proceeded against summarily by libel." The word "seizure," as here used, cannot, however, be considered as referring to a revenue seizure, but to that seizure by the marshal under the process of the court, which forms part of every proceeding *in rem* in the admiralty. So construed, the provision for a seizure and summary hearing upon a libel is simply a statutory averment of the jurisdiction of the district courts to enforce the lien which the Act creates, according to the course of the admiralty. This construction of the Act is certainly reasonable, while to hold that the word "seizure" as used was intended to authorise an assertion of title to property not forfeited but simply subject to a lien—perhaps insignificant in amount—would be to give to the statute a strange and harsh effect. My opinion, therefore, is that the objection to the libel that it does not aver a seizure within the district must fail. No such averment is necessary because no prior seizure could be legally made in a case like this. The case being, then, simply a proceeding to enforce a lien, the next question is whether it is a civil case of admiralty and maritime jurisdiction. It might be deemed a sufficient answer to this question to say that the Act, when it declares that the proceeding against the ship shall be by libel, clearly intended to declare the cases under it to be cases of admiralty jurisdiction. But if this were not so, or if a doubt be entertained as to the competency of the Legislature to require a proceeding according to the course of the admiralty in a case not within the constitutional provision, I hold the present case to be within the admiralty and maritime jurisdiction conferred by the constitution, and for two reasons. One reason—to my own mind entirely satisfactory—is that it is a proceeding to enforce a lien upon a ship. A ship is never free from liens. From her cradle on the stocks to her grave in the sand, she is always, to a greater or less degree, encumbered by those charges which attach to her under the rules of the maritime law. These liens are necessities of her existence and usefulness as a ship. They are to the ship what credit is to the merchant; without them she must lie by the wall; by means of them she ploughs the sea. A proceeding to enforce any lien upon a ship by her sale—which is the only method of enforcing a lien—must, if injustice is to be avoided, call in question all the liens upon her, and must accordingly involve an adjudication upon liens created by the maritime law and exclusively maritime in their nature. It would seem, therefore, that it might well be held for this reason, if for no other, that all such proceedings should be taken in that court to which the determination of maritime questions more especially belongs. And all such proceedings should be held to be within the jurisdiction of the admiralty for the further reason that the proceeding *in rem* of the admiralty is the only proceeding known to the law which is competent to determine the rights which are liable to be involved by any attempt to enforce a lien upon a ship. An illustration such as might be presented any day will serve to show the correctness of this proposition. Suppose then the case of a lien upon a ship to the extent of her value, under this Act of 1866, and that the ship proves to have been heavily bottomried abroad, and on the voyage home to have sustained a collision by which a ship equal to her in value has been sunk. Of course upon arrival she owes a considerable sum to her crew, and her cargo turns out damaged by the disaster. If in such a case the lien of the Government is to be enforced by a suit at law, who is to be the defendant? Do you say the owners? They have no interest to defend until they have successfully disputed both the bottomry and the collision demand. If you say the bondholder, his interest depends upon the validity of his bond and the invalidity of the collision demand, and that in turn can only be recognised after it appears that the cause of the collision was faulty navigation of the vessel proceeded against, and what, in such a suit, is to become of the sailors and of the demands of the numerous freighters? To such a state of facts—and I have supposed no unreasonable case—a suit at law is inadequate. In all such cases the proceeding *in rem* of the admiralty to which all the world are parties—a proceeding which is, in some sense, a ship's bankruptcy proceeding, whereby she is discharged of all her debts, and her value distributed among her creditors—a proceeding of which the Supreme Court in the case of the *Moses Taylor*, 4 Wal. 427, say: "The distinguishing and characteristic feature of a proceeding in admiralty is that the vessel or thing proceeded against is itself seized and impleaded, defended, and judged, and sentenced accordingly." Such a proceeding, I say, is a necessity, if injustice is to be avoided. By means of that most sensible and useful of legal proceedings, the conflicting demands of the Government, of the bondholder, of the owner, of the crew, and of the freighters in the case supposed, are all easily adjudicated and disposed of at once—perhaps, even the ship meanwhile earning a sum equal to them all, to the advantage of her owners and the benefit of mankind. My own opinion therefore is that a sufficient reason for sustaining the jurisdiction of the admiralty in a case like this is to be found in the nature of the thing to be proceeded against—namely, a ship. But a second reason can be given, and that is, that the subject matter, which is the foundation of the charge upon the ship, is clearly maritime in its character, and therefore within the admiralty and maritime jurisdiction of the United States. The lien which is sought to be enforced arises under the statute out of an alleged unlawful importation of cargo by this ship. This is as clearly "a water transaction"—to use the words of Chief Justice Marshall, as the exportation of cargo; and in the case of the *Vengeance*, 3 Dal. 297, the jurisdiction was sustained upon the sole ground that the exportation of cargo in a ship was a water transaction. Such matters have indeed long been conceded to be within the lawful jurisdiction of the admiralty: (Godolphin, 43.) If, then, the subject matter out of which the lien arises be maritime, the lien, although created by statute, may be enforced in the admiralty: (*The St. Lawrence*, 1 Black 522.) Because of the subject matter, therefore, I hold the present proceeding to be a case within the admiralty and maritime jurisdiction of the United States. Nor do I see any difficulties in the way of enforcing the Act of July, 1866, in accordance with these views, such as seem to have occurred to the minds of some in considering the effect of similar provisions in the passenger laws. The provision of the Act which requires the proceeding to be by libel in the admiralty would, doubtless, be held to import that the lien is to be treated according to the principles and rules of the admiralty, which are ample to prevent injustice and also to protect commerce. Again, it is objected to this libel that it fails to show jurisdiction in this court, inasmuch as it does not appear that this court would have jurisdiction of a criminal prosecution for the illegal importation of the cargo in question, while the Act of 1866 declares that the proceedings against the vessel shall be "in the district court having jurisdiction of the offence." There remains to consider one other objection to this libel, which is, that it contains no averment of a prior judgment against the master for the penalty now sought to be recovered against the vessel. Upon

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this question my opinion is that under the Act of 1866 proceedings like the present may be taken against the vessel in the absence of any proceedings against the master or owner. The obvious intention of the Act was to enable the Government to enforce the revenue laws by a prompt seizure and prosecution of the vessel in case of a violation of them. It therefore declares that when the master or owner incur a penalty, the vessel may be seized and proceeded against summarily. If a forfeiture had been declared any previous proceedings against the master would not have been suggested, and a forfeiture to be followed by instant seizure without prior proceedings against any one is frequently declared for acts of the master. Thus the Act of 2nd March 1799, forfeits the vessel for the unlading of cargo before arrival at the place of discharge, and also for the unlading without permit, or otherwise than in open day. The Act of 27th June, 1864, forfeits the vessel for unlading except in presence of an inspector, and for a refusal of the *person in charge* to deliver the key. The Act of 18th July 1866, forfeits the vessel for failure of master to report at the first port, all goods bought for use of vessel in British provinces. The Act of 28th March 1826, forfeits the vessel for neglect of the master to deliver his manifest. In place of instant forfeiture of the whole vessel, the Act of 1866 creates a lien which is by far the milder form of punishment, and if so construed as to render it as effective as possible, it will still be much less rigorous than many laws. It is easy, therefore, to say that the words, "holden for the payment of such penalty," used in this Act are intended to create an original liability on the part of the ship for a penalty equal to that imposed upon the master or owner; and that the words, "seized and proceeded against summarily," preclude the idea of delay, and import that the proceeding may follow the unlawful act, and rest upon that alone, thus adopting the rule of the maritime law—that a ship may be treated as a person, and "judged and sentenced accordingly:" (*The Moses Taylor*, 4 Wal. 427.) And it will be found that great difficulties attend any other construction of the Act, for if it be held that the ship becomes chargeable by the unlawful act when committed, but can only be proceeded against at the termination of proceedings against the master or owner, which may be commenced at any time within three years, a most dangerous class of secret liens upon ships will be created to the great detriment of commerce, with but little, if any, advantage to the Government; while if it be held that under the Act the vessel first becomes chargeable upon the rendition of a judgment against the master or owner, the ship would become first chargable long after the transaction, when she might meanwhile have been sold to innocent parties, or encumbered by liens to her full value, or removed to foreign parts. A further objection to the latter construction seems to me also entitled to great weight, namely, that under either the owners and other parties interested in the ship would be debarred from the right to contest the question of liability for the penalty. A judgment against the shipmaster in an action where he would be the only defendant, and of which no others would have notice, would be conclusive of the liability of the ship. I cannot believe that such was the intention of the Legislature. On the other hand it may be said, that under the construction here sought to be given to the Act, the proceedings against the ship would often be a proceeding to collect an uncertain sum, inasmuch as many of the penalties imposed for violation of the revenue laws are, within certain limits, left in the discretion of the court which tries the offender. To which the sufficient answer is, that the same discretion can as well be exercised in the proceeding *in rem* against the ship as in the proceeding *in personam* against the master. Proceedings *in rem* for sums uncertain and dependent on the judicial discretion are common proceedings, in the admiralty, as, for instance, actions for salvage, personal injuries, and the like. The considerations I have thus endeavoured to present seem to me to lead forcibly to the conclusion to which I have arrived, that under the Act of 1866, taken in connection with the 24th section of the Act of March 2, 1799, the facts alleged to exist in the present case are sufficient to create a lien upon this steamer for the amount of the penalty claimed, which may be enforced by a proceeding in admiralty in this court, without proof of a prior seizure of the vessel, or of a prior judgment against the master for such penalty.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Thursday, Dec. 2, 1869.

(Present, the Right Hon. the LORD CHANCELLOR, the ARCHBISHOP OF YORK, the BISHOP OF LONDON, Lord CHELMSFORD, Sir JAMES W. COLVILE, and Sir JOSEPH NAPIER.)

THOMAS BYARD SHEPPARD (app.) *v.* the Rev. WILLIAM JAMES EARLY BENNETT (resp.)

Practice—Appeal from Arches Court to Privy Council—Rule 14—Period between bringing in petition of appeal and hearing—Contumacious non-appearance in court below.

Rule 14 of the Rules for Appeals in Ecclesiastical and Maritime Causes applies to an appeal from the Arches Court, as to the form of articles of charge against a clerk for heresy, although the clerk contumaciously refused to appear to the citation of that court.

In such a case, therefore, as well as in the ordinary case where an appearance has not been entered, the appeal shall not stand for hearing before the Judicial Committee until a period of four months has expired from the bringing in of the petition of appeal.

This was an appeal from a decree of the Dean of Arches (Sir Robert Phillimore), dated 30th Oct. 1869, in a cause of the office of the judge promoted by the appellant, of the parish of Frome Selwood, Somersetshire, against the respondent, the vicar of that parish.

The cause came before the Arches Court by letters of request from the Bishop of Bath and Wells. The respondent was charged with having caused to be printed and published within the diocese of London, certain works in which he advisedly maintained or affirmed doctrine directly contrary or repugnant to the articles and formularies of the Church of England, the said works being entitled respectively "Some Results of the Tractarian Movement of 1833," forming one of the essays contained in "The Church and the World," printed and published in 1867; and "A Plea for Toleration in the Church of England, in a letter to the Rev. E. B. Pusey, D.D., &c." second and third editions, printed and published in London in 1867 and 1868.

Certain passages from the said works were set out in the letters of request and citation. In the articles, further passages from the same works were set out. At the hearing on the admission of the articles, after the arguments of counsel on behalf of the appellant, the Dean of Arches determined that these further passages referred to a separate and distinct charge of heresy, and were, therefore, a variance from the letters of request and citation, and accordingly directed the articles to be reformed by omitting all such parts thereof as charged the respondent with contravening the 29th Article of Religion, entitled, "Of the Wicked which

eat not the Body of Christ in the use of the Lord's Supper." The Dean of Arches in the course of his judgment, remarked on the inconvenience arising to the court from the contumacious refusal of the respondent to appear to the citation.

Leave to appeal to the Judicial Committee was given to the appellant, and on 13th Nov. 1869, the petition of appeal was filed, and transmitted to the registrar of the Judicial Committee, who acknowledged the receipt thereof by letter of the same date.

Dec. 2.—*Stephens*, Q. C. and Dr. *Tristram* (with whom were *Archibald* and *Shaw*) for the appellant.—A preliminary point would be submitted to their Lordships, viz., whether the hearing of the appeal was not too soon, under rule 14 of the Rules for Appeals in Ecclesiastical and Maritime Causes. That rule provided that four months must elapse between the bringing in and hearing of the petition of appeal, where an appearance has not been entered. It would be submitted that this rule did not apply to the present case, since this was a mere interlocutory application, by which the respondent could not be in any way prejudiced or benefited. The respondent had been pronounced contumacious for non-appearance in the court below; he was, therefore, in no way before the court below, nor had he any right of appeal, nor could he benefit by that appeal:

Herbert v. *Herbert*, 2 Phill. 430;
Hanley v. *Edwards*, 4 Moo. P. C. 407.

The LORD CHANCELLOR delivered judgment to the following effect:—Their Lordships are all of opinion that this appeal stands for hearing too soon. Rule 14 is that, "as soon as the time allowed for bringing in the cases has expired, the appeal shall stand for hearing before the Judicial Committee, provided that where an appearance has not been entered, a period of four months has expired from the bringing in of the petition of appeal:" (Rules for Appeals in Ecclesiastical and Maritime Causes, Dec. 11, 1865; 32 L. J. Priv. Co. p. ii.) It was contended that the rule does not apply to the present case, because this was an interlocutory application, and because the respondent had contumaciously refused to appear in the court below. Their Lordships, however, consider that the rule applies, and will therefore order that the case stand over till four calendar months have expired from the bringing in of the petition of the appeal.

Proctors for the appellant, *Moore* and *Currey*.

Equity Courts.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Friday, Dec. 10, 1869.

ATTORNEY-GENERAL v. THE DRAPERS' COMPANY.

Costs—Taxation—Surveyor's charges—Commission on purchase-money—"Ryde's scale."

On taxation of a bill of costs, the master allowed an item in respect of surveyor's charges calculated according to "Ryde's scale," by which a commission of from one-half to one per cent. on the amount of the purchase-money, according to the nature of the case, is allowed to surveyors.

Summons to review the taxation in respect of this item dismissed with costs.

"Ryde's scale" approved of.

Adjourned summons.

This was a summons taken out by the South-Eastern Railway Company, asking that the taxing master should be directed to review his taxation of a bill of costs payable by the railway company under the following circumstances:

The South-Eastern Railway Company had taken for the purposes of their works certain real estate belonging to the Drapers' Company. The bill of costs sent in to the railway company in respect of this purchase comprised an item of 73*l.* for surveyor's charges. The purchase-money was little more than 1200*l.*, and the surveyor's charges were made in accordance with a scale of charges prepared by Mr. Ryde, an eminent surveyor in the city of London, and known as "Ryde's scale." By this scale a commission of from one-half to one per cent. on the amount of the purchase-money, according to the nature of the case, is allowed to the surveyor. On taxation this item of 73*l.* was allowed by the taxing master, and the railway company, being of opinion that the charge was excessive, took out the present summons to have the master's decision reviewed.

Phear, for the railway company, submitted that the system adopted in common law taxation of allowing the surveyor a *quantum meruit* was preferable to that adopted by the taxing masters in Chancery of making an *ad valorem* allowance on the amount of the purchase-money.

Bowring, for the Drapers' Company, was not called upon.

Lord ROMILLY.—I am quite clear that this application is wholly misconceived. I am asked to set aside the taxing master's decision, not on a question of principle, but on a mere question of amount. I never enter into calculations of this kind. Moreover, I am of opinion that the allowance of a commission of from one-half to one per cent. on the purchase-money is a reasonable charge, and that if Ryde's scale has been generally adopted, it should not be interfered with, as regular allowances of this kind are very convenient, and prevent disputes as to the amount of charges. The summons must, therefore, be dismissed with costs.

Solicitors for the railway company, *E. P. Cearns*.

Solicitor for the Drapers' Company, *Lawford* and *Waterhouse*.

Friday, Dec. 10, 1869.

KERSHAW v. KERSHAW.

Vendor and purchaser—Appropriation of purchase-money—Interest.

A purchaser contracted to buy certain real estate for 38,500l., and was by the terms of the contract liable to pay interest at 5 per cent. up to the time of payment. Completion being delayed, he transferred 38,000l. to a separate account at his banker's, and gave notice that he would not pay any further interest. The vendor denied the sufficiency of the notice, and the purchaser afterwards finding that he had not paid in the whole amount of the purchase-money, paid in the remaining 500l. with interest thereon:

Held, that he was not liable to pay interest from the date when he transferred the 38,000l. to a separate account, notwithstanding that the amount so transferred was less than the amount of the purchase-money:

Winter v. Blades, 2 *Sim. & Stu.* 393, *distinguished.*

Adjourned summons.

This was an application by the plaintiff in the suit that the purchaser of certain real estate, part of the estate which was being administered in the suit, might be compelled to pay interest on his

purchase-money at 5 per cent. under the following circumstances.

The amount of the purchase-money was 38,500*l.*, and by the contract it was provided as follows: "Purchase to take effect from the 30th June 1868, and interest at 5 per cent. to time of payment, and timely notice to be given as to requirement of the purchase-money." Possession was given to the purchaser on the 30th June 1868, but completion being delayed in consequence of certain difficulties which arose with regard to the title, the purchaser on the 12th Nov. following gave notice to the vendors that he had appropriated the sum of 38,000*l.* for the purpose of the purchase, and had transferred it to a separate account at his bankers', and that he would not pay any further interest. In a letter acknowledging the receipt of the notice, the vendors' solicitors stated that they denied the sufficiency of the notice. About a year later the purchaser, finding that he had appropriated 500*l.* less than the amount of the purchase-money, transferred to the separate account at his banker's a further sum of 500*l.* with interest at 5 per cent. up to that date.

Humphreys (with him *Southgate*, Q. C.), for the vendors, contended that the purchaser, having appropriated a sum less than the amount of the purchase-money, and having been informed by the vendors' solicitor that the sufficiency of his notice that he would not pay any further interest was denied, must now pay interest on the whole amount of the purchase-money. He cited

Dickenson v. *Heron*, Sugd. V. & P. 14th edit., p. 630;
Esdaile v. *Stephenson*, 1 Sim. & Stu. 122;
Binks v. *Lord Rokeby*, 2 Swanst. 222;
Winter v. *Blades*, 2 Sim. & Stu. 393; Sugd. V. & P. 14th edit., p. 628.

Jessell, Q. C., and *Brett Ince*, for the purchaser, were not called upon.

Lord ROMILLY.—I consider this quite clear, that if he had paid in the full amount of the purchase-money, and given notice, he would thereby have freed himself from the liability to pay interest. The vendors might have called upon him to invest the sum in their joint names, so that they might get interest on it; but they do nothing of the kind. He pays in 38,000*l.* to a separate account, and they give him no notice that it is 500*l.* under the amount of the purchase-money. This is not the case of a floating balance, as in *Winter* v. *Blades* (*sup.*), the purchaser here fairly appropriated the money, and from the date of his notice derived no benefit from it. I am of opinion that in substance he paid in the whole amount, and that he is not liable for any interest from the date when he paid the money into the bank.

Solicitors for the vendors, *Johnson* and *Weatheralls*.

Solicitors for the purchaser, *Clarke*, *Woodcock*, and *Ryland*.

Nov. 20 *and* 22, 1869.

THRUPP *v.* GOODRICH.

Annuity—Survivorship—Construction of order of court —Consent binding on married woman.

A testator directed his residuary estate to be invested in the purchase of a Government annuity for the joint lives of his wife and daughter, and the life of the survivor, and directed the annuity to be paid to them during their joint lives in equal shares, and on the death of either the whole to be paid to the survivor during her life; and he declared that his wife and daughter, or the survivor of them, should not have the power of electing to take the money in lieu of the annuity:

It being found in a suit for the administration of the testator's estate that such an annuity would only amount to about 4½ per cent. on the residue, the two ladies applied to the court, and, by an order made with their consent, it was ordered that the residue should be invested, and it was declared that the difference between the amount of the residue and the price for the time being of such a Government annuity as the residue would have purchased at the testator's death would belong to the two ladies during their joint lives, and that they had each power to dispose by will of one moiety of such difference.

The testator's widow married again before the date of the order. The daughter died intestate, and the price of the annuity was much reduced in consequence of her death:

Held, that both the ladies, having consented to the order, were, notwithstanding the fact that they were under disability, bound by the order, but that it must be adhered to strictly, and that the daughter not having exercised the power given her by the order to dispose by will of one moiety of the difference between the amount of the residue, and the price for the time being of such a Government annuity, the whole of such difference must go exactly as if the power of disposition by will had been struck out of the order, viz., to the survivor.

By his will dated the 16th Feb. 1849, John Collett, after directing the payment of his just debts and funeral and testamentary expenses, and making some specific legacies, gave, devised, and bequeathed all the residue of his estate, property, and effects of every description unto and to the use of J. W. Thrupp, O. Vile, and W. Batty, their heirs, executors, administrators, and assigns, upon trust to sell the same, and after making the payments thereinbefore directed out of the proceeds of sale, to invest the residue in their names in the purchase of one or more Government or other well secured annuity or annuities to be payable during the joint lives of his wife Ermingarde Collett (now Mrs. Goodrich) and of his daughter Charlotte Eustatia Atkinson, and the life of the survivor or longer liver of them. And the testator directed and declared that his said trustees should stand and be possessed of and interested in the said annuity or annuities so to be purchased or acquired by them as aforesaid, upon trust to pay the same by quarterly or half yearly payments or otherwise when received unto and between his said wife and daughter during their joint lives in equal shares and proportions, and on the death of either of them to pay the whole of such annuity or annuities to the survivor of them for her life. And the testator directed and declared that such annuity or annuities should be for the sole and separate use and benefit of his said wife and daughter as aforesaid respectively without power of anticipation, and particularly the said testator declared that his said wife and daughter, or the survivor of them, should not have the power of electing to take and receive the money to be appropriated as aforesaid for the purchase of the said annuity or annuities in lieu of such annuity or annuities being actually purchased, but that the said annuity or annuities should be purchased and applied for their respective, separate, and inalienable use and benefit during their joint lives, and the life of the survivor of them in manner thereinbefore directed.

The testator died on the 28th Nov. 1856, and his will was proved on the 12th Dec. following, by his executors, J. W. Thrupp, O. Vile, and W. Batty, who soon afterwards instituted a suit for the administration of the testator's estate.

In pursuance of an order made in the suit, the

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sum of 15,852*l.* 0*s.* 11*d.* Bank Three per Cent. Annuities was carried over to an account entitled "The Indemnity Fund."

By the chief clerk's certificate, dated the 1st June 1860, it was, amongst other things, certified that a Government annuity of 2620*l.* 17*s.* 6*d.*, payable during the joint lives of the said Ermingarde Collett and Charlotte E. Atkinson, and the life of the survivor of them, could have been purchased on the 28th Nov. 1857, being the end of one year after the testator's death, with the sum of 58,567*l.* 1*s.* 2*d.*, being the amount or value of the testator's residuary estate.

By an order made in the said suit, at the instance and with the consent of the two ladies, and dated the 16th July 1860, it was, amongst other things, declared that the difference for the time being between the total amount or value of the Bank Annuities therein mentioned, or other the stocks, funds, or securities in or upon which the proceeds thereof should for the time being be invested, and the said sum of 15,852*l.* 0*s.* 11*d.* Bank Three per Cent. Annuities (the indemnity fund), on the one hand, and the price or sum at which the Government annuity of 2620*l.* 17*s.* 6*d.*, payable during the joint lives of the said Ermingarde Collett and Charlotte E. Atkinson, and the life of the survivor of them, could for the time being be purchased, on the other hand, would belong during their joint lives to the said E. Collett and C. E. Atkinson, in equal shares for their separate use respectively, and with liberty for them to apply to the court as advised, having regard to such declaration. And it was declared that the said E. Collett and C. E. Atkinson had each power to dispose by will of one moiety of so much of the capital of the residuary estate of the testator, including the indemnity fund, as, having regard to the declaration aforesaid, should not be required to be retained as the price or sum of money at which such Government annuity as aforesaid could for the time being be purchased.

The testator's widow, Ermingarde Collett, before the date of the order, intermarried with, and was now the wife of, Thomas White Goodrich.

Charlotte Eustatia Atkinson (the testator's daughter), died on 2nd Aug. 1869 intestate, and letters of administration to her estate and effects were duly granted to her husband Adam Atkinson.

The result of Mrs. Atkinson's death was, that the sum required for the purchase of a Government annuity of 2620*l.* 17*s.* 6*d.* was very considerably reduced, and a surplus of over 8700*l.* was left.

Petitions were presented by Mr. Atkinson and Mrs. Goodrich for payment of the moiety of the amount, and the question which arose on these petitions was, whether Mrs. Goodrich, the survivor of the two annuitants, was to take the whole amount, or whether one moiety went to the administrator of Mrs. Atkinson.

Sir *Roundell Palmer*, Q.C., *Southgate*, Q.C., and *Chitty*, for Mrs. Atkinson's administrator, submitted that the 8700*l.*, being a surplus after providing for the annuity, one moiety of it must go to Mrs. Atkinson's administrator, in accordance with the declaration in the order of the 16th July 1860, that the ladies had power to dispose of a moiety of the surplus by will. They cited,

Woodmeston v. *Walker*, 2 Russ. & My. 197.

Jessel, Q.C., *Hardy*, Q.C., and *Montague Cookson*, for Mrs. Goodrich, contended that she was not bound by the order of the court, having been under disability at the time when she consented to the order; but assuming her to be bound, the order must be construed strictly, and the construction could not be carried one jot further than Mrs. Goodrich had consented.

Freeman appeared for mortgagees of Mrs. Goodrich's interest.

Sir *Roundell Palmer*, Q.C. replied.

Nov. 22.—Lord ROMILLY.—This is a very singular case, because the question has been raised in fact by an order of the court, and the more one looks at it the more one doubts whether the court had any power to make such an order. The court sometimes, in the interest and at the request of the parties, is induced to strain a little for their objects and purposes, and this is one of those instances. The state of the case, which is very singular, is this: A testator had a very considerable sum of money; he desires that on his death it shall be converted into a Government annuity for the joint lives of his widow and his daughter, and the life of the survivor, and that they shall not be allowed under any circumstances to take the capital of the fund which is to be converted into an annuity, and that they shall have it as an annuity. Upon inquiry what a Government annuity could be obtained for, they found that at the death of the testator the amount of the annuity for the joint lives, and the life of the survivor, would be less than 4½ per cent. on the fund. They thought that this was rather hard, and amounted to throwing away the money, and thereupon they come and ask the court to make a particular order, and the court makes the order which I am about to refer to and read. Now this I am certain of, that this is the effect of the will—whether the court had power to make the order or not I am not at this moment considering; but the will gives the property, whatever it is, absolutely to the survivor, and the survivor takes the whole of the property There is no gift over, and there is nothing undisposed of. Of that I have no doubt. The only question is what the order has done. Now, in the first place, I must say I am willing to adopt Mr. Montague Cookson's argument, that the construction of the order must not be carried one jot further than this lady, Mrs. Goodrich, consented. That I admit. But also I must say this, that not only was it made with her consent, though it does not appear to be a consent order, but it was made at her request and instance, therefore I cannot allow her to dispute the effect of the order, or to say that the court had no power to make the order. What is the order? I take it with these two considerations—that she is bound by it, but not one jot further than the order expressly states. The order was to this effect. [His Lordship read the order of 16th July, 1860.] The younger life (Mrs. Atkinson) has died, the consequence of which is that a very much smaller sum than was anticipated would be sufficient now to buy this annuity of 2620*l.* for the older life. The result is that there is at least 8700*l.* surplus, and the question is to whom that belongs. I do not at this moment discuss whether the court had power to make that particular order. But I do not think that the court, if it has strained a point, has injured anybody, and it has benefited certain persons that are now before the court. I do not think it probable that any interest can arise which would induce any person to contest the propriety of the order, or that the order could be now successfully appealed from; and I assume that I am bound, as are all the parties who are before me, by the order. The order takes away nothing from any of the persons that was given to them by the will, with this exception, that, having created a certain surplus fund, it has declared that each party has a power to dispose of the moiety by will, and, as Mr. Hardy very justly said, the court has added something to the will for them. They have power to dispose of this moiety by will, but if they do not dispose of it, what is the

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consequence? Has the court dealt with it? Has the court professed to deal with it? Was it agreed between the parties that they should deal with it? Nothing of the sort. This lady has died, and she has left no will at all. Can this court make a will for her? An arrangement was made between the two ladies, by which in possible events a sum of 8000*l.* might arise, and they agreed that though this would belong to the survivor, unless otherwise disposed of, the one who died first should have power to dispose of one half of it by will. She does not dispose of it by will. Does it not belong to the survivor? Can I in any way interfere with it and say that the survivor is not entitled to it? This is a very singular case. Sir Roundell Palmer stated it very fully to me at the time, and I thought I could make the order, and I am sure it was a very beneficial order for all parties. I am not now disposed to affect it; but of this I am certain, that I must adhere to it strictly, and that having given this lady a power to dispose of one-half by will, and she not having done so, it must go exactly as if this clause as to disposition by will had been struck out of the order. If so, there can be no doubt that it would belong to the survivor, because it was expressly so given by the testator's will. I am of opinion, therefore, that I cannot comply with the prayer of the husband's petition, and that I must comply with the prayer of Mrs. Goodrich's petition, and declare that she is entitled to the whole amount in question.

Solicitors for Mrs. Atkinson, *Shum* and *Crossman*.

Solicitors for Mrs. Goodrich, *Bargoynes, Milnes, Bargoyne*, and *Thrupp*.

Dec. 4 and 11, 1869.

WALL v. ROGERS.

WALL v. OGLE.

Married woman—Compromise of suit—Power of court to sanction—Practice.

On a petition presented by a husband and wife for the compromise of a suit, relating to the reversionary interest of the wife in a certain trust fund in which suit she and her husband were plaintiffs:

Held, that the court had power to sanction the compromise, but that the wife should be made a respondent to the petition, and appear separately.

The above suits were instituted by Mr. and Mrs. Wall and others, to compel the trustees of a certain settlement to replace a trust fund, to an undivided share in which Mrs. Wall was entitled, subject to the life-interest therein of her mother, Mrs. Ogle.

An agreement was entered into and signed by all the parties to the two suits, of whom Mrs. Wall alone was under disability, for a compromise of both suits. By this agreement the defendants were to pay 100*l.* to Mrs. Wall, and to each of the other plaintiffs who were entitled to shares in the trust-fund, and also to pay the costs of the suits; it was also thereby agreed that all proceedings in the suits should be stayed, and the defendants released from all further liability.

The plaintiffs in the suit now presented a petition to obtain the sanction of the court to the compromise, and the only question which arose was, whether the court had power to bind Mrs. Wall by the compromise, her interest being reversionary.

Jessell, Q. C., and *D. Jones* appeared in support of the petition.

Stirling, for the trustees of the settlement, suggested that the bills should be amended by making the husband a defendant, and the wife, by her next friend, a plaintiff. He cited

Wilson v. Hill, 25 L. J. 156, Ch.;
Clarke v. Green, 13 L. T. Rep. N. S. 38; 2 H. & M. 474.

Cottrell appeared for the other respondents.

Jessel, Q. C. in reply, contended that the course suggested by *Stirling* could not be adopted, as the property was not settled to the separate use of the wife. He cited

Doane v. Hart, 2 Russ. & My. 360.

The following case was also referred to:

Brooke v. Lord Mostyn, 11 L. T. Rep. N. S. 392; 2 De G. J. & S. 373.

Dec. 4.—Lord ROMILLY.—I think I have power to sanction the compromise so as to bind Mrs. Wall, but she must be made a respondent and appear separately on the petition.

Dec. 11.—The petition having been amended in accordance with his Lordship's judgment, an order was made in the terms of the prayer of the petition.

Solicitors for the petitioners, *Allen, Colley* and *Edwards*.

Solicitor for the respondents, *H. J. Adcock*.

Saturday, Dec. 11, 1869.

Re THE PATENT PAPER MANUFACTURING COMPANY; ADDISON'S CASE.

Company — Winding-up — Contributory — Conditional allotment of shares — Ultra vires.

In 1858 A. applied for 100 shares in a company, on the faith of a resolution by which the directors were authorised to enter into negotiations with parties for the investment of capital in the shares of the company on condition of such shares being cancelled, and the amounts so invested therein being returned to the parties on their giving one month's notice within a limited period. The shares were duly allotted to A., and registered in his name, and he paid 500l. in respect of them. He afterwards, in 1859, gave notice in accordance with the condition; the 500l. was thereupon repaid to him, and he transferred the shares to a nominee of the directors, and his name thenceforth ceased to appear on the register. The winding-up of the company commenced in 1868.

Held, that the condition subject to which A. took the shares was ultra vires and void, and that his name must be fixed on the list of contributories, notwithstanding the lapse of time during which his name had not appeared on the register.

Adjourned summons.

This was an application by Mr. Joseph Addison to have his name removed from the list of contributories to the above company, which was being wound-up under the supervision of the court, in respect of 100 shares.

In Feb. 1858, a resolution was passed by which the directors were authorised to enter into negotiations with parties for the investment of capital in the shares of the company, "on condition of such shares being cancelled, and the amount so invested therein being returned to the parties on their giving notice of their requiring the same to be done, one calendar month previous to the 31st Dec. 1859."

In the same month Mr. Addison, wishing to lend 500*l.* to the company at interest, and relying on the resolution above set forth, applied for 100 5*l.* shares. The shares were allotted to him, and registered in his name, and he paid 500*l.* to the company. Towards the end of the year 1859 he gave one month's notice

to the company that he wished the shares to be cancelled, and the 500*l.* to be repaid; the 500*l.* was accordingly repaid to him, and in Jan. 1860 he executed a transfer of the shares to a nominee of the directors for and on behalf of the company. Since the transfer of the shares his name had ceased to appear on the register; but on the winding-up of the company in 1868, the liquidator placed his name on the list of contributories, on the ground that the condition under which the shares were cancelled was *ultra vires*.

There was no clause in the articles of association authorising the investment of the funds of the company in the purchase of its own shares.

Swanston, Q. C. and *J. Napier Higgins*, in support of the application, submitted that the condition was either *intra vires* or *ultra vires*, and that in either case the applicant was entitled to have his name removed from the list; if it was *intra vires* then the cancellation of the shares was valid; if the condition was *ultra vires* it was void, and the allotment of shares was also void, so that the applicant was at no time a shareholder. They cited

Re Waterloo Life Assurance Company, Saunders's case, 10 L. T. Rep. N. S. 3; 2 De G. J. & S. 101;
Re Richmond Hill Hotel Company, Pellatt's case, 16 L. T. Rep. N. S. 442; L. Rep. 2 Ch. 527;
Re The London and Northern Assurance Company, Stace and Worth's case, 21 L. T. Rep. N. S. 182; L. Rep. 4 Ch. 682.

They contended that the present case was quite distinct from

Spackman v. *Evans*, 19 L. T. Rep. N. S. 151; L. Rep. 3 H. of L. 171.

Jessel, Q.C., and *Jackson*, for the official liquidator, contended that the present case was not governed by *Pellatt's case* (*sup.*), where the condition was precedent; here the condition was subsequent, and therefore collateral as in

Re Richmond Hill Hotel Company, Elkington's case, 16 L. T. Rep. N. S. 301; L. Rep. 2 Ch. 511.

Swanston, Q.C., in reply contended that the company were guilty of *laches* in allowing Addison's name to remain so many years off the register, and that, therefore, he could not now be fixed on the list, even assuming that the condition under which he took the shares was *ultra vires*. He cited

Re European Central Railway Company, Parson's case, L. Rep. 8 Eq. 656.

Lord ROMILLY.—It is unfortunate for this gentleman that he ever had any dealings with the company, but I have no doubt that he has been properly placed on the list of contributories. *Pellatt's case* (*sup.*) is quite distinct from this; in that case there was an agreement that the calls should be set-off against goods to be supplied by the shareholder, but no letter of allotment was sent to him. Here the shares were duly allotted to Mr. Addison, who applied for them on the faith of a condition that he might give them up and have his money repaid on giving a certain notice. But it is quite clear that a person cannot accept shares on condition that in a year or two he may give them up. Such a condition was *ultra vires*, but the invalidity of the condition does not make the whole transaction void. The reservation of the right to retire was *ultra vires*, but the allotment of the shares was valid. I am also of opinion that there has been no *laches* on the part of the company in this case, inasmuch as they, as well as Mr. Addison, acted throughout in the belief that the transaction was *intra vires*, and no one has been injured by the delay. I have, therefore, no doubt that Mr. Addison must be fixed on the list of contributories.

Solicitors for the applicant, *Waller* and *Scott*.

Solicitors for the official liquidator, *Kimber* and *Ellis*.

Friday Dec. 17, 1869.

WEEKES *v.* GALLARD.

Vendor and purchaser—Contract for sale at price to be fixed by valuers—Valuers named in contract—Inadequate valuation—Specific performance.

A. entered into a contract with B. for the sale of certain property to him at a price to be fixed by two valuers, named in the contract, who afterwards valued the property at an inadequate price:

Held, nevertheless, that B. was entitled to a decree for specific performance, there being no proof of fraud or collusion on the part of the valuers.

Parken *v.* Whitby, 1 *Turn. & Russ.* 366, *not followed.*

This was a purchaser's suit for specific performance.

In Feb. 1868, the defendant entered into a contract to sell to the plaintiff a brewery, situate at Cliftonville, near Brighton, and known as the Brighton Brewery, with the plant, fixtures, and public-houses belonging to it, at a price to be fixed by Messrs. Mason and Thomas, who were named in the contract, and who subsequently valued the property at a little over 12,000*l.*

The vendor's defence to the suit was that the valuation was grossly inadequate, the valuers not having duly estimated the value of the public-houses belonging to the brewery, which were under covenants to purchase beer from the brewery at an increased price.

The defendant had caused the property to be valued by four different valuers, and produced their valuations in support of his case; the lowest of them was 13,200*l.*, and the highest 18,300*l.*

Sir *Richard Baggallay*, Q. C. (with him *Everitt*) for the plaintiff, submitted that the defendant was bound by the price fixed by the valuers named in the contract, and that the plaintiff was entitled to a decree for specific performance.

Jessel, Q. C. and *Cecil Russell*, for the defendant, contended that the court was not bound by the judgment of the valuers named in the contract, and that where there was evidence that the valuation was inadequate, the court would not decree specific performance, a remedy in which the court had a wide discretion, but would leave the plaintiff to his legal remedy. They cited

Parken v. *Whitby*, 1 Turn. & Russ. 366;
Clowes v. *Higginson*, 1 V. & B. 524.

Lord ROMILLY.—This is a very unfortunate case, assuming the property to be valued too low, which seems probable. But that is no defence to the plaintiff's suit. The plaintiff and defendant agreed to be bound by the valuation of two persons named in the agreement, and it is the duty of the court to enforce specific performance of such agreements. The court has really no discretion in the matter. The discretion of the court is bound, as Lord Ellenborough says, by fixed rules. In one case of this kind a house and furniture were valued at three times their value, and yet there was a decree for specific performance. The only defence to such a suit would be fraud or collusion. There is no proof here that the valuers did not value the property as fairly as they could; there is no suggestion of fraud or collusion. There must, therefore, be a decree for specific performance of the contract with costs.

Solicitors for the plaintiff, *Tilleard, Son, Godden*, and *Holme*, for *Black* and *Freeman*, Brighton.

Solicitor for the defendant, *E. M. Hore*, for *Williams* and *Greaves*, Brighton.

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V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Wednesday, Dec. 22, 1869.

Re THE RAILWAY COMPANIES ACT 1867, AND *Re* THE SOMERSET AND DORSET RAILWAY COMPANY.

Railway company—Scheme of arrangement—Confirmation—Dissent of outside creditors—Railway Companies Act 1867 (30 & 31 *Vict. c.* 127).

Where upon a petition for the confirmation of a scheme of arrangement between a railway company and their creditors some of the outside creditors appeared and opposed the scheme:

The court, on its appearing that their opposition was reasonable, and based on a due regard to their own interests, dismissed the petition.

This was a petition presented by the Somerset and Dorset Railway Company for the purpose of obtaining the court's sanction to a scheme of arrangement between the company and its creditors.

The facts were briefly these:—

The company, by its Acts, was authorised to raise about 1,250,000*l.* stock and shares, and 439,000*l.* debentures, of which 833,215*l.* stock and shares and debentures had been issued. Debts amounting to 356,750*l.* had been incurred on the personal guarantee of the directors, which were partially secured by the deposit of various amounts of debenture and other stock. The total amount of the company's liabilities was 450*l.* per annum for rentcharges, 90,000*l.* for rolling stock and land, 70,000*l.* for other debts; on debentures deposited with creditors, 100,000*l.*, on other debentures, 282,000*l.*, on stock and shares, 833,215*l.*

The proposed scheme contained (*inter alia*) the following provisions:—

That the revenue of the company should be applied in the first instance, towards payment of the rentcharges. That the superfluous lands should be sold, and the proceeds applied towards repaying the directors the amounts they had been obliged to pay on their guarantees. That 160,000*l.* should be raised by the issue of a debenture stock (which was to have a priority over all other debenture stock) of which 40,000*l.* was to be issued in lieu of deposited securities, the remainder applied in payment of debts incurred for rolling stock, and the purchase of land, and the residue in payment of other debts, other than debenture debts. That three other classes of debentures should be created, all like the first carrying interest at 5*l.* per cent, which were to be issued to the holders of existing securities in specified proportions. That the receiver who had been appointed in the suit of *Miller* v. *The Somerset and Dorset Railway Company*, should continue to act, and that the balance of certain sums in that suit should be applied in payment of the costs of the scheme, and the residue be paid to the company.

Dickinson, Q. C., *Speed*, and *Smith Osler*, in support of the petition, submitted that the scheme came within the Railway Companies Act, and deserved the approval of the court. They had obtained the assent of the requisite majority of share and debenture-holders, and of all unpaid vendors of land, except one who was a creditor for 4000*l.* The scheme was the result of a compromise effected with great difficulty, and there was every reason for believing that it would act most beneficially for all parties interested in the company. The affairs of the company were steadily improving. The net income amounted to about 16,600*l.* per annum, which far more than sufficed to pay the interest on the debenture stock proposed to be raised. There would be no difficulty in raising the required fund.

Osborne Morgan, Q. C. and *Byrne*, on behalf of Mr. Drax, the landowner above referred to, opposed the scheme. They stated that his land had been taken possession of by the company in May 1857, and his purchase-money had not as yet been paid. In 1865 he filed a bill against the company, and obtained a declaration of lien and a decree enabling him in February next to take possession of the land in default of payment of his purchase-money. They contended that if the scheme were confirmed, Mr. Drax would be deprived, not only of his rights under the decree, but of his land. The 14th clause of the scheme empowered the directors to dispose of all superfluous lands, and the directors might thus, after keeping Mr. Drax out of his purchase-money for thirteen years, declare his land superfluous, and sell it for the benefit of the company. There was no clause in the Act which enabled a majority of the creditors to bind the minority. It had recently been decided in two instances that a creditor might successfully resist a scheme if he could show that he did so consistently with his own interest, and the present case came within those authorities. They referred to

Re Cambrian Railway Company's Scheme, L. Rep. 3 Ch. App. 278; 17 L. T. Rep. N. S. 374;
Re Bristol and North Somerset Railway Company, L. Rep. 6 Eq. 448, 454; 20 L. T. Rep. N. S. 70.

Ince for the Bristol and Exeter Railway Company, also opposed the scheme.—He stated that his clients were creditors of the company, and had a demand against a sum of money at present in the hands of the receiver of the court. One of the clauses of the scheme proposed to deal with that money, and he therefore submitted that he was perfectly justified in his opposition. He relied on the authorities cited.

Martineau for a debenture-holder for 13,000*l.*, and for a preference shareholder, also opposed the scheme. He submitted that it was unjust to the preference shareholders as a body; they were creditors as well as shareholders, but it was not proposed to deal with their claims like the other creditors, but to postpone them. He submitted that the company ought not to be permitted to make a distinction between the two classes of creditors.

Dickinson, Q. C. in reply, contended that the court ought not to listen to the objections of persons whose consent was not required, and whose rights and remedies were not affected. The rights of the Bristol and Exeter Railway Company would not in the least be affected; but, even if they were, the company had no lien on the fund which it was proposed to deal with, and could not successfully oppose the scheme. But the scheme in fact instead of being prejudicial to them would, if carried out, operate in their favour. With regard to Mr. Drax he would not be injured. The clause of which he complained dealt only with surplus lands, and his property could not come under that description. In short the scheme was the most beneficial that could be arranged for all parties. It had the approval of every person who was likely to be injuriously affected; it had been drawn up with a strict regard to the requirements of the Act, and it ought not now to be upset by the unsubstantial opposition of parties whose interests were in no way interfered with

Greene, Q. C., *Hardy*, Q. C., *E. K. Karslake*, Q. C., *Charles Hall*, *Lindley*, *Everitt*, *Humphrey*, *Chitty*, *Langley*, *Hemming*, *Currie*, *Youl*, *Batten*, *Currie*, *Whitaker*, and *W. Pearson*, appeared for other parties.

The VICE-CHANCELLOR.—I should certainly confirm this scheme if I were in a position to do so. It has been brought forward with *primâ facie* evi-

dence of the assent of all the classes of persons in which the Legislature has invested the majority with the power of binding the minority. On this occasion, however, the scheme is opposed by creditors, who are not members of a class which is bound by the decision of the majority. It is perfectly clear, upon the construction of the Act, that these creditors may appear and ask the court to withhold its assent, provided that their opposition is reasonable, and based on a due regard to their own interests. It has been observed that there is no clause in the Act enabling a majority of creditors to bind the minority; but I entertain no doubt that the court has jurisdiction to bind by its order an obstinate creditor whose dissent is unreasonable. In the present instance three dissentients have appeared to oppose the scheme. One of them is a debenture-holder to the extent of 13,000*l.*; as to his position it is clearly defined by the Act; he is bound by the assent of the requisite majority of his class. His opposition, therefore, is a circumstance of no great weight, and would not in itself have prevented the confirmation of the scheme; but when I find that it is also opposed by two other creditors, one of whom is a landowner, who has already obtained a declaration of lien, and who was on the point of being put again into possession of his land, the case becomes different. One of the objections taken on behalf of this landowner is founded on one of the clauses of the scheme, which enables the directors to dispose of superfluous land. I consider this objection not unreasonable, and that the opposition offered by this creditor comes within the principle laid down by Lord Cairns and Lord Justice Giffard in the cases referred to in the course of the argument, as one which the court would be justified in countenancing. With regard to the other set of opposing creditors, the Bristol and Exeter Railway, represented by Mr. Ince, they claim a sum of money now in the hands of the receiver of the court. Mr. Dickinson has contended that they have no right to this sum, but that even if they have, they have no lien upon it. They have, however, a summons pending for payment of the money. Whether they can establish a right to it is a question now *sub judice;* but if I had now to decide the question, I should say that they had shown a clear *primâ facie* right. In the presence, therefore, of the opposition of these creditors, I cannot confirm this scheme. Looking at the large interests that are involved by it, and to the number of persons who have thought it consistent with their interests to support it, I regret that I am unable to do so; but that regret is modified in some measure on looking at the complex nature of the scheme itself, which, I am bound to say, appears likely to involve all parties in new perplexities and fresh litigation. All these difficulties have arisen from proceedings under an Act of Parliament which it is, of course, the duty of the court to carry out, but with regard to which it is also the duty of the court to point out that it is an Act which has caused more delay, expense, vexation, and difficulty than could ever have been contemplated by its framers. As to the costs, all has been done so honestly by those directors, struggling with Parliamentary difficulties, that although I am bound to dismiss the petition, it will be dismissed without costs.

Solicitors, *Toogood; Edward Byrne; Whitaker* and *Woolbert.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Nov. 16, *and* 17, 1869.

WALTERS *v.* WEBB.

Demurrer—Copyholds—Seizure quousque—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27.)

W. filed a bill against the lords of the manor of W., alleging that he was entitled to be admitted, but that the defendants refused to admit him; that previously to 1819 *his grandfather was in possession of lands, portion of the manor, and from* 1811 *to other portions in right of his wife, the plaintiff being unable to describe them by reason of the defendant's refusal to allow him to inspect the court rolls; that the plaintiff's grandfather was entitled through his father, who died in* 1793, *and his wife was entitled through one J., who died intestate, and without issue, about* 1811; *that for sixty years before* 1819 *no court had been holden, and the plaintiff could not set forth who was last admitted. The bill then alleged neglect of the grandfather to be admitted, seizure quousque, and entry on the rolls that the lands were thenceforth held in trust for the persons entitled to be admitted; that the plaintiff's grandfather died in* 1831 *intestate, leaving a son, who was during the greater part of his life beyond the seas, and died in* 1864, *leaving the plaintiff, his eldest son, one of his co-heirs; and the bill prayed admission, or payment of what was due in respect thereof.*

General demurrers to this bill allowed.

This case came on upon four general demurrers for want of equity to a bill filed stating as follows: That the defendants, Elizabeth Frances Webb, George Eyston, Henry White, the Rev. Hugh Evans, George Payne Kitson, Richard Snead Cox, the Rev. William Howell Evans, and William Dawes Freshfield and Edwin Freshfield, were the lady and lords of the manor of Wentsland and Bryngwyn, in Monmouthshire. That the plaintiff was entitled to be admitted as tenant in fee simple, according to the custom of the said manor, to certain lands and tenements, portion thereof thereinafter more particularly described or referred to; but the defendants had refused, and still refused to admit the said plaintiff. That for many years previously to the year 1819, and down to the time of the seizure thereinafter mentioned, William Walters, the grandfather of the plaintiff, was in possession of and entitled as tenant in fee simple, according to the custom of the said manor, to certain lands and tenements, portion of the said manor, which formed part of an estate then, and still commonly known as the Gelly Pistill Estate.

The said William Walters had also been in possession from the year 1811 in right of his wife Elizabeth Walters, of the remaining portions of the said Gelly Pistill Estate. The plaintiff was unable to set forth a particular description of the lands comprised in the said Gelly Pistill Estate, and to identify the same with the description thereof on the court rolls of the said manor by reason of the fact that the defendants had wrongfully neglected and declined, and still declined, to allow the plaintiff to inspect the said court rolls as the plaintiff was entitled to do; that the said William Walters had become entitled and possessed of the portion of the Gelly Pistill Estate, through his father, Charles Walters, deceased, who died about the year 1793. The portion of the said estate of which the said William Walters was possessed and to which he became entitled in right of his said wife Elizabeth Walters, had descended to her as the heiress-at-law, according to the custom of the said manor, of one John Jones, her deceased nephew, who died intes-

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tate and without issue about the year 1811; that for nearly sixty years previously to the year 1819 no court baron of the said manor had been held at which the copyholder could have been admitted, and neither the said William Walters nor his wife, the said Elizabeth Walters, nor the said John Jones, had ever been admitted as tenants of the said manor.

The plaintiff was unable to set forth who among the predecessors in title, as copyholders of the said manor of the said William Walters and John Jones were the last persons whose names were entered on the court rolls of the said manor as tenants thereof, in respect of the said lands and tenements comprised in the Gelly Pistill Estate, by reason of the fact that the defendants, by their steward, refused to produce either the said court rolls to the plaintiff, or allow the same to be inspected on his behalf. That the said William Walters being in possession of, or entitled to, the said lands and tenements, called or known as the Gelly Pistill Estate as aforesaid, and having neglected to procure himself to be admitted as tenant thereof, the then lady and lords of the said manor, the predecessors in title of the defendant, caused successive proclamations to be made for the heir or heirs, according to the custom, to come in and be admitted as a tenant or tenants of the said lands and tenements, and no one having appeared to demand admittance thereto, the said lands and tenements were duly seized, *quousque*, acording to the custom of the said manor, and thereupon an entry was made upon the court rolls thereof, from which it appeared that the said lands and tenements were thenceforth to be held in trust for the person or persons entitled to be admitted thereto as copyholders of the said manor, and the same had ever since been held accordingly.

The said William Walters died about the month of July 1831 intestate, leaving Charles Walters his only son and heir according to the custom of the said manor, him surviving.

The said Charles Walters was also the heir-at-law, according to the custom of the said manor, of his mother the said Elizabeth Walters, then deceased, and on the death of the said William Walters the said Charles Walters became entitled to demand admittance to one portion of the said lands and tenements forming a part of the said Gelly Pistill Estate as the heir-at-law according to the custom of the said manor of his father the said William Walters and to the remaining portion as the heir-at-law, according to the said custom, of his mother the said Elizabeth Walters. The said Charles Walters, who was a soldier, and the greater part of his life beyond the seas, never made any demand or claim to be admitted to the said lands and tenements, and died in the year 1864, leaving the plaintiff, his eldest son, and one of his co-heirs according to the custom of the said manor, him surviving, and the plaintiff thereupon became, and still was, entitled to be admitted as a customary tenant of the said manor. That on or about the 3rd June 1868 the plaintiff made a formal claim in writing to be admitted to the said lands and tenements, and caused the same to be served on the defendant, Elizabeth Frances Webb, who was the only one of the defendants then known to the plaintiff, and afterwards on the 23rd of the same month the plaintiff, by himself and his attorney, appeared before the steward of the manor at a court baron of the lady and lords of the said manor, and demanded to be admitted as tenant of the said lands and tenements, and the plaintiff at the same time offered to pay the proper fine due to the said lady and lords in respect of such admission, but the defendants by their steward declined and refused, and still declined and refused, to admit the plaintiff. The defendants, or some of them, pretended that some persons other than themselves, or jointly with them, or otherwise, were entitled as lords or ladies of the said manor, and ought to be made parties, but declined to inform the plaintiff who such parties were, and the plaintiff was unable to obtain redress without the assistance of the court. And the bill prayed that the defendants might be decreed to admit the plaintiff as tenant, according to the custom of the said manor, of the said lands and tenements, the plaintiff thereby offering to pay what should be due to the defendants in respect of such admission. That the defendants might pay the costs, and for further relief. To this bill the demurrers were put in.

Wickens and *Cracknall*, in support of the demurrer of Elizabeth F. Webb, Henry White, the Rev. Hugh Evans, George Payne Kitson, Richard Snead Cox, and the Rev. William Howell Evans, insisted that, under the provisions of 3 & 4 Will. 4, c. 27, the plaintiff on his own showing had no title to sue, this being a bill to recover land or rent, and the seizure having taken place, necessarily before the year 1831, the form of the seizure being *quousque* made no difference. Moreover the allegation of seizure *quousque* stated no date, nor by whom the entry was made, and therefore did not amount to an allegation even of that fact.

Bampton v. *Birchall*, 5 Beav. 67;
Jackson v. *North Wales Railway Company*, 13 Jur. 69;
Steadman v. *March*, 2 Jur. N. S. 39.
Doe v. *Truesman*, 1 B. & Ad. 336.

[Counsel were stopped by the court.]

Osborne Q.C. and *Riddell* in support of the demurrer of George Eyston.

Widdowson v. *Earl of Harrington*, 1 Jac. & Walk. 532;
1 Watk. on Copy. 290; 2nd vol. 75.

Bristowe, Q.C. and *Kekewich* in support of the demurrer of Messrs Freshfield and Co.

Glasse, Q. C., *Cotton*, Q. C., and *Job Bradford* in support of the bill. The only questions are what is the effect of a seizure by the lord of a manor *quousque*, and whether this is a bill for the recovery of land or rent within the purview of the stat. 3 & 4 Will. 4 c. 27? The Statute of Limitation does not apply to this case. This is a bill simply seeking to compel the lord of a manor to do his duty by admitting the plaintiff who offers to pay the fines and fees. There has never been a forfeiture, and the seizure *quousque* leaves everything open until the lord does some other act, which he has not done. There is not one authority which shows that any time is a bar, even 100 years. All that are found are *dicta*: (*Doe* v. *Harrison*, 6 Ad. & Ell., N. S.) The seizure *quousque* creates no adverse title. *Doe* v. *Hellier*, 3 T. R. 171, shows that it is not an absolute seizure:

Doe v. *Truesman*, 1 B. & Ad. 736-45;
Doe v. *Muscat*, 12 M. & W. 832;
Coke's Copyholder;
Mason v. *Day*, Gilb. Eq. 77.

The lord is a trustee for the heir, and is bound to admit him:

Doe v. *Wilkinson*, 3 B. & Cr. 414;
3 & 4 Will. 4, c. 27, ss. 2, 3;
Dean of Ely v. *Bliss*, 2 De G. M. & G. 458.

where Lord Cottenham refused to decide that tithes were within the statute. This is a demurrer of the first impression, this being only a bill for production of the court rolls, which alone is an equity. The question stood first, Irrespective of the special circumstance, is this a suit to recover rent? and, under the special circumstances is the statute a bar? This is not a bill to take anyone out of possession, the lord having wrongfully refused to receive the service and homage. All that is asked is to put the

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plaintiff in feudal relationship to the lord: (*Andrews* v. *Hulse*, 4 K. & J. 392.) There has been no forfeiture, no distress on entry, no right accrued after the seizure *quousque*; it was merely an interruption until something was done.

Chichester v. *Hall*, 17 L. T. 121;
Pickett v. *Packham*, L. Rep. 3 Ch. App. 190

The VICE-CHANCELLOR.—This bill is filed by William Walters, alleging himself to be entitled to certain copyhold property, and it asks that the defendants, the lords and lady of the manor, may be ordered to admit him to such property, he offering to pay all fines, fees, &c. By the allegations in the bill it appears that one William Walters was entitled to be possessed of this land before the year 1831, the precise date not being stated; that he had not paid the fines due in respect of such copyholds, and that therefore the lord had duly seized *quousque*. Now the date is not given, but it must have been before 1831, as it is alleged that the lord duly seized *quousque*, and he could only have done so after three proclamations (according to the rule stated in *Doe* v. *Trueman*, *sup.*) at three successive courts, and the lord was in possession, as the bill alleges, in trust for certain persons, and that William Walters died in 1831, leaving a son Charles, who, I suppose, is alleged to be entitled on the death of William Walters, the plaintiff being one of such heirs. To this bill four several demurrers have been put in, and the only question on those demurrers is, whether the plaintiff, under the circumstances stated in the bill, is entitled to call on the lord of the manor to admit him to the possession of the same. Now that a bill can be sustained by a copyholder for admission, and that this court has a concurrent jurisdiction so to decree, is not disputed by Mr Wickens or any of the counsel for the demurrers, because that was decided in *Andrews* v. *Hulse* (*sup.*) before the present Lord Chancellor when Vice-Chancellor; and that in a proper case, and within a proper time, a lord of a manor may be in a situation to admit or refuse to admit a copyholder, and a bill can be sustained to compel him to perform that duty; and the sole question here is, whether the lord of this manor (a very material question, upon which I desire not a shadow of a doubt to exist), under the circumstances alleged, can be compelled to admit the plaintiff. In all questions of right to land the Statute of Limitations is applicable, and no person can recover upon this or any other cause alleged, unless he can allege that the right accrued to himself, or to the person or persons through whom he claims, within the period of twenty years. Now it has been most strenuously urged that this is not a suit for the recovery of land; but I am totally unable to see how that can be, for it is admitted that it is a suit to compel the lord to admit the plaintiff to the property; and if the lord does so he thereby puts him in possession, for a tenant on the court rolls can recover possession, and the lord will be dispossessed, if the tenant can only compel the lord to admit him, and therefore it is recovered possession of the land. The plaintiff may not *ipso facto* recover it, but the lord loses it if he admits him, and he is no longer able to remain in possession, the other being tenant on the court rolls. It has been argued that if the lord seizes copyhold lands, not for any definite act or positive forfeiture, but *quousque*, for failure in payment of the fines, after the lapse of a century (or even centuries if the argument is good for anything), a party may recover by compelling the lord to admit him. It is not necessary for me to give any opinion what the law would have been but for the stat. 3 & 4 Will. 4, c. 27; but at all events it is clear that the object of the Legislature was that, after the passing of this Act, after the expiration of twenty years, supposing there is no let or disability, and after the expiration of ten years, supposing there is a disability and it is removed after ten years from the time of its removal, no continued series of disabilities being able to carry it beyond forty years, no person is able to recover the possession of land. Now I am distinctly of opinion that this is a suit for the recovery of the possession of land; not, perhaps, in so strong a sense as an action of ejectment, but this is the case of a person, a copyholder, to which this statute is expressly applicable, the language being, "whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure;" and the question is, can a copyhold tenant, out of possession, as between him and the lord, having been out of possession for a century, where the lord has seized *quousque*, recover that possession by compelling the lord to admit him as tenant? The 2nd section disposes of this question beyond all doubt. It says this: (The Vice-Chancellor referred to the words of the second, and also of the third section of the Statute of Limitations.) It is not necessary that there should be a public ousting or dispossession. Applying this, what is the estate or interest in respect of which the claim is made as copyholder? Why that of William Walters, and when was he last seised? According to the allegations in the bill, up to 1831. And taking it in the most favourable view, it cannot be later than thirty-eight years ago that the person under whom the plaintiff claims was out of possession. Like the case of a tenant without the receipt of rent, that time is as fatal to the plaintiff's case as centuries; and it is in vain for any person to come into this court to recover that of which he, or those through whom he claims, have not been in possession within twenty years. It is insisted that the seizure *quousque* is not adverse possession, but that is immaterial. It is certainly not like violent dispossession; but it is possession which the lord has taken, and which he holds until he gets his fines, and there is thus a discontinuance. The receipt by the officiating party is immaterial, and the statute applies. It is not necessary that the possession shall be adverse. Put the case of a tenant holding over, and yet, notwithstanding, the landlord allows him to do so for more than twenty years, that is fatal to the landlord. On every ground, therefore, it appears to me that this is a suit for the recovery of land, and that the right or interest in respect of which the plaintiff claims was last in possession of William Walters thirty-eight years since, that is more than twenty years, and there being no disability alleged, that is fatal to a bill to compel the lord to put the plaintiff in possession of land. With respect to the point as to the seizure *quousque* by a holding on trust, it is said it is a case of express trust, which takes it out of the statute. An express trust for whom? The person entitled to be admitted? In order to be so entitled, he must show himself to be the party entitled to the land, and he fails to do so here. Therefore, on the broad ground, whether the case be that of landlord and tenant or lord and copyholder, or any other relation, if you show a discontinuance for twenty years, that is fatal, and you have no *locus standi* in this court. The demurrers must be allowed in the usual way. Mr. White appearing for two defendants must have only one set.

Solicitors for the plaintiff, *Rooke*, *Kenrick*, and *Harston*.

Solicitors for the defendants, *H. White*, *Messrs. Freshfield* and *Co.*, *Messrs. Ward*, *Mills*, and *Co.*

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Saturday, Nov. 20, 1869.

CAPDEVIELLE *v.* CAPDEVIELLE.

Domicil—Property in France and England—French domicil of origin—Vault and burial of wife and child.

C., born in France, succeeded his uncle in business at Manchester, and purchased land and built a handsome house there, and also a vault in which he buried his uncle, wife and child, and, going to Vichy for his health, died at the place of his birth. The evidence of intention was conflicting, and went chiefly to the impression of the witness, but it appeared that he preferred the French climate, and talked of taking his wife's body to France:

Held, that the domicil of origin never was lost, and that C. died a domiciled Frenchman.

This was an adjourned summons on the question whether the domicil of Domingo Capdevielle at his death and the date of his will was French or English, the chief clerk having found that it was French. The facts were these. The testator was born at Montory, in the Basses Pyrenees, and having an uncle in business as a commission merchant at Manchester, he came to England and succeeded his uncle in business; purchased a piece of land, and built a house at Bowden, eighteen miles from Manchester, and expended thereon 5000*l.* He also built a vault in the churchyard, where he buried his uncle, and ultimately his wife and a child. He lived for twenty years in England, and having gone to Vichy for his health, he died at Montory, his native place, in 1866.

There were several affidavits by friends, his solicitor, and one Theodore Darthey, as to the proof of the will, made in the French form, in England. From this it appeared that although he laid out a good deal of money in England, and had a preponderating idea of settling his son (the plaintiff) in his business at Manchester, his own views as to permanent residence were vacillating. Several of the witnesses deposed to their impression that he was settled in England, and his solicitor expressly stated that had he not so considered, he should have advised his becoming naturalised in England. He was stated to have spoken of the superior salubrity of the Continental climate, and retaining his property at Montory. He was greatly depressed after his wife's death, and very uncertain as to his future movements, but entertained an idea of having her remains removed to Montory. It was admitted that his visit to Vichy and Montory, where he died, was merely a temporary one.

Glasse, Q. C. and *Bovill*, for the plaintiff, contended that there was quite sufficient to support an acquired English domicil. There was a residence in England for twenty years, purchase of land, building a house at a great expense, carrying on trade, an expressed solicitude that his son should settle in England, and the building of a vault, and the burial of his nearest relatives in it. On all these grounds, the domicil of origin had been abandoned, and an English one acquired, and the chief clerk's finding was wrong. The matter had been amicably adjourned into court for decision.

Cole, Q. C. and *Bardswell*, for the testator's daughter borne before his marriage, and

De Gex, Q. C. for the residuary legatee, were not called upon.

The VICE-CHANCELLOR (after stating the facts.)—The domicil of origin is admitted to have been proved, and the onus therefore lies upon those who allege that the domicil of the testator at the date of his will and at the time of his death was English, to show that he abandoned such original domicil. On the whole of the evidence I come to the conclusion that during his wife's lifetime, at all events, he does not seem to have had any fixed or definite intention on the subject of a permanent residence. It is true that he carried on trade in this country, and purchased land and built a house upon it at some expense, but still his views were uncertain and his mind vacillating, and the witnesses only speak from his acts, except the expressions used as to climate. When his wife died, however, it is stated that he was in depressed spirits, and he then is said to have expressed an intention of taking her remains over to France. I don't think the evidence proves that he intended to take up his permanent residence in England; and this those who support an English domicil must show to have been the case, which I think they have failed to do. I am, therefore, of opinion that the chief clerk was correct in his decision, and the summons must therefore be dismissed; but, it being a friendly matter, the costs of all parties must come out of the estate.

Solicitors for the plaintiff, *Tilleard, Son, Goodden* and *Holme.*

Solicitor for the defendants, *H. G. Smith.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., Barristers-at-Law.

Thursday, Dec. 9, 1869.

SILVER *v.* UDALL.

Partition suit—Partition Act 1868, *sect.* 3—*Sale.*

In a partition suit, the plaintiff being entitled to one-tenth, and the defendant to seven-tenths of the property and two other persons not before the court to the remaining two tenths:

The court declined to order a sale under sect. 3, *of the Partition Act* 1868, *but directed an inquiry who beside the plaintiff and defendant were entitled to any and what shares, and whether they were within or without the jurisdiction.*

This suit was instituted for the purpose of having the trusts of a marriage settlement carried into execution so far as regarded leasehold property, comprised therein, and the bill prayed for a sale or partition of the same.

By the terms of the settlement, on the death of the husband the property became divisible in tenths among the children of the marriage. The husband of the plaintiff as one of the children of the marriage, had become entitled to one-tenth. The plaintiff, as his executrix, instituted the present suit against the defendants, John Udall and E. D. Silver, the trustees of the settlement. The defendant, E. D. Silver, as one of the children of the marriage was also entitled to one tenth, and he had purchased six other tenth shares from the persons entitled thereto. The persons entitled to the remaining two tenth shares were not before the court.

Hinde Palmer, Q. C. and *J. T. Crossley* for the plaintiff, now asked for a sale under sect. 3 of the Partition Act 1868 (31 & 32 Vict. c. 40), unless the defendants agreed to purchase the plaintiff's shares at a valuation in the manner provided by sect. 5.

Kay, Q. C. and *W. P. Dickins* contended that the court could not direct a sale in the absence of the persons entitled to the remaining two tenth shares.

The VICE-CHANCELLOR said that if he were quite satisfied that the two persons entitled to the other

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shares were out of the jurisdiction, he might have decreed a sale; but that at present he could only direct an inquiry as to who besides the plaintiff and defendant Silver were interested in any and what shares of the property, and whether they are within or without the jurisdiction, and an account of what, if anything, was due to the plaintiff in respect to her one tenth share in the settled property.

Solicitor for the plaintiff, *J. A. Stuart.*

Solicitors for the defendants, *Phelps* and *Bennett.*

Nov. 10, *and* 12, 1869.

LEATHER-CLOTH COMPANY (LIMITED) *v.* LORSONT.

An agreement (made on a sale of a business to the plaintiffs) not to carry on in Europe any company or manufactory having for its object the manufacture or sale of an article known as Crockett's leather cloth, and not to communicate to anyone the processes of the manufacture, "so as to in any way interfere with the exclusive enjoyment of the said intended company of the benefits hereby agreed to be purchased:"

Held, not to be an undue restraint of trade, and an injunction granted accordingly.

This was a suit for an injunction to restrain the defendant from manufacturing and selling leather cloth in contravention of an agreement entered into by him, and from using certain trade marks.

The plaintiffs, the Leather-Cloth Company (Limited), were registered on the 22nd May 1857, under the Joint-Stock Companies' Act 1856.

By an agreement in writing dated the 21st May 1857, and made between the defendants, J. B. A. Lorsont, N. S. Dodge, the Crockett International Leather-Cloth Company (by J. P. Crockett, their attorney), and others, of the first part, and Mr John Murrray, as agent for the plaintiff company, it was agreed, *inter alia*, that the parties of the first part should sell to the plaintiff company for 20,000*l.* and other considerations thereinafter mentioned, certain letters patent obtained in France and England for the manufacture of American leather-cloth, and also the exclusive right of soliciting similar patents in Belgium and all other countries of Europe, together with all the processes of manufacture used by them or their agents or workmen up to the date of the agreement, and also the lands and buildings thereon situate at West Ham, in the county of Essex, where the business or manufacturing of the American leather-cloth was then carried on, together with all the leases and agreements for leases thereof, and the plant of the manufactory as set out in the schedule thereto; and that the parties of the first part should sell, and the plaintiff company should buy at a valuation all the goods in hand, manufactured and not manufactured, raw material and produce, and all the furniture and effects on the premises at West Ham, and it was also agreed as follows:

That the parties of the first part, or any of them, will not directly or indirectly carry on, nor will they to the best of their power allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions in any way similar to the productions which are the subject of the letters patent, and now manufactured in the business or manufactory so carried on at West Ham as aforesaid, and will not communicate to any person or persons the means or processes of such manufacture so as in any way to interfere with the exclusive enjoyment of the said intended company of the benefits hereby agreed to be purchased.

By the memorandum of association of the plaintiff company, the registered office of the plaintiff company was to be in England, and the objects for which the company were established were, "the manufacturing of leather-cloth, and of moleskins, oil-cloths, and other productions of a similar kind, and of yarns and stuffs necessary or incident to the manufacture of such productions."

The memorandum of association was subscribed by the defendant for 100 shares, and by article 97 of the articles of association, the defendant was appointed general manager and superintendent of the factory or factories of the company to be established in England, France, Belgium, and elsewhere.

Upon the registration of the company the sale and purchase under the agreement of the 21st May 1857 was duly carried into effect, and the defendant was appointed manager of the company. Shortly afterwards the defendant became "the managing director" of the company, and was commonly so described in the circulars and documents issued by the company under his direction.

The patents referred to in the agreement of the 21st May 1857 were taken out by Mr N. S. Dodge for the benefit of, and as trustee for, the Crockett International Leather-Cloth Company, and were at the date of the agreement the property of that company, and the premises at West Ham, mentioned in the agreement, were certain leasehold premises constituting the establishment of the Crockett International Leather-Cloth Company.

By an indenture dated the 8th July 1857, made between N. S. Dodge of the first part, the Crockett International Leather-Cloth Company (by C. P. Crockett, their attorney) of the second part, and the plaintiff company of the third part, N. S. Dodge, by the direction of the Crockett International Leather-Cloth Company, assigned and sold to the plaintiff company all the patents mentioned in the agreement of the 21st May 1857, and the interest of the Crockett International Leather-Cloth Company and N. S. Dodge therein. And by the said indenture C. P. Crockett, as the agent and attorney of the Crockett International Leather-Cloth Company, thereby granted and assigned to the plaintiff company all the machinery, &c., belonging to the Crockett International Leather-Cloth Company at West Ham, and also the goodwill of and in the business hitherto carried on there by the Crockett International Leather-Cloth Company.

The plaintiff company, upon their registration, commenced carrying on the business, comprised in the sale and purchase, upon the premises at West Ham; they also had an establishment in the City of London. Upon commencing business the plaintiff company adopted in their business a trade mark, formerly in use by the Crockett International Leather-Cloth Company, and called in the bill trade mark A. They also adopted two other trade marks, called in the bill trade marks B and C respectively.

In Aug. 1863 the directors of the plaintiff company dismissed the defendant from his post of manager of the company. In March 1868 the defendant commenced to carry on the business of the sale and manufacture of leather cloth at North Woolwich, in the county of Kent, and at 97, Cannon-street.

The plaintiffs alleged that the defendant had thereby acted in breach of the engagement entered into with him by the agreement of the 21st May 1857, and that the conduct of the defendant in his business was calculated and likely to deceive the public into the belief that the defendant was carrying on the business, the goodwill of which had been purchased by the plaintiff company, and to obtain for the defendant custom intended for the plaintiff company. They also alleged that the defendant used trade marks which were evident imitations of their trade marks A, B, and C, respectively.

On the 10th March, 1868, the defendant had issued a circular of that date, which was as follows:

I beg leave to inform you that my works are now in full

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operation, and that I shall be happy to receive your orders. The goods supplied by me are in every respect similar to those made by the Crockett International Leather-Cloth Company (since known as the Leather-Cloth Company), whilst their works were under my management, and I may state with confidence that with sixteen years' experience, acquired in that business from its origin, I am enabled to adapt and bring to bear upon my works every mechanical, commercial, and other improvement of the present day, and that you will find my leather-cloth equal, if not superior, to any in the market, and the prices most advantageous to purchasers. I am prepared to deliver any quantities of Crockett's cloth and leather-cloth, either at once or periodically, by regular shipments or delivery. My price list is enclosed herewith, and I shall be glad to forward samples by post, or to submit them to your inspection at the above address. I am, yours most respectfully.

A. LORSONT.

The bill alleged that the defendant's conduct had occasioned great damage to the plaintiffs, and prayed for an injunction and for damages.

The cause now came on upon motion for decree.

Sir *R. Palmer*, Q. C., *Kay*, and *A. G. Marten* appeared for the plaintiffs.

Eddis, Q. C., *Fischer*, and *A. Cohen* (of the Common Law Bar), for the defendants, contended that the agreement, being in restraint of trade generally, was void, as against public policy.

Kay, Q. C., in reply.

The following cases were cited. As to the agreement being in restraint of trade:

Mitchel v. *Reynolds*, 1 P. Wms. 181; 1 Sm. L. C. 340;
Horner v. *Graves*, 7 Bing. 735;
Hitchcock v. *Coker*, 6 A. & E. 438;
Mallan v. *May*, 1 L. T. Rep. N. S. 258; 11 M. & W. 653;
Tallis v. *Tallis*, 21 L. T. Rep. 43; 1 E. & B. 391;
Whittaker v. *Howe*, 3 Beav. 383;
Bryson v. *Whitehead*, 1 Sim. & Stu. 74;
Harnes v. *Parsons*, 7 L. T. Rep. N. S. 815: 32 Beav. 328;
Gale v. *Reed*, 8, East 80;
Young v. *Timmins*, 1 C. & J. 331;
Ward v. *Byrne*, 5 M. & W. 548;
Price v. *Green*, 16 M. & W. 346.

As to the trade marks:

The Leather-Cloth Company (Limited) v. *The American Leather-Cloth Company (Limited)*, 9 L. T. Rep. N. S. 558; 11 H. L. Cas. 523; 8 L. T. Rep. N. S. 829;
Edlesten v. *Vick*, 11 Ha. 78.

The VICE-CHANCELLOR, after stating that in his opinion the plaintiff's case as to the trade marks, had failed, as trade marks A and B were covered by the decision of the House of Lords in the *Leather-Cloth Company (Limited)* v. *American Leather-Cloth Company*, 9 L. T. Rep. N. S. 558; and trade mark C was a palpable imitation of the trade mark of another company, which had been formed after the plaintiff company—continued as follows:—Having disposed of the trade marks, I now come to that question which is a very important one, as it seems to me, with respect to the covenant. The covenant, no doubt, is expressed in very large words, and it is insisted that the mere fact that the covenant is "not to carry on, nor allow to be carried on, in any part of Europe" is in itself what is called a general restraint of trade; as what is called a general restraint of trade, is a restraint of trade throughout the United Kingdom; and that a restraint of trade in that form, extending throughout the United Kingdom, is upon the face of it bad, though something short of it may be admissible, provided the circumstances justify it. I do not read the cases as having laid down that unrebuttable presumption, which was insisted upon with so much power by Mr. Cohen. The truth is, that all the cases when they come to be examined, according to my view of it, establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties dealing legally with some subject-matter of contract. Public policy requires that every man should be at liberty to work for himself, and should not be at liberty to deprive himself or the state of his labour, skill, or talent by any contract that he enters into. On the other hand public policy requires this—that where a man has by skill or any other means obtained something which he wants to sell, he should be able to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser; but that then, the same public policy which enables him to do so, does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject-matter of the contract. Now in this case the subject-matter of the contract was a particular manufacture, carried on partly under patents, and partly by processes which were known to the vendors, and it is to be assumed not known except to the vendors, their agents, and workmen. That being the subject-matter of the contract, the stipulation is that the vendor will not set up a similar manufacture in Europe, and will not communicate the process of the manufacture anywhere, so as to interfere with the exclusive enjoyment by the intended company of the benefits thereby agreed to be purchased. It seems to me that the case resembles the sale of a secret which has been held to be perfectly good, and as connected with the sale of that secret, an unlimited stipulation as to time or place with regard to communicating the secret or dealing with it so as to interfere with the purchaser, because, in truth, there were particular processes for the manufacture. These processes were to be communicated, and they were to be communicated for the exclusive benefit of the purchaser. It is settled by authority that a man may bind himself not to communicate such a process under any circumstances in any part of the world to anybody else. But how would it be possible to enforce a covenant not to communicate the process, if he were at the same time to be at liberty to carry on that same trade with the same process in such a way that it would have to be communicated to every servant and workman engaged by him in the trade? Therefore the mere fact that he is entitled to restrain himself simply amounts to this. It is not that he is restrained, but that he is entitled to restrain himself from communicating the process, and is thereby enabled to get a higher price for that which he is selling. The fact that he is so entitled to restrain himself, entitles him also to restrain himself from carrying on a manufacture which would involve the communication of the process. Therefore, independently of those words, "so as to in any way interfere with the exclusive enjoyment," I am of opinion that there is nothing in the covenant which violates the rules of law, or which is in contravention of the decided cases, when the principles upon which those cases have been decided come to be properly considered. But if there were anything in a covenant so standing which might be supposed to be in contravention of some of the decided cases, I am satisfied that those words, "so as in any way to interfere with the exclusive enjoyment of the company" do properly and sufficiently qualify it, the principle being that you are not to have any more restraint than is necessary for the benefit of the company. The company says "in order to obviate

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any objection, we do not ask for any unreasonable restraint, for any capricious restraint upon you, we only ask you to tie yourself not to do something which will interfere with that which you profess to sell to us, and for which you have received a consideration." Therefore I am of opinion that the plaintiffs are right in saying that the covenant is one which is capable of being enforced in this court. Then the next question is, Does the defendant Lorsont violate the covenant? Has he been doing anything which is in violation of that covenant? I am of opinion that he is doing so, that he is engaged in a manufactory for the manufacture of productions similar to those which were the subject of letters patent, and which were then manufactured in the manufactory so carried on at West Ham at the time of the contract, that is to say, it is proved to me that the particular production is the production of an article known as Crockett's leather-cloth, and that Crockett's leather-cloth was manufactured at West Ham at that time. The leather-cloth known by that very name is manufactured by the defendant, and sold by him under that very name, with an advertisement from him to the effect that the goods supplied by him "are in every respect similar to those made by the Crockett International Leather Company, since known as the Leather-Cloth Company, while the works were under my management;" and then he states his sixteen years' experience, and so on. That is to say, having covenanted that he would not be engaged in the manufacture of products similar to those which were then being made, he circulates to the world a letter, saying, I am now actually making productions which are in every respect similar to those which were made by the vendors and afterwards made by the purchasers. I am of opinion, therefore, that the plaintiffs are entitled to an injunction. The injunction, I think, ought to be in these words—"to restrain the defendant from carrying on any manufactury for the production of Crockett's leather-cloth, or being engaged in any company for the sale of Crockett's leather-cloth, or any cloth or any production similar thereto, and from in any manner holding himself out as the manufacturer of such Crockett's leather-cloth, or any production similar thereto." Then with regard to the costs, the plaintiffs are entitled to the costs of the suit, except so far as they have been occasioned by the litigation as to the three trade marks, as to which I should have given the defendant the costs if he himself had not been personally concerned in the introduction and use of them by the company. I do not give him any costs, but he will not have to pay any costs in respect of that part of the suit. He will have to pay the costs of the rest of the suit.

Solicitors for the plaintiffs, *Thomas* and *Hollams*.

Solicitors for the defendant, *Combe* and *Wainwright*.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Wednesday, Dec. 8, 1869.

(Before the LORD CHANCELLOR (Hatherley).

Re YATES' PATENT.

Petition for letters patent—Objections by a prior patentee—Certificate of law officer against grant—Dismissal of petition with costs.

On a petition for the grant of letters patent, which petition was opposed by a prior patentee on the ground that the alleged invention for which such letters patent were sought was an infringement of his own patent, a reference was directed to the proper law officer to ascertain whether the prayer of the petition should be complied with.

The law officer certified against the patent. The court therefore dismissed the petition with costs, notwithstanding no opposition had been made to the petitioner's application for a patent until he had applied to have it sealed, and he had given all the requisite notices.

This was a petition to have the great seal affixed to letters patent under the following circumstances: The petition set forth that the petitioner, William Yates, was in possession of an invention for improvements in furnaces for effecting the consumption of smoke, and that he was the true and first inventor thereof, and that the same was not in use by any other person or persons before or at the time when he obtained his provisional specification; that on the 15th June 1869 he applied by petition for a grant of letters patent in respect of his said invention; that on the 21st June 1869 provisional protection was granted in respect of the said invention; that on the 2nd July 1869 the petitioner gave notice of his intention to proceed with his application, which was duly advertised, and no notice of opposition thereto was given; that on Aug. 25 the Solicitor-General gave his warrant for the sealing of letters patent for the said invention; that the sealing of the letters patent was prevented by an opposition entered into at the patent office on behalf of the respondent, John Fletcher, who had alleged for grounds of opposition that the petitioner's invention was not new, and was not the invention of the petitioner, but was a mere colourable imitation of an invention of the said John Fletcher, for which he had applied for letters patent in April 1869; that such grounds of opposition were false and groundless, and that the petitioner's invention was wholly different from that of John Fletcher; and the petitioner prayed that letters patent might be granted to him in respect of his said invention; and that John Fletcher might be ordered to pay the costs occasioned by his said opposition. The letters patent to Fletcher in respect of his alleged invention were dated 2nd Oct., 1869. The law officer having certified that the letters patent ought not to be granted to the petitioner, the only question before the court was whether the petition should be dismissed without costs. On behalf of the petitioner it was alleged that he had no knowledge of the respondent's patent until after he had applied to have his patent sealed; that as the petitioner had acted in good faith, and had duly given all notices which it was incumbent on him to give, and as the respondent had offered no opposition until the last moment, the petitioner ought not to be called upon to pay the respondent's costs.

Macrory appeared for the petitioner.

Aston for the respondent.

The LORD CHANCELLOR (Hatherley).—I can see no reason for distinguishing this case from the ordinary case of an unsuccessful petition, and must dismiss the petition with costs in the usual way.

Solicitor for the petitioner, *Bristow Hunt*.

Solicitor for the respondent, *W. Wynne*.

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Saturday, Dec. 4.

(Before Lord Justice GIFFARD.)

Ex parte CYRUS; *Re* BROADBRIDGE.

Bankruptcy—Adjudication—Petitioning creditor's debt—Bills accepted by bankrupt and taken up by the drawer after the act of bankruptcy—Whether they constitute a good petitioning creditor's debt.

Bills of exchange were drawn by C. upon, and accepted by B. B. committed an act of bankruptcy, and at this time the bills were in the hands of bona fide holders for value. Afterwards C. took up the bills, and petitioned for an adjudication of bankruptcy against B. An adjudication was made, but was afterwards annulled by the commissioner on the ground that there was not a good petitioning creditor's debt.

On appeal, held, that the decision of the commissioner was wrong, and that there was a good petitioning creditor's debt.

Re Petrie, *L. Rep.* 3 *Ch. App.* 232; 18 *L. T. Rep. N. S.* 169, *where it was held that the persons to assent to a creditor's deed in respect of bills on which the debtor was liable were the holders of the bills at the date of the registration of the deed, had no application to the present case, it being well settled law that it is not necessary that the petitioning creditor's debt should have been due to him before the act of bankruptcy if it was due from the debtor before that time.*

This was an appeal from an order made by Mr. Thring, the commissioner of the Liverpool District Court of Bankruptcy, annulling an adjudication of bankruptcy which had been obtained against George Broadbridge, a broker at Liverpool, on the ground that the petitioning creditor's alleged debt on which the adjudication was founded, was insufficient to support it.

The petitioning creditor was Frederick Cyrus, a merchant at New York, for whom Broadbridge had acted as agent in Liverpool. The adjudication of bankruptcy was made on the 28th Oct. 1869, the act of bankruptcy on which it was founded being the execution by Broadbridge of a deed of assignment for the benefit of his creditors, on the 23rd April 1869. There had been various transactions between Broadbridge and Cyrus, and when the dispute as to the sufficiency of the petitioning creditor's debt arose, it was referred to Mr. Banner, an accountant, to investigate the accounts, and to determine whether there was any balance due from Broadbridge to Cyrus. Mr. Banner made a certificate in which he stated that he had investigated the account, and that he was of opinion that upon the proved items, there was a balance owing by Broadbridge to Cyrus amounting to 170*l.* 7*s.* 2*d.* He added that there were further claims made by Cyrus which, if established, would increase the above balance, but would not diminish it. In estimating this balance, Mr. Banner included among the sums due from Broadbridge to Cyrus certain bills of exchange for sums amounting altogether to 1687*l.*, which had been drawn by Cyrus upon, and accepted by, Broadbridge. These bills were dishonoured at maturity. At the date of the assignment for the benefit of Broadbridge's creditors, the bills were in the hands of *bona fide* holders for value, but before the petition for adjudication of bankruptcy was presented, they were taken up by Cyrus. Under these circumstances the commissioner was of opinion that the bills in question could not be taken into account in estimating the balance due from Broadbridge to Cyrus, and consequently that there was not a good petitioning creditor's debt, and his Honour, therefore, on the 26th Nov. annulled the adjudication, with costs to be paid by the petitioning creditor. From this decision Mr. Cyrus now appealed.

The material portion of the Commissioner's judgment was as follows:—"The question which the court has now to determine is, whether a good petitioning creditor's debt can be based on an account of which these bills constituted by far the largest portion. Now this principle is laid down in the books of practice, that in order to support an adjudication there must be a legal debt of sufficient amount, for which, if payable at the time, an action could be maintained by and in the name of the petitioning creditor; but Mr. Etty has insisted very strongly in argument that the rule is to be received with the qualification that it is only necessary that the debt should have been due by the bankrupt before the act of bankruptcy, not that it should be due to the petitioning creditor. He has referred to Griffith and Holmes on Bankruptcy, p. 190, in support of this position, and has cited and commented on a series of cases which are there collected in the notes. It must be observed that all these decisions are of considerable antiquity, and although in point to a certain extent, they cannot be reconciled with more recent cases in which similar questions have been determined. In *Ex parte Botten*, Mont. & Bl. 412, the very point now before me was decided, and it was there held, that if a creditor has received and transferred a bill of exchange, the holder of the bill is the proper petitioning creditor. The authority of that case was upheld in *Ex parte Magnus*, 2 M. D. & De G. 604; I now come to the case of *Ex parte Petrie*, 18 L. T. Rep. N. S. 169, on which Mr. Potter relies. There bills, to the amount of 9732*l.*, had been drawn by Messrs. Swire and Sons, and accepted by Petrie. Before the registration of a trust deed executed by Petrie part of those bills, to the amount of 2080*l.*, had been taken up and were in the hands of Messrs Swire and Sons; the remainder were held by the Union Bank of Liverpool under discount, but came into the hands of Messrs. Swire and Sons after the registration. Messrs. Swire and Sons were entered as assenting creditors for the whole amount. It was held by the Lords Justices that at the time of the registration the legal holders and owners of the debt to the extent of 7652*l.*, were the Union Bank, the holders of the bills. They were the persons who, if matters had remained so, would have been the persons to sue Petrie, as indorsers and holders of the bills, and consequently the creditors entitled to assent to, or dissent from, the deed. It is contended, on the other hand, that the class of cases which have arisen under the proviso of the statute relating to deeds are not analogous, and have no bearing on the right of petitioning creditors. But I am unable to distinguish the position of a petitioning creditor at the time of an act of bankruptcy from that of a creditor whose assent is required at the time of the registration of a trust-deed. The Act of Bankruptcy in the one case, the registration of the deed in the other, is the hinge of the proceeding. Now it is admitted that the amount of bills (1687*l.*) outstanding at the time of the act of bankruptcy is sufficient to extinguish the petitioning creditor's debt, unless the contingent liability of Cyrus, as drawer at that period, coupled with the fact that the bills were subsequently taken up by him be sufficient to support the petitioning creditor's debt. I am of opinion, on the general principles of the law of bankruptcy, as well as on the authority of the cases to which I have referred, that the debt of the petitioning creditors cannot be supported, inasmuch as the holders of the bills for value were the persons entitled to sue Broadbridge at the date of the act of bankruptcy, and the relative rights of the parties upon this adjudication have not been altered by any subsequent occurrences. The adjudication

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must therefore be annulled. I have the less reluctance in arriving at this conclusion when I consider the involved state of the current account between the parties on which the debt is founded, for the Lords Justices. in *Patton's Case*, 30 L. J., Bank.; and in *Scott Russell's Case*, 30 L. J., Bank.; 6 L. T. Rep. N. S. 188, have stated, as a general rule, that it is an objectionable, or at least an incovenient mode of proceeding, and one not deserving of encouragement, to found a petition of adjudication upon a disputed balance of a complicated diversity of cross demands and unsettled accounts."

De Gex, Q. C. and *Hemming*, on behalf of the appellant, contended that the law was well settled by a series of authorities that a debt due before the act of bankruptcy, even though not then due to the petitioning creditor, was a good petitioning creditor's debt. If it were otherwise, then, if a legal debt on a negotiable instrument was transferred after the commission of an act of bankruptcy, no one could present a petition for an adjudication in respect of it. That would be an absurd result. The cases relied on by the commissioner were to be distinguished. They referred to

Eden on Bankruptcy, 3rd edit., 47;
Deacon on Bankruptcy, last edit., 127;
Shelford on Bankruptcy, 182;
Ex parte Thomas, 1 Atk. 73;
Anon., 2 Wils. 135;
Glaister v. *Hewer*, 7 T. R. 493;
Bingley v. *Madison*, Coke's Bank. Law, 32;
Ex parte Botten, M. & Bl. 412;
Ex parte Magnus, 2 M. D. & De G. 604, 723;
Re Petrie, L. Rep. 3 Ch. Ap. 232; 18 L. T. Rep. N. S. 169;
Stat. 5 Geo. 2, c. 30, ss. 22, 23;
Stat. 7 Geo. 1, c. 31;
The Bankrupt Law Consolidation Act 1849, sect. 89.

W. Potter, on behalf of Broadbridge, supported the commissioner's order.

Without calling for a reply,

Lord Justice GIFFARD said that the commissioner had mistaken the law. If the law were as the commissioner had supposed it to be the result would be very inconvenient, not to say absurd. The old authorities on the question were all one way, and the later cases did not conflict with them. The argument of Mr. Hemming was really a *reductio ad absurdum*. The law had been entirely mistaken, and his Lordship would be very sorry that any doubt should be raised about it. The commissioner's order must be discharged.

Solicitors for the appellant, *Underhill* and *Field* agents for *Etty*, of Liverpool.

Solicitor for the respondent, *Samuel Forest*, of Liverpool.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs: Barristers-at-Law.

Saturday, Jan. 15.

ALLEN (app.) *v.* WORTHY (resp.)

Vaccination—Proceedings for non-vaccination after a conviction for a similar offence—30 & 31 Vict. c. 84, ss. 15, 16, 29, 31 and 34.

The jurisdiction of justices under sect. 31 of the 30 & 31 Vict. c. 84 (Vaccination Act 1867) to make an order for the vaccination of a child under fourteen years of age, is not limited to the making of one order only.

Where, therefore, an order had been duly made under that section upon the appellant, which he had disobeyed, and he was thereupon fined, and similar proceedings were again taken against him under the same section for not having his child vaccinated:

Held, that such proceedings were lawful:

Held, also, that upon proceedings before justices under the 31st section, the certificate of a medical practitioner in form of schedule B. is no bar.

This was a case stated by justices under the 20 & 21 Vict. c. 43, upon a conviction under sect. 31 of the 30 & 31 Vict. c. 84 (the Vaccination Act 1867), as follows:—

Be it remembered that on the 8th May 1869, at St. Neot's, in the said county of Huntingdon, Alfred Worthy, of Eynesbury, in the said county of Huntingdon, registrar of births and deaths, personally cometh before the undersigned, one of Her Majesty's justices of the peace, in and for the said county, and informeth me that Henry James Allen, late of the parish of Eynesbury aforesaid, Dissenting minister, within the space of six calendar months last past, to wit, on the 8th May 1869, at the parish of Eynesbury in the said county of Huntington, did disobey a certain order under the hand and seal of Capt. William Humbley, one of Her Majesty's justices of the peace for the said county of Huntingdon, bearing date the 29th April 1869, whereby the said Henry James Allen was ordered and directed to have Eliza Allen, under the age of fourteen years, and the legitimate child of the said Henry James Allen, vaccinated within seven days of date of said order, contrary to the form of the statute in such case made and provided, wherefore the said Alfred Worthy prayeth the consideration of me, the said justice in the premises, and that the said Henry James Allen may be summoned to appear before me and answer the premises and make his defence thereto.—ALFRED WORTHY.

Exhibited before me the day and year at the place first above written.—W. HUMBLEY.

The said justice issued his summons to the said Henry James Allen, to appear at the petty sessions held at St. Neot's, on the 18th May 1869.

At the hearing before us two of Her Majesty's justices of the peace for the county of Huntingdon, it was proved that the following order had been made and served on the appellant:

Huntingdonshire to wit—To H. J. Allen, of Eynesbury, in the county of Huntingdon, Dissenting Minister.

Whereas, by an information in writing taken before the undersigned Capt. William Humbley, one of Her Majesty's justices of the peace, in and for the said county, on the 22nd April now instant. Alfred Worthy, of Eynesbury, in the county of Huntingdon, registrar of births and deaths for the district of the St. Neots Union, comprising the said parish of Eynesbury, informed me, the said justice, that Eliza Allen, under the age of fourteen years, the legitimate child of you, the said H. J. Allen, had not been successfully vaccinated, notwithstanding that he the said Alfred Worthy, had given notice to you, the said H. J. Allen, to procure such child to be vaccinated, contrary to the form of the statute for such case made and provided, whereupon I the said justice, issued my summons to you the said H. J. Allen, directing you to appear with the said child before me the said justice or some other justice of the peace for the said county, on the 29th April instant, to show cause why such child had not been vaccinated, and whereas you the said H. J. Allen have this day appeared before me the said justice, and it being now made to appear to me on oath that the said Eliza Allen is under the age of fourteen years, and has not been vaccinated, and has not had the small pox, and you the said H. J. Allen having failed to show any reason why the said Eliza Allen should not be vaccinated now, I, the undersigned, do hereby order and direct you the said H. J. Allen, to have the said Eliza Allen vaccinated within seven days from the date of the order. Given under my hand and seal 29th April 1869, at St. Neots, in the county aforesaid. W. HUMBLEY.

It was proved that the said appellant had neglected to obey the said order, and it was admitted that the said child had not at the time of such hearing been vaccinated. The appellant then stated,

and the fact was admitted by the respondent, that he, the appellant, had previously, on the 30th March 1869, been convicted of disobeying an order dated the 11th March 1869 under the hand and seal of a justice for the said county, whereby the said appellant had been ordered to cause Eliza Allen to be vaccinated within seven days from the date of such last-mentioned order.

It was therefore contended on behalf of the said appellant that the information now laid against him was for the same offence, and that therefore the appellant could not be again convicted, and stress was laid on the concluding words of the Lord Chief of England in the judgment pronounced in *Pilcher* v. *Stafford*, 33 L. J., N. S., 113, M.C.

We however considered that the jurisdiction of justices under sect. 31 of the Vaccination Act of 1867 was not limited to making but one order directing a child under fourteen years of age to be vaccinated, and that the neglect to obey each order formed a separate offence, punishable on conviction, and that the conviction for disobeying a previous order was no previous conviction of the offence charged in the information before us, and that, consequently, the case was in no way governed by the decision in *Pilcher* v. *Stafford*, and that sect. 31 of the Vaccination Act of 1867 appeared to us to have been inserted in such Act with the object of avoiding the mischief found to exist when *Pilcher* v. *Stafford* was decided.

The appellant then contended that the said Eliza Allen was then and since the 20th April then last past had been in an unfit state for vaccination, and, in support of this contention, produced a certificate, of which the following is a copy:

The Vaccination Act of 1867 (30 & 31 Vict. c. 84). Medical certificate of unfitness for successful vaccination to be delivered (pursuant to sect. 18) to the father or mother of an unvaccinated child, or to the person having the custody of such child.

I, the undersigned, hereby certify that I am of opinion that Eliza, the child of H. J. Allen, of Eynesbury, in the parish of Eynesbury, in the county of Hunts, aged twelve, is not now in a fit and proper state to be successfully vaccinated. I do hereby postpone the vaccination until the 20th June 1869.

W. J. COLLINS, M.D., L.R.C.P.E., M.R.C.S.E., &c.
1, Albert-terrace, Regent's Park.

And it was contended on behalf of the appellant that the justices were bound by the terms of the Vaccination Act of 1867 to accept such certificate as proof that the child was then unfit to be vaccinated, and that the production of such certificate was reasonable ground for the omission of the appellant to carry the order of the 29th April 1869 into effect.

We drew attention to the fact that such certificate was dated on a day prior to the date of the order of the 29th April 1869; and it was admitted that the same certificate had been produced when such last-mentioned order was made, but the justice making such order had refused to attach any weight to such certificate on the ground that the practitioner by whom such certificate purported to have been signed was opposed to the operation of vaccination generally, as had been stated by the appellant on a previous occasion, and such practitioner has signed a certificate under the Vaccination Act of 1867, and which had been on such previous occasions produced in court, stating that the said Eliza Allen ought never to be vaccinated, that the reproduction of such certificate of the 20th April 1869, which had been refused by the justice making the order of the 29th April 1869, formed under such circumstances no reasonable ground for the omission of the appellant to carry into effect such order, and we therefore convicted the appellant and adjudged him to pay a penalty or sum of 7*s*., or the sum of 13*s*. for costs, such sums to be respectively levied by distress, and in default of sufficient distress we adjudged the said appellant to be committed to the common gaol at Great Stuckley, in the county of Huntingdon, for a period of fourteen days.

The appellant subsequently being dissatisfied with our decision, made application in writing to us to state and sign a case pursuant to sect. 2 of the stat. 20 & 21 Vict. c. 43, setting forth the facts and grounds of our determination in order that he might take the opinion of Her Majesty's Court of Queen's Bench, at Westminster, on the following questions of law:—1. Whether the conviction of the appellant, on the 30th day of March 1869, was a sufficient defence to the information of the 8th day of May 1869. 2. Whether the production of the medical certificate set out in the case was a sufficient answer to the said information of the 8th May, 1869. HY. WELSTEAD, BENJ. HALL PUCKLE.

By the 30 & 31 Vict. c. 84 (The Vaccination Act 1867), it is by sect. 16 enacted that—

The parent of every child born in England shall, within three months after the birth of such child, or where, by reason of the death, illness, absence, or inability of the parent, or other cause, any other person shall have the custody of such child, such person shall, within three months after receiving the custody of such child, take it, or cause it to be taken, to the public vaccinator of the vaccination district in which it shall then be resident, according to the provisions of this or any other Act, to be vaccinated, or shall, within such period as aforesaid, cause it to be vaccinated by some medical practitioner; and the public vaccinator to whom such child shall be so brought, is hereby required, with all reasonable dispatch, subject to the conditions hereinafter mentioned, to vaccinate such child.

Sect. 18 enacts—

If any public vaccinator or medical practitioner shall be of opinion that the child is not in a fit and proper state to be successfully vaccinated, he shall forthwith deliver to the parent or other person having the custody of such child a certificate under his hand according to the form in the schedule hereto annexed marked B, or to the like effect, that the child is then in a state unfit for successful vaccination, which certificate shall remain in force for two months, and shall be renewable for successive periods of two months until a public vaccinator or medical practitioner shall deem the child in a fit state for successful vaccination, and the child shall, with all reasonable despatch, be vaccinated, and the certificate of successful vaccination duly given, if warranted by the result.

Sect. 29 enacts that—

Every parent or person having the custody of a child who shall neglect to take such child, or to cause it to be taken to be vaccinated, or after vaccination to be inspected according to the provisions of this Act, and shall not render a reasonable excuse for his neglect, shall be guilty of an offence, and be liable to be proceeded against summarily, and upon conviction to pay a penalty not exceeding twenty shillings.

Sect. 31 enacts that—

If any registrar or any officer appointed by the guardians to enforce the provisions of this Act shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justices may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find after such examination as he shall deem necessary, that the child has not been vaccinated nor has already had the small-pox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time; and if at the expiration the child shall not have been so vaccinated, or shall not be shown to be then unfit to be vaccinated, or to be insusceptible of vaccinating, the person upon whom such order shall have been made shall be proceeded against summarily, and unless he can show some reasonable ground for his omission to carry the order into effect shall be liable to a penalty not exceeding twenty shillings.

Sect. 34 enacts that—

In any prosecution for neglect to procure the vaccination of a child, it shall not be necessary in support thereof to prove that the defendant received notice from the registrar or any other officer of the requirements of the law in that respect; but if the defendant produces any such certificate as hereinbefore described on the register of vaccinations kept by the registrar as hereinbefore provided, in which the certificate of successful vaccination of such child shall be

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duly entered, the same shall be sufficient defence for him, except in regard to the certificate marked B, where the time specified therein for the postponement of the vaccination shall have expired before the time when the information shall have been laid.

W. Graham appeared for the appellant.—The question is, can a person who has once been convicted for not having vaccinated his child be again convicted for a similar offence? This point would seem to have been decided in the negative by the case of *Pilcher* v. *Stafford*, 33 L. J. 113, M.C., which although a decision upon the old Act of the 16 & 17 Vict. c. 100 is applicable to the present case, and where it was held that a parent having been fined for neglecting to have a child vaccinated, no further proceedings could be taken, although the child remained unvaccinated. In giving judgment in that case Cockburn, C. J. says, "I quite agree that the continuous omission to have a child vaccinated is as much within the mischief intended to be remedied by the statute as the not doing it within the prescribed time; but this mischief has not been reached by the present legislation. The 2nd section of the 16 & 17 Vict. c. 100 imposes the duty of having a child vaccinated within three or four months of its birth as the case may be, and the 9th section requires that the registrar shall give notice of this duty, and if the notice be given and the duty not performed within the prescribed time, then this non-performance is the offence arising and punishable under the Act, and when once that offence is complete and has been dealt with, and the person offending has been punished, no further offence can be committed. It is not enough to say the mischief continues; the answer to that is, the Act does not enact a remedy. If we were to hold otherwise on the present enactment, it would follow that for every day during which the omission to vaccinate a child continues, a penalty would be incurred, so that the penalties might accumulate to a very serious amount, which could never have been the intention of the Legislature." That decision, it is submitted, applies equally to the present case, for if he may be fined twice he may be fined fifty times for the same omission. [COCKBURN, C. J.—Do not the provisions in sect. 31 of the recent statute extend the powers of the former statute, so that the registrar can give notice after notice?] That is really the question, but I submit that he cannot do so. Having committed a breach of the Act, and being fined for it, there is an end. There is nothing in the Act which says that the registrar may give the notice over and over again. If so, justices might go on making orders from day to day. If the Legislature had intended anything of the sort, it would have expressed itself in plain terms. Then, secondly, the certificate was a bar. The 34th section says, "If the defendant produce any such certificate as hereinbefore described," that is, a certificate of a medical practitioner that he is of opinion that the child is not in a fit and proper state to be successfully vaccinated. This he did, and the justices therefore had no jurisdiction to convict. The certificate is in itself a defence, and it matters not whether or not it is a sound opinion that it contains. If it be false, there is a remedy against the person who signs it, given by the 30th section. The justices cannot inquire into the reasons of the medical man who gives it.

The Solicitor-General (*Archibald* with him).—Looking at the facts of the case, and the old and new statute, it is clear that the latter was passed with reference to the decision in *Pilcher* v. *Stafford*. Under the old Act the vaccination was to be within a fixed time, and on disobedience a fine was imposed, and where, therefore, the time had elapsed, no fresh proceedings could have been instituted. This, however, is altered by the late Act, and the words in section 31, "has not been successfully vaccinated," imply that proceedings upon proceedings may be taken until the child is successfully vaccinated. If the parent persists in not having the child vaccinated, he commits a fresh offence. If the child is under fourteen years of age, and is not vaccinated, or not successfully vaccinated, it is within the mischief of the Act. The notice may be given many times so long as the child is under fourteen years of age. [MELLOR, J.—The object of the statute is certainly to have a successful vaccination.] Then, as to the second objection. Is the certificate a conclusive answer? It is not, for though it might be one under sects. 16 and 29 it is not under the 31st. Upon an information under sect. 31 the justices had a right to consider the *bona fides* of the certificate. If made *mala fides* they would properly disregard it, especially if it is given not because the child is labouring under a temporary disability, but because the medical man thinks that vaccination ought not to be practised at all. [COCKBURN, C. J.—You admit that under the 16th and 29th sections it would be a bar; but you say that when the proceedings are under the 31st section it is not such, and that the justices may consider it with the other evidence.] That is so.

Graham was heard in reply.

COCKBURN, C.J.—I am of opinion that the decision of the justices was correct, and that there should be judgment for the respondents. It is quite clear, when we look at the 31st section, that it was the intention of the Legislature to add additional powers for ensuring vaccination. The Act, however, does not repeal or supersede the machinery which had been provided by the previous Act. The 15th, 16th, and 29th sections recite what proceedings are to be taken. The 15th section directs the registrar to give notice to the parent to have the child vaccinated. The 16th makes it incumbent on the parent to take the child to be vaccinated; and the 29th section makes it an offence if the parent neglects. There is, however, a proviso that if the public vaccinator or any other medical practitioner shall be of opinion that the child is not in a fit state to be vaccinated, and shall give a certificate to that effect, the vaccination may be postponed for two months with a power of renewal for successive periods of two months. If, however, the child is not vaccinated, and there is no certificate, the offence is complete under the 29th section. In *Pilcher* v. *Stafford* this court held that where once the parent had been convicted and punished there was no provision in the Act whereby he might be again proceeded against. The question now, however, is, whether the machinery is under the recent Act applicable to a second offence? I think that we are bound to hold that the machinery of the 31st section applies to the present state of things. The section enacts that when there is a child under fourteen years of age that is not vaccinated, the registrar may give notice to the parent to procure its being vaccinated, and if such notice be not obeyed he may be summoned before a justice, and if the justice shall find that the child has not been vaccinated, nor has already had the smallpox, he may make an order directing the child to be vaccinated within a certain time, and if that order shall not be complied with an offence is committed in so disobeying it. Here the appellant received notice to have the child vaccinated, the justices made an order that it should be vaccinated, which was not complied with, and the appellant was convicted. Nevertheless, he still refuses to have the child vaccinated. Then a second proceeding is commenced against him under the 31st section; fresh notice is given, he is again summoned before the justices, and

a fresh order is made. This order also is disobeyed, and now he is convicted in respect of that disobedience. It is said that the power of the registrar to give a notice is gone when once such a notice has been given; in short, that the proceedings under the 31st section cannot be renewed *toties quoties* as often as necessary. At first I was in some doubt, and I still think that the Legislature have not used the best words to express their meaning, but upon consideration I think it is competent to the registrar to give notice, and to the justices to convict *toties quoties* as often as it becomes necessary, and if indeed we look at the object of the Legislature, which is that of effecting a great public benefit, we ought to give it all the effect in our power. The Legislature has certainly thus far thought that vaccination is of great public advantage, and I cannot but think that its objects were not merely to punish for a single offence, but to enforce obedience in a matter which is considered to be of such vast importance. But then it is said that there is an answer to the proceedings, because the medical man had given a certificate that the child was in a state unfit for successful vaccination; and the question which arises is this, is the certificate a bar? I think that it is not, and that such a certificate has no application to a proceeding under the 31st section. It must be observed that the certificate has reference to the 29th section, and that it does not apply to proceedings under the 31st. The earlier sections amongst which this certificate is found, have reference to what the parents are to do. If they fail to do what is required under the 15th and 16th sections, they are guilty of an offence against the 29th section: and it may very well be, as far as that offence is concerned, that if they have a medical certificate that the child is not in a fit state to be vaccinated, that that would be an answer; but when you come to the 31st section, where the matter comes before the magistrates under it, although a medical certificate may fairly be considered in evidence, it cannot be considered as depriving them of all discretion, and when we look to the language of that section, it certainly cannot be said that a medical certificate was intended to deprive them of jurisdiction. There is nothing which implies it, and there is not a word which puts any restraint upon them. If the magistrate sees fit, he is to make an order under his hand and seal, directing the child to be vaccinated within a certain time; and if, at the expiration of such time the child shall not have been so vaccinated, or shall not be then unfit to be vaccinated, or insusceptible of vaccination, the party may be proceeded against summarily, unless he can show some reasonable ground for his omission. Here, then, there is a total silence as to the effect of the production of any such medical certificate. If such a certificate be produced, the magistrate alone must be the judge of its effect. We must look also to the 34th section, which enacts. [Reads the section.] Now, does this section influence by implication the 31st section? I think that it does not. I do not understand the word "prosecution" to mean proceedings before justices under the 31st section, but to apply to proceedings under the 16th and 29th sections. With reference to the certificate, the question is not what were the motives of the medical man, but whether or not his certificate was a bar. The justices thought it was not such a bar as they ought to give effect to, and I think they were right, and that we cannot interfere with their decision.

MELLOR, J.—I am of the same opinion. I was a party to the decision in the case of *Pilcher* v. *Stafford*, which I still consider was rightly decided upon the then state of the law; but the law since then has been altered, for the purpose, I conceive, of meeting the difficulty which that case exhibited. As regards the 34th section, I think it applies only to cases within the 15th, 16th, and 29th sections. Under the 31st section the medical certificate has no application as a bar to the proceedings. It may operate upon the discretion of the justices, but not otherwise. In construing this enactment we must not lose sight of the obvious policy of the Legislature. I think the magistrates were quite right.

HANNEN, J., concurred.

Judgment for the respondent.

Attorney for the respondent, *Solicitor to the Treasury.*

Attorneys for the appellant, *Conquest* and *Stimson*, Bedford.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Thursday, Jan. 13.

SMITH v. LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

Negligence, evidence of—Railway—Sparks from engine—Accumulation of cut grass on embankment.

The defendants, in the course of a very dry summer, allowed hedge trimmings and cut grass to accumulate in heaps on the embankment, along which their railway ran; when the heaps had been there for a fortnight, and were in a very combustible state, they caught fire, and the wind being high, and the country in a very parched state, the fire spread through a hedge, over a stubble-field, and across a lane to the plaintiff's house, which it destroyed.

It was proved that just before the fire broke out, two locomotives of the defendants had passed along the defendants' line close to the spot where the fire broke out; but no evidence was given to show that the defendants had not taken all possible precautions to prevent the emission of sparks from their engines:

Held, by Bovill, C. J., and Keating, J. (dissentiente Brett, J.), in an action against the defendants for negligence, that there was evidence from which the jury might infer that the heaps in question were set on fire by a spark from one of the defendants' engines, and that there was evidence of negligence in having left those heaps so long on the embankment during so dry a season.

The first count was for the negligent use of a locomotive. The second count stated that at the time, &c., the plaintiff was possessed of a cottage and premises, and the defendants were possessed of and had the care and management of a railway running near the said cottage and premises, with banks belonging thereto, and part of the said railway, and were possessed of locomotive engines containing burning substances, which were used by the defendants for conveying passengers along the said railway; yet by the negligence and improper conduct of the defendants, and the want of due care on the part of the defendants in the keeping and management of the said railway and banks, quantities of cut grass and hedge trimmings were heaped up on the said railway and banks and became ignited, and a fire was occasioned which spread over and along a stubble field near the said railway to the cottage and premises of the plaintiff, and set fire to the same, &c.

The third count stated that the defendants by their servants so negligently burnt hedge trimmings and grass cuttings on the banks of their railway, that the fire extended, &c.

The defendants pleaded not guilty.

Issue thereon.

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At the trial before Keating, J. at the summer assizes at Dorset in 1869, it appeared that the summer of 1868 when the plaintiff's house was burnt, was an unusually dry one. A short time prior to the accident the company's servants had been trimming the hedges along the defendants' line, and also cutting the grass and other stuff growing there. These trimmings and other stuff were collected in heaps along the embankment of the railway, and had been lying there for a fortnight on the day when the accident happened. Evidence was given that on the morning of the day in question (but about four hours before the accident) the company's servants were setting fire to some of these heaps, but this was more than half a mile from the place where the fire that consumed the plaintiff's house, began. It was, however, on this suggested that these men had gone along the line, burning the heaps as they went. The main theory, however, in support of the plaintiff's case was, that one of these heaps was set on fire by a spark from one of the engines passing along the line, and this theory was strengthened by the fact that two trains had passed a few minutes before the fire was first observed. At the time a very high wind was blowing, and the whole country was in a very parched state, so that the fire, which no doubt originated in some way or other in one of these heaps, quickly spread up the embankment of the line, through a hedge, over a large stubble field, and across a lane to the plaintiff's house, which was quite 200 yards from the place where the fire originated. When the fire was first observed, some of the company's servants, who happened to be on the spot, tried to put it out, but it burned so fiercely that they were unable to do so.

On this state of facts it was contended on behalf of the defendants that there was no evidence of negligence on their part.

The jury found a verdict for the plaintiff for 30*l.*, leave being reserved to the defendants to move to enter a nonsuit or a verdict for the defendants on the ground that there was no evidence of negligence to go to the jury. In Michaelmas Term *Kingdon*, Q. C. obtained a rule *nisi* accordingly.

Cole, Q. C. and *Bere*, Q. C. showed cause. Under the circumstances there can be no doubt that the fire which consumed the plaintiff's house originated in the heaps of hedge trimmings and what was called "rummidge," which the defendants had allowed to accumulate on the banks of their railway. There was evidence that these heaps were set on fire, either by the company's servants with a view to their destruction, or else accidentally by a spark from the defendants' engines. The latter is by far the most probable view of the case. In the former case there was clear evidence of negligence. If we take the latter view of the case, then we do not find fault with either the construction or the management of the engines, but we say that any engine, however managed, is liable to emit sparks, and, that being so, the company ought not to have allowed the accumulation of combustible material at a season of the year when the country was unusually dry. A prudent man might certainly have foreseen that such an accumulation was very dangerous, and that if a fire once broke out, it might, in the dry state of the country, spread a considerable distance. This action is grounded on the second count of the declaration in *Vaughan* v. *The Taff Vale Railway Company*, 2 L. T Rep. N. S. 394; and 3 H. & N. 743; and in Ex. Ch. in 29 L. J. 247, Ex.; and 5 H. & N. 679. They cited also

Freemantle v. *London and North-Western Railway Company*, 31 L. J. 12, C. P.; 5 L. T. Rep. N. S. 556;

Addison on Wrongs, 209, 2nd edit.

Kingdon, Q. C., *Lopes*, Q. C., and *Murch*, in support of the rule.—Supposing it to be conceded that reasonable men might have thought it likely that the heaps of trimmings, &c. would catch fire, no one could even possibly have anticipated that the fire would spread 200 yards to the plaintiff's house. The reason of its spreading so far was the very unusual dryness of the weather and the high wind that prevailed at the time. The practice of cutting hedges and other stuff and letting it lie in heaps for a short time before removing is a very usual one. They cited

Blythe v. *The Birmingham Waterworks Company*, 11 Ex. 781.

BRETT, J.—I am of opinion that there was no evidence of negligence on the part of the defendants to go to the jury in this case. I quite feel the difficulty in which the judges are placed in such a case as this, when they have to decide upon a matter of fact rather than of law. The rule in these questions of negligence is clearly laid down by Alderson, B., in *Blyth* v. *Birmingham Waterworks Company*, 11 Ex. 784: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a prudent and reasonable man would not do." The question then here is, whether the defendants, giving that reasonable consideration of all the circumstances which would require the consideration of reasonable men in their position, have done or omitted to do anything which prudent and careful men would not have done or omitted. The case is put thus: Mr. Cole admits that there is no ground for saying that the engines used by the company were not of the best construction, and that there was no evidence of negligence as to the engines. But he says that the defendants were bound to take notice of the fact, that all engines must necessarily emit sparks, and that the season was unusually dry, and had been so for some time, and therefore they ought not to have left a quantity of combustible material on their banks, for they ought as reasonable men to have expected that sparks from the engines would set light to such material, and if so, that the fire so caused might extend to the plaintiff's property. I agree that the defendants might reasonably have expected sparks to be emitted from the engines, and that these sparks might set fire to the hedge trimmings collected on the embankment; but I think that no reasonable man could be expected to foresee further consequences, nor can it be pretended that they could have foreseen the high wind which was one of the principal causes of the fire spreading in the way it did. The defendants were thus, in my opinion, not guilty of any omission of duty to the plaintiff either as to the emission of sparks or the collection of trimmings. There was no duty imposed upon them to take precautions, unless the plaintiff's property was so situated that it might have been supposed to be put in danger. If the plaintiff's property had been of a combustible nature, and situated near to the railway, the case might have been different, and the remarks of Cockburn, C. J. in *Vaughan* v. *Taff Vale Railway Company* (*ubi sup.*) might have applied, and it might have been considered that the plaintiff's property was put in danger by the defendants' omission to do something which they ought to have done. But here, bringing to bear my knowledge of ordinary English country life, I cannot suppose that any man would ever have contemplated that a fire would spread over a stubble field and across a road up to the plaintiff's house. I have heard of such things in the American prairies, but not in England. I cannot think that any man is bound to anticipate such a concurrence of circumstances as produced the

disaster in this case. On these grounds, I think that this rule ought to be made absolute.

KEATING, J.—I quite feel the difficulty of the position in which the judges are placed, when asked to determine a question of this kind. I come, however, to a conclusion different from that of my brother Brett, and think that in this case there was evidence which could not properly have been withheld from the jury. Notwithstanding any differences of opinion that may have existed on minor points, the broad facts of the case are clear enough. At a quarter to one o'clock on the day in question the plaintiff's house was safe, and between that time and one o'clock a fire unquestionably broke out on the defendants' line. The fire broke out in the heaps of hedge trimmings and other "rummidge" which were lying on the banks of the defendants' line. There is no evidence that these heaps had been there for more than would have been, under ordinary circumstances, an usual time. Owing, however, to the time they had been there, and the dryness of the season, they had become very dry, and on becoming ignited the fire immediately spread with very great violence, so that the defendants' servants, who were on the spot, were quite unable to extinguish it or arrest its progress. This circumstance shows that the heaps in question were of a very combustible nature; if they had not been so, the fire might easily have been extinguished. The fire then extended over the stubble field. The wind at the time was undoubtedly high, and gave an unusual force to the fire. It may have been that, under ordinary circumstances, the fire might have been extinguished; but what weighs on my mind is the accumulation of such material at such a season. It is clear that this material must have been very dry. Moreover, there had been fires all over the country, though I do not recollect that it appeared that there had been fires on the line itself. Under these circumstances there was a collection of combustible material at a spot where trains were continually passing. I quite feel the force of my brother Brett's difficulty, that under ordinary circumstances it was most improbable that the fire should ever have extended so far; still I think that that was a circumstance for the consideration of the jury. My firm impression is that this case could not and ought not to have been withheld from the jury, and I therefore think that this rule must be discharged.

BOVILL, C. J.—The question for us to decide is whether there was any evidence to go to the jury. Now there was abundant evidence to show that the fire was caused by the sparks emitted by one of two locomotive engines belonging to the company. This alone is, however, not sufficient to give a cause of action. The company has the authority of the Legislature to use these engines. Moreover, there was no evidence to show that the engines in question were of an improper or unusual description, or that they were being used in a careless or improper manner. Yet it must be remembered that the company were using a dangerous instrument—dangerous as of necessity emitting a certain quantity of fire. Such being the state of the case, let us look at the circumstances. Locomotive engines emit a greater or less quantity of sparks, according to the manner in which they are used, and the persons in charge of them can regulate their speed and accommodate them to circumstances. The present case is different, then, from *Blythe* v. *Birmingham Waterworks Company*, 11 Ex. 781, because there, so soon as the company had laid the pipes, it had no further control over them. But if particular circumstances require it, the company's servants can regulate the speed of a locomotive engine so as to prevent it from being dangerous. It is a question of the speed and power at which the engine was being driven. At the time of this occurrence the weather was very dry, there was an accumulation of hedge trimmings, and what was called at the trial "rummidge." The company had allowed this accumulation to take place. Under most circumstances it might not have been expected that the hedge would take fire, but in a very dry season it might, and if it once caught fire who can say where it would stop? It is contended that no person in the plaintiff's house would ever have expected the fire to spread so far, but I think it very doubtful whether anyone in the house would have gone quietly to bed when he saw the hedge on fire. The company, therefore, is in this position: They allowed an accumulation of combustible material on their property, and used an engine which emitted sparks, so that they caused the fire, which extended over the hedge and stubble field to the plaintiff's house. The plaintiff thus sustained great loss through the act of the company. It does not follow certainly that they can recover compensation from the company; they must show negligence. The company was bound to have regard to circumstances in using a dangerous instrument. It is said that they could not have contemplated the fire spreading so far as the plaintiff's house; but in this case all things tended to reduce the distance, and the extent to which a fire will spread depends on the nature of the material over which it has to pass. I do not think that it is for me to judge whether the spreading of the fire in this case was a probable consequence of the defendants' acts; that was a question for the jury. All that this court has to say is whether there was any material on which the jury could find a verdict against the defendants. I think there was, and consequently the rule must be discharged.

Rule discharged. The verdict to be entered for the defendants on the first and third counts, and for the plaintiff on the second.

Attorneys for the plaintiff, *Sole, Turner*, and *Turner*, for *Lacy*, Wareham.

Attorney for defendants, *Crombie*.

Friday, Jan. 14.

PECK v. PECK.

Practice at nisi prius—Cross-examination—Reception of evidence.

If a document be given to a witness during cross-examination for the purpose of identifying the handwriting, the counsel for the party whose witness is in the box has a right to inspect the document sufficiently to enable him to re-examine about the writing, and also to identify the document in case it should afterwards be put in evidence. He has, however, no right to read the document through, nor to comment upon its contents, until it be put in by the other side, although he may remark upon its absence if it be not put in.

In an action by executors against a son of their testator to recover money received by him from his father, the Dr. side of the testator's account book, containing entries of the receipt of interest from the son, was held to be admissible in support of the plaintiffs' contention that the money had been lent and not given, although the right of the plaintiffs without consent to put in the other side, which contained no entries opposed to the advantage of the writer, was doubtful.

This was an action by executors against a son of their testator to recover the sum of 1000*l.*

The testator had lent the defendant 3000*l.*, for which the defendant gave a promissory note. 2000*l.* of this sum had been paid back by the defendant before his father's death, and the contention

between the parties was as to the residue of the amount originally advanced. The defendant maintained that his father had made him a present of the remaining 1000*l.*, but the jury found a verdict for the plaintiff. The trial took place in Middlesex before Brett, J.

Cole, Q. C., moved on behalf of the defendant for a new trial on the grounds of misdirection and improper reception of evidence. In the course of the cross-examination of one of the plaintiffs' witnesses, who was a near relation of the testator, he put into his hand a document, and asked in whose handwriting it was; the witness said it was the testator's, upon which Mr. Francis, who was counsel for the plaintiff, claimed to look at the document; the judge decided in his favour, and defendant's counsel, under protest, handed it to plaintiffs' counsel; afterwards defendant's counsel concluded his case without putting this document in evidence; upon which the other side asked to have it put in, or to put it in themselves. The defendant's counsel refused his consent, and the judge remarked, "Are you not satisfied, Mr. Francis, with Mr. Cole's refusal to put in the document?" In addressing the jury in reply, the plaintiff's counsel commented upon the absence of this document from the defendant's case, and asked the jury to infer that it contained strong evidence in support of the plaintiff. This was the first objection; and it was contended that the plaintiff's counsel had no right to read, or even to see, any document belonging to the defendant until it was put in by the other side; that the request to have the document put in was irregular and improper; and that the remark of the learned judge amounted to misdirection. The second objection related to an account book in the handwriting of the testator, which the plaintiffs proposed to put in evidence. This was opposed; but the learned judge, having consulted Byles, J., ruled that the debtor side containing entries of the payment of interest by defendant to his father was at all events admissible, and, as the judge entered in his notes, if pressed by the plaintiffs' counsel, he should also have admitted the creditor side. The debtor side alone was read. It was now contended that this was an improper reception of evidence.

BOVILL, C. J.—I am of opinion that there should be no rule. The first objection was that the opposing counsel had no right to see a document which was put into a witness' hand at the trial for the purpose of proving the handwriting of the signature upon it. I am clearly of opinion that when Mr. Cole, in cross-examination on behalf of the defendant, gave this document to the plaintiff's witness, the plaintiff's counsel had a right to have the document handed to him, and had a right to see it in order to re-examine on the hand-writing of the signature. If this right exists for the object of cross-examination, or, as in this case, re-examination concerning hand-writing, how can a counsel exercise his right without looking at and even reading the document? Certainly he should see as much of the document as the witness does himself. A further objection consisted of a complaint which I do not clearly understand. Mr. Francis, who was counsel for the plaintiff, seems to have proposed that Mr. Cole should put this document in evidence for the defendant, or should allow him to put it in for the plaintiff; no doubt he had no right to put in a document in possession of the opposite side, nor had he any right to demand that the other side should adduce any particular evidence. There seems to have been some irregularity in the proceedings, but I do not see why a verdict should be set aside merely because a counsel made a request about the evidence which he had no right to make. The result was that the document was not put in; Mr. Francis wanted it, but could not do it; Mr. Cole might have put it in, but did not choose to do so. Under these circumstances it would be impossible for a judge to exclude the remarks of either learned counsel as to the conduct of the other side. Mr. Cole says that the remarks in this case created a prejudice in the minds of the jury, to the effect that the contents of the document told against his client: I am inclined to think that such an effect would, under the circumstances, be the result of a fair presumption, and not of prejudice. I am at a loss, therefore, to see any misdirection, or any other ground for a new trial, merely because my brother Brett said, in answer to Mr. Francis's request to have this document in evidence, "Are you not satisfied with Mr. Cole's refusal?" The natural inference from these proceedings, which were necessarily in the hearing of the jury, was that there was something of importance in the document, and it did not require the judge's suggestion to believe that its contents would not assist the contention of the counsel who refused to make it evidence. The last objection taken by Mr. Cole was, that a portion of a certain account book in the handwriting of the testator was admitted as evidence; the ground upon which my brother Brett allowed this page of the book to be put in, was that it contained entries by the deceased against his own interest. The other pages contained entries which were not so clearly against his interest at the time they were made, and my brother Brett thought that Mr. Francis's right to make them evidence was doubtful, although he said he should not consider himself justified in refusing if Mr. Francis continued to press his request to put in the whole of the book; and there can be no doubt that if Mr. Cole had then suggested that a part of the book ought not to be referred to unless the whole of it were made evidence, my brother Brett would have consented, and Mr. Francis would gladly have put in the whole of it. The objection now made that part of an admission ought not to be received was not suggested at the trial. If there had been the least intimation of it by Mr. Cole, the whole book would have been immediately admitted.

M. SMITH, J.—I am of the same opinion. It is a matter of everyday practice for counsel to hand to a witness a document for the purpose of the proof of its handwriting, which he may or may not subsequently put in evidence in his client's behalf. The object of the proceeding being proof of the writing, the opposing counsel ought to have an immediate opportunity of looking at the document, and, as I think, not only for the purpose of re-examining his witness as to the writing, but also to enable him to identify the document if it should afterwards be put in evidence by the other side. Strictly speaking, I think such a document, when both sides are satisfied as to the proof of the handwriting, ought to be put into the hands of the officer of the court until the counsel for the party in whose possession the document is, has made up his mind whether he will make it evidence or not. There might, however, be inconvenience in such a practice, and it is not commonly enforced; but the document should be so seen and even examined by the counsel that he might recognise it again. I should, however, be sorry to lay down as a rule that the opposing counsel under such circumstances has a right to read the document, or make any comment upon its contents, but it is difficult to draw a line between a proper inspection of the signature and an unnecessary examination of the document. Here my brother Brett ruled that as Mr. Cole had put a question to a witness about a certain document, Mr. Francis had a right to see that document. This being done in the face of the jury,

they could not resist the natural inference that it contained something of importance, nor could the judge prevent counsel from commenting upon the circumstance. I think my brother Brett's question to Mr. Francis was merely a remark, which was not likely to affect the verdict. On the second ground of objection, the admission in evidence of entries in the testator's handwriting of interest received from his son, the defendant, it seems to me clear that as these entries were against the advantage of the writer they could not be excluded. They might have been difficult to separate from the rest of the book, and I do not see why the whole should not have been put in. This objection, however, was not taken by Mr. Cole at the trial, and is not therefore valid now.

BRETT, J.—I merely decided that, if a counsel puts a document into the hands of a witness and asks him a question about it, the counsel on the other side has a right to look at the document. In that I consider I was right, but I do not desire to hold that in looking at the document the counsel has a right to read it over. The only question for the jury was whether the testator had lent or given the defendant this 1000*l.*, and with regard to the admission of the account book my restriction in making only the debtor side evidence was in Mr. Cole's favour; Mr. Francis would have preferred to put in the creditor side, because it contained an entry, in which this sum of 1000*l.* was mentioned by the writer as having been lent to his son. Mr. Cole might have complained if I had refused to allow the whole book to be read, but there can be no reason to grant him a rule on the ground of the reception of a part only, when the rest was kept back in his interest

Rule refused.

BRAMWELL *v.* SPILLER.

Agent—Del credere commission—Right to sue vendee.

An agent upon del credere commission is in the same position with regard to a vendee as any other agent, and cannot sue the vendee in his own name for a debt contracted between the principal and vendee.

This action, for goods bargained and sold, was tried before Bovill, C. J., at the London sittings after Michaelmas Term, when a verdict was, by direction, entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict of 191*l.* 2*s.*, if the court should be of opinion that the plaintiffs had a right to sue for the goods sold. The court was to be at liberty to draw inferences of fact.

The plaintiffs carried on business as tobacco brokers in the city, and had frequent transactions with a Mr. Jimenez, a large importer of cigars and a general merchant. The plaintiffs sold to the defendant a case of cigars, the plaintiffs acting in the matter as agents for Jimenez on *del credere* commission. The defendants afterwards repudiated the contract, and the cigars remained at the St. Katherine's Docks in the names of the plaintiffs, Jimenez having transferred the cigars to the plaintiffs' names immediately upon receiving a sold note from the plaintiffs. The plaintiffs had given to the defendant a bought note in their names, and not in that of Jimenez, but the defendant knew throughout the transaction that the plaintiffs were brokers, and that they were acting for Jimenez.

The only question left to the jury was whether at any time an express contract with the plaintiffs as principals was substituted for the original contract entered into by the plaintiffs as agents for Jimenez. The jury found that there was no such substituted contract.

The question reserved for the court therefore was, whether a *del credere* agent, who has throughout a transaction disclosed his principal, but whose principal looks solely to him for payment, is entitled to sue the vendee in his own name.

H. James, Q. C. (with him *English Harrison*) moved in pursuance of the leave reserved to enter the verdict for the plaintiffs, and contended that, although agents were unable generally to sue in their own names for debts contracted with them on behalf of their principals, yet this restriction had never been applied to agents on *del credere* commission; they are expressly excepted from the rule laid down by Blackburn, J., in *Fawkes* v. *Lamb*, 31 L. J. 98, Q. B. He also cited

Houghton v. *Matthews*, 3 Bos. & Pul. 485;
Atkyns v. *Amber*, 2 Esp. 493;
Williams v. *Millington*, 1 H. Bl. 81;
Hornby v. *Lacy*, 6 M. & S. 166.

BOVILL, C.J.—I reserved this point at the trial in order that the plaintiff's counsel might get an opportunity to enter the verdict, if he could find any ground for doing so, but I was then, and am now, strongly of opinion that the plaintiffs had no right to sue in their own names. The action is brought upon a contract of sale between the plaintiffs' principal and the defendants', the latter being aware throughout that the plaintiffs were mere agents, and it has long been settled that under such circumstances agents cannot sue. The first authority is as far back as *Houghton* v. *Matthews*, in the year 1803. It was also held in *Hornby* v. *Lacy*, that in the case of a *del credere* commission, the principal might have *assumpsit* against the vendee. The cases of auctioneers stand upon a different footing, as appears in *Spittle* v. *Lavender*, 2 B. & B. 542. From these and other cases the general principle of the law is clear, and the case of *Fawkes* v. *Lamb* is a distinct authority against the plaintiffs. There are many cases to the same effect, in all of which I entirely concur, whilst I have considerable doubt about the only case which had any tendency the other way; that case is *Atkyns* v. *Amber*, which is not very satisfactorily reported. It may be there was some special property in the goods in that case, or some other reason for the ruling of Chief Justice Eyre which does not apply here. Here the contract is clearly between the principals, and the fact that the plaintiffs were *del credere* agents makes no difference in their right to sue.

M. SMITH, J.—I think the nonsuit was perfectly right. The plaintiffs sold to the defendant for Jimenez, as appears on the face of the bought and sold notes, and the contract was therefore between the principals. Mr. James contends that because the plaintiffs are to receive a *del credere* commission they can sue upon this contract; but on principle they cannot do so, and by authority there is no such exception. I adopt the rule laid down by Lord Ellenborough in *Hornby* v. *Lacy*,' p. 171: "I own," he said, "I cannot think that a commission *del credere* is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports that if the vendor does not pay the factor will; it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency. But it varies not an iota the rights subsisting between vendor and vendee."

BRETT, J.—This is an action for goods bargained and sold, and therefore a contract of purchase and sale between the plaintiffs and the defendant must be proved. It seems clear that the bought and sold notes were evidence of the only contract, and they show the contract to have been between Jimenez

and the defendant. It is said that notice to the defendant that the plaintiffs were to receive a *del credere* commission made the defendant liable to the plaintiffs personally. But this is not so, and the plaintiffs wholly fail to show their right to sue. The rule, therefore, ought to be refused.

Rule refused.

Attorneys for plaintiffs, *Drake* and *Son*.

Saturday, Jan. 15.

THE DERBY COMMERCIAL BANK (LIMITED) *v.* LUMSDEN AND ANOTHER.

Interrogatories—C. L. P. A. 1854 (17 & 18 *Vict. c.* 125), *s.* 51—*Trover—Plaintiff's title.*

In trover for barley, the defendants, admitting the prima facie title of the plaintiffs, as holders of the bill of lading, indorsed by the shipper to D. and G., and by D. and G. to the plaintiffs, showed that they (the defendants) had delivered the barley to D. and G. immediately on its arrival in this country, and without production of the bill of lading; that three months afterwards, on D. and G. becoming bankrupt, the plaintiffs, for the first time, claimed the barley as holders of the bill of lading indorsed to them by D. and G.; that the plaintiffs were bankers to D. and G.

Under these circumstances, the defendants sought to interrogate the plaintiffs as to the time at which, and the circumstances under which, the bill of lading was indorsed to them by D. and G., and also as to their relations and dealings with D. and G:

Held, that the defendants were entitled to exhibit these interrogatories.

This was an application for leave to administer interrogatories to the plaintiffs in an action of trover, brought for a cargo of barley. The defendants had pleaded not guilty, and not possessed.

The affidavit on which application was made stated the following facts:

In the month of March 1869 a certain quantity of barley, the subject of this action, was shipped on board a steamer called the *Panther*, of which the defendants were the managing owners, by a Mr. Heinemann, of Hamburg, whose agent in Hull was a Mr. Stephenson.

That the said barley was sold by the said Heinemann through the said Stephenson to Messrs. Dawber and Gentel, and upon the arrival of the *Panther* in Hull, on or about the 19th March, was delivered from the said ship to the said Stephenson's order.

That steamers from Hamburg often arrive in Hull as soon as, if not sooner, than bills of lading of the cargoes which they carry, and that on this occasion, as had often been done on previous occasions, the barley was delivered to the said Stephenson for, and to be forwarded to, Dawber and Gentel, under the statement that they had purchased, and were the consignees of and entitled to the barley.

That it was not until more than three months after the said barley had been so delivered, namely, until the end of June, and just after the failure of Messrs. Dawber and Gentel aforesaid, that the said plaintiffs claimed to have any interest in the same, or ever communicated with the defendants on the subject.

That the plaintiffs were the bankers of Messrs. Dawber and Gentel, and, as the defendants had reason to believe, intended that delivery of the barley should be made to them, and knew, or had the means of knowing, that it had been so made before they made any claim on the defendants.

The interrogatories were as follows:

1. When first, and under what circumstances, did the bill of lading for the barley, the subject of this action, come to your hands, and how was it then indorsed?

2. Did you then, or have you since the bill of lading first came to your hands, made or caused to be made any inquiries as to the arrival of the ship or the goods mentioned therein? if yea, state when and through whom?

3. Was the bill of lading indorsed by Messrs. Dawber and Gentel when it first came to your hands? If not, when first and by whom, was that indorsement put on, and what passed on the indorsement being obtained?

4. What (if any) advance did you make when the bill of lading came to your hands, and to whom, and on whose behalf? On whose behalf did you then, and have you since continued to, hold the said bill of lading, and by way of security for what (if any) sum or sums of money?

5. Were not you, at the time the said bill of lading came to your hands and until the end of June following, the bankers of Messrs. Dawber and Gentel? and what payments were made to you by them or on their behalf during that period?

6. Did not Messrs. Dawber and Gentel, or either and which of them, frequently come to the bank on business during that period, and did not you know or had you not reason to suppose before the 29th June 1869, that delivery of the said barley had been made to the said firm, or to some one acting for them or on their behalf, on or soon after the arrival of the barley?

7. Did Messrs. Dawber and Gentel, or either and which of them, some time in April, May, or June 1869, deposit with you, or place in your hands, or of any one for you, or on your behalf, a quantity of barley, or documents representing barley, similar to that which is the subject of this action? or some barley or documents representing some barley; and, if so, for what purpose and on what terms?

8. When did you first intimate to the said Messrs. Dawber and Gentel, or either of them, that a claim was about to be made on the defendants in respect of the barley, the subject of the present action, and what passed on the subject?

9. When did you first know that Messrs. Dawber and Gentel, aforesaid, were insolvent, or unable to meet their engagements?

10. Have you at any time, and when, accepted any and what bill or bills of exchange, either through yourselves or your London agents on behalf of Messrs. Dawber and Gentel aforesaid, receiving at the time the bills of lading against which such bills were drawn, and have you always received the goods represented by such bills of lading? and, if not, state when and in what instance you have not received such goods.

11. Have you received or written any and what letters to Messrs. Dawber and Gentel aforesaid, or either of them, or to any person or persons (other than your attorney) relative to the barley, the subject of this action? if yea, give the dates and particulars thereof.

Mellor, J., refused leave to exhibit these interrogatories, and this was an appeal from his decision.

Crompton Hutton, for the defendants.—The question on which this case must be decided is, who were the holders of the bill of lading at the time that the defendants delivered the barley to Messrs. Dawber and Gentel. This can only be ascertained by the defendants by interrogating the plaintiffs as to the time at which the bill of lading was indorsed to them. For the purpose of these interrogatories, the defendants admit the plaintiffs to be the holders of the bills of lading; but it is all important to ascertain when and under what circumstances they became the holders. The plaintiffs were the bankers

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of Messrs. Dawber and Gentel, and it seems probable that they intended them to receive the barley.

A. L. Smith for the plaintiffs.—One party in an action is not allowed to interrogate the other as to what is his cause of action. The pleas here are not guilty, and not possessed. The defendants thus deny the plaintiff's title, and they cannot interrogate them in order to find out what their title is. The decision of the Court of Exchequer in *Finney* v. *Forwood*, 13 L. T. Rep. N. S. 296; L. Rep. 1 Ex. 6; 35 L. J. 35, Ex., shows that in an action of this description the defendant must lay a foundation for his claim to interrogate by admitting the plaintiffs' *prima facie* title. [BOVILL, C. J.—Is it not, however, consistent with this application that the defendants may say, "We admit your *prima facie* title by the possession of the bills of lading properly indorsed; but, if you are entitled to succeed we shall have been defrauded by somebody, and we therefore seek to invalidate your title by showing your connection with the persons from whom you received the bills of lading?] The defendants never admit our title from Heinemann.

Crompton Hutton was not called upon in reply.

BOVILL, C. J.—I am of opinion that these interrogatories must be allowed. They are made for the purpose of supporting the defendant's case, and of showing that a fraud has been committed on the defendants by somebody, and that under the circumstances the plaintiffs cannot avail themselves of their bill of lading. A mere suggestion of such a thing would not be sufficient to entitle the defendants to these interrogatories, as was decided in *Finney* v. *Forwood* (*ubi sup.*), but some facts must be stated to raise a foundation for the charge of fraud, and to connect the plaintiffs with it. In *Finney* v. *Forwood* no such thing was stated; the defendants only alleged their ignorance of the nature of the plaintiff's title. As was said in that case by the Lord Chief Baron, "You do not lay a foundation for your application by connecting the plaintiff in any way with Saunders, from whom you received the cotton." Here it is shown that the plaintiffs are connected with the shipper, and that they claim under the bill of lading; also that they are connected with the persons to whom delivery was made. The court sees, then, that the defendants have been defrauded by somebody, and it is the essence of the case that the defendants, who have been defrauded, should interrogate the plaintiffs, so as, if possible, to establish their defence to this action.

M. SMITH, J.—I am of the same opinion. I think that this is eminently a case for interrogatories. The plaintiffs are the holders of the bill of lading, and on the defendants' affidavit it is not denied that they are the holders of the bill, which was indorsed by Heinemann to Dawber and Gentel, and by them to the plaintiffs. But the defendants state grounds for thinking that the plaintiffs rescinded the bill of lading as bankers for Dawber and Gentel; they admit the plaintiffs' *primâ facie* case, but they seek to get rid of it by showing either that the plaintiffs, as holders of the bill of lading, allowed Dawber and Gentel to receive the goods, or that the bill of lading, being held back by Dawber and Gentel, was given to the plaintiffs after the receipt of the cargo. It may be that there is no ground for either defence, but the defendants can only ascertain the facts by interrogating the plaintiffs. Supposing the facts to be as suggested by the defendants, it would surely be against equity and good conscience that the plaintiffs should succeed. There can be no doubt that, if a bill were filed, a court of equity would compel the plaintiffs to answer, and we must give relief where a court of equity would do so.

BRETT J.—I think also that these interrogatories must be admitted. The plaintiffs sue for a misdelivery of the goods. Their *prima facie* case is that they are the holders of the bill of lading properly indorsed. This *prima facie* case is not disputed by the defendants, but the defendants seek to meet it by showing either that the bill of lading was not indorsed to the plaintiffs, by Dawber and Gentel, at the time of the delivery of the goods to them, or that, if it were, the plaintiffs knew of, and acquiesced in the delivery to Dawber and Gentel. These facts can only be ascertained by interrogating the plaintiffs, and I therefore think the interrogatories should be admitted.

Rule granted, the interrogatories to be settled at chambers

Attorney for plaintiffs, *F. C. Greenfield.*

Attorneys for defendants, *Chester* and *Urquhart.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Friday, Jan. 14.

GLADWELL v. TURNER.

Bill of exchange—Notice of dishonour—Ignorance of drawer's address—Reasonable time.

A bill of exchange was dishonoured on Friday. The holder was then ignorant of the drawer's address, and was not able to learn it until between five and six p.m. on Saturday. After six o'clock on the same evening he posted a letter containing notice of dishonour, which reached the drawer on Monday morning. If a letter had been posted before six o'clock it would have been delivered the same evening.

Held, that the notice of dishonour was sufficient.

Action upon a bill of exchange against the drawer. Plea traversing notice of dishonour. Issue thereon. The case was tried before Kelly, C.B., at the sittings after term in Middlesex, when the facts appeared to be as follows. The bill was drawn by the defendant on one Welch. It was accepted by Welch, and indorsed to Smith, who indorsed it to the plaintiff. It became due on Friday, the 17th Sept., and was presented to the acceptor, but not paid. Plaintiff did not know the drawer or his address. He went to inquire his address of Smith on the same day, but Smith was not at home. Plaintiff called again on the next day, Saturday, the 18th, and succeeded in seeing him, and getting the address, between five and six o'clock. It appeared that both the plaintiff and the defendant resided in London, and if the plaintiff had posted a letter to defendant before six o'clock it would have been delivered the same night. The plaintiff did write a letter to defendant giving notice of dishonour, but did not post it till after six o'clock on the Saturday, so that it was not delivered until the Monday morning. The defendant's counsel, upon proof of these facts, contended that the plaintiff ought to be nonsuited on the ground that he was bound to send notice of dishonour immediately upon finding out the defendant's address, and that the notice not having arrived till the Monday, was too late.

The learned judge was of opinion that the question was, whether the plaintiff had exercised reasonable diligence after learning the address of the defendant, and the verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit on the above ground.

Cole, Q. C. now moved accordingly.—The general rule is clear. Where both parties live in the same

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town, or where they live in London, notice must be given in time to be received in the course of the day following the day of dishonour. Lord Ellenborough, in the case of *Smith* v. *Mallett*, 2 Camp. 208, says: "Where the parties reside in London, each party should have a day to give notice." In this case notice was not given on the next day after dishonour, but it will be contended that ignorance of the drawer's address was an excuse. But admitting that such ignorance may be an excuse, on the principle that *Lex neminem cogit ad impossibilia*, the indulgence is not to be extended any further than is absolutely necessary. It was quite possible for the holder, on finding out the address, to have immediately written a letter, and posted it to the drawer; the notice would then have been delivered on the day after dishonour. In such a case the ordinary rule applies, and it being possible to give notice within the proper time, the supposed ground of excuse is inapplicable. He also cited

Bateman v. *Joseph*, 2 Camp. 463;
Williams v. *Smith*, 2 B. & Ald. 500.

KELLY, C. B.—The general rule as to notice of dishonour is quite clear, but ignorance of the address of the drawer or person to be made liable takes the case out of that rule, and the question is, whether a reasonable time is not to be allowed for giving notice after the address is found out. It seems to me that unless a man is bound *omissis omnibus aliis negotiis*, to use the words of Lord Ellenborough, to devote himself altogether to giving notice of dishonour, and to rush off and write a letter the instant he has ascertained the address of the drawer, this notice was given in time.

MARTIN, B.—I think the verdict was right, and I should be inclined to hold that a man is entitled to a day for the purpose of giving notice from the time when he is in a condition to give it. Here the plaintiff was not in a condition to give notice until between 5 and 6 o'clock on Saturday, and he posted a letter the same evening. That seems to me a sufficient notice of dishonour.

CHANNELL and PIGOTT, BB., concurred.

Rule refused.

Attorney for defendant, *Harris*, Moorgate-street.

Monday, Jan. 17.

WALLIS v. THE SOUTH-WESTERN RAILWAY COMPANY.

Railway company—Goods carried—Lien on—Tolls—8 & 9 Vict. c. 20, s. 97.

The Railways Clauses Consolidation Act (8 & 9 *Vict. c.* 20), *s.* 97, *provides that if any person fail to pay the tolls due in respect of any carriage or goods it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall not have been removed from the premises of the company to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such rates to retain the said tolls payable as aforesaid, and all charges and expenses of such detention and sale:*

Held, that this section did not refer to charges made by a railway company as carriers of goods, but only to tolls levied for the use of their line.

The declaration stated that the plaintiff delivered to defendants, as being carriers of goods by railway and steam packet, to wit, from London to Jersey, certain goods of the plaintiff to be by them carried, to wit, from London to Jersey aforesaid, and there delivered for the plaintiff within a reasonable time in that behalf, for reward to the defendants, and the defendants as such carriers received and had the said goods for the purpose and on the terms aforesaid, and a reasonable time for carrying and delivering the same elapsed. Yet the defendants did not within a reasonable time, or at any time afterwards, deliver the said goods for the plaintiff, whereby, &c.

Second count alleging a conversion of the plaintiff's goods.

Fifth plea: That the goods in the first count mentioned were the same as the goods in the last count mentioned, and the same were, after the passing of a certain Act of Parliament entitled the Railway Clauses Consolidation Act 1845, carried and conveyed by the defendants for the plaintiff from London to Jersey within a reasonable time in that behalf, and before and at the time of their arrival at Jersey aforesaid, the plaintiff had failed on demand to pay certain tolls due from him to the defendants in respect of the carriage by them of certain other goods of the plaintiff before then, and after the passing of the said Act, carried and conveyed by the defendants for the plaintiff, and which said other goods had before then been removed from the premises of the defendants, and which said tolls were then and still are due, and owing from the plaintiff to the defendants; and the said goods in the declaration mentioned were within a reasonable time after their arrival at Jersey as aforesaid tendered by the defendants to the plaintiff on payment by him to them of their reasonable charges for the conveyance of the same, and also of the said tolls so then due to them in respect of the said other goods as aforesaid, but the plaintiff refused, and still does refuse, to pay to the defendants their said charges and the said tolls, wherefore the defendants detained, and still do detain the said goods in the said declaration mentioned for a lien and security for the said charges and tolls, and which said detention is the non-delivery complained of in the said first count and the conversion alleged in the last count of the declaration.

Demurrer and joinder.

By the 8 & 9 Vict. c. 20 (the Railway Clauses Consolidation Act), s. 97, it is enacted as follows:

If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriages or any part of such goods, or if the same shall have been removed from the premises of the company to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and all charges and expenses of such detention and sale, rendering, if any, the overplus of any of the moneys arising by such sale, and such of the carriages and goods, if any, that remain unsold to the party entitled thereto.

The 3rd section of the same Act (the interpretation clause) provides that—

The word toll shall include any rate or other charge or payment payable under the special Act for any passenger, animal, carriage, goods, merchandise, articles, matters or things, conveyed on the railway.

Thrupp in support of the demurrer.—The English statute is of no force in Jersey, and cannot be pleaded to a failure to deliver or conversion there. [MARTIN, B.—Does the toll referred to in the section relied on mean a charge made by the company as common carriers? It was often made a subject of complaint that the railway companies had altogether altered the mode of carrying on their business originally contemplated by the Legislature, namely, that they should charge a toll for the use of their line, and had become themselves common carriers. The tolls referred to meant a charge for the mere use of the line.]

Wood in support of the plea.—The meaning given to the word "toll" by the interpretation clause is wide enough to cover the charges for the

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carriage of goods in the ordinary way. The goods were delivered for carriage in England, and part of the transit was to be performed in England. The moment the goods are delivered, the right given by the statute accrues, and it can make no difference that, in addition to the carriage in England they are taken to a place beyond the limits of the country. Even if the argument on the other side be correct, and the statute has no force as a positive enactment in Jersey, the goods having been delivered, and the contract made, in England, it must be taken that the parties meant to do business on the ordinary terms on which the company do business in this country, and so if the plea is not good by force of the statute, *qua* statute, still it is good by way of contract as setting forth the terms to which the parties consented. He cited

Grafton v. *The Bristol and Exeter Railway Company*, 30 L. J. 273, Q. B.

Kelly, C. B.—The defendants claim a lien on certain goods conveyed to Jersey, not merely for the price of the conveyance of these goods, but for the price of the conveyance of other goods conveyed on previous occasions. This claim is based on the 8 & 9 Vict. c. 20, s. 97. Now it seems to me quite clear that that section applies not to the price of the carriage of goods from one part of the kingdom to another, still less to the carriage of goods partly within and partly without the kingdom, but only to the case of goods conveyed by the carriages of the owner on the railway, where all that is given is the use of the railway. It is perfectly clear, if we look to the 95th and 96th sections, which immediately precede the section in question.

Martin, B.—I am of the same opinion. It is clear that the tolls mentioned in the 97th section do not mean charges made by the railway as carriers, but charges made by them for the use of their line, the owners taking the risk and providing the carriage, as people do, I believe, with respect to coal and many other articles.

Channell, and Pigott, BB., concurred.

Judgment for plaintiff.

Attorneys, *Flowers*; *Crombie.*

Jan. 14 *and* 18.

MacManus *v.* Bark.

Promissory note—Subsequent agreement for payment of amount by instalments—Absence of consideration—Nudum pactum.

To an action against the maker by the payee of a promissory note, payable upon demand, with interest at the rate of 5 per cent. from a certain date, the defendant set up a subsequent agreement, made between himself and the payee for the payment of the amount by quarterly instalments, with interest at the rate of 5 per cent. upon the amount from time to time remaining due upon the note:

Held that this agreement was no bar to the action, there being no consideration for it.

Declaration by the plaintiff, as administratrix, upon a promissory note, by which the defendant promised to pay to John MacManus, the intestate, or his order on demand, the sum of 520*l.*, with interest at the rate of 5*l.* per cent. per annum from 24th July 1867.

Plea (*inter alia*) of a recission of the contract contained in the note while the said John MacManus was the holder thereof, and the substitution of an agreement to pay the amount thereof by quarterly instalments of 25*l.* with interest on the amounts remaining due at the rate of 5*l.* per cent. per annum.

The case was tried before Willes, J., at the last Liverpool assizes, when the following agreement was put in:

Agreement between Mr. John MacManus and Mr. John Bark, both of Book-lane, Liverpool. The said John Bark owing the said John MacManus the sum of 520*l.*, for which the said John MacManus has already a promissory note, it has been mutually agreed this day that the principal shall be repaid at 25*l.* each quarter, with interest after the rate of 5*l.* per cent. per annum, the first quarter due the 24th July 1868. John MacManus.

The learned judge directed a verdict for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit or verdict for the defendant.

Aspinall, Q. C. (with him *R. G. Williams*) moved accordingly.—The agreement was a bar to the action upon the note. There is sufficient consideration to support it, inasmuch as it varied the mode of payment, and this, amounting to a consideration in law, the court cannot inquire into the adequacy of it. It is quite clear, however, that there is a substantial consideration, because by this agreement the defendant deprived himself of his right to come at any moment and tender the whole amount remaining due on the note, with interest, and so discharge himself. The payee had thereby the advantage of a profitable investment of his money. He cited

Foster v. *Dawber*, 6 Ex. 839;
Bowerbank v. *Monteiro*, 4 Taunt. 844;
Cook v. *Lister*, 13 C. B., N. S., 543.

Cur. adv. vult.

Jan. 18.—Kelly, C. B. delivered the judgment of the court (himself, Martin, Channell, and Pigott, BB.)—In this case the question is whether the agreement entered into is a bar to an action on the note. We are of opinion that it is not, on the ground that there was no consideration for it. It was suggested by the counsel who moved the rule that there was a sufficient consideration to support the agreement in two ways. First that there was an alteration in the mode of payment of the interest, and that a payment of a quarterly instalment was secured. But this did not amount to a consideration, for the whole note was payable with interest on demand, and the whole amount might at any moment have been demanded with the interest. Secondly, it was said that the agreement provided the plaintiff with a safe investment for his money during the time which it gave for payment. That depends entirely on the question whether the agreement deprived the defendant of the right to come at any time and tender the whole amount remaining due upon the note. We see nothing in the agreement to deprive the defendant of this right, or, on the other hand, to deprive the plaintiff of the right to sue at any time for the whole amount of the note. There, will, therefore, be no rule.

Rule refused.

Attorneys for defendant, *Cunliffe* and *Beaumont*, for *Woodhouse* and *Pemberton*, Liverpool.

Jan. 11 *and* 12.

Heugh and another *v.* The London and North Western Railway Company.

Railway company—Carriers—Delivery of goods to persons not entitled to them.—Conversion—Negligence—Involuntary bailee.

The consignors of certain goods by railway sued the railway company for misdelivery and conversion of the goods under the following circumstances. An order for the goods was sent to the town where the plaintiffs carried on their business, purporting to be from a company with whom the plaintiffs had

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been in the habit of doing business. This order was signed and sent by one N., who had been in this company's service, but had ceased to be so, and was sent without any authority. The plaintiffs, in compliance with the order, consigned the goods in question by the defendants' railway to the company. The goods were duly carried by the railway, and on arrival were sent to the address given as that of the company, the consignees. The place was found to be shut up, and the woman in charge of the premises refused to receive the goods. They were thereupon taken back to the defendants' station, and an advice note sent to the consignees' address stating that the goods remained at their risk, and would be delivered to the person producing the advice note. N. having somehow obtained possession of the advice note, produced it subsequently at the station, together with a delivery order signed by himself for the company, and obtained delivery of the goods, which he made away with. The judge upon these facts, directed the jury, that if the defendants had not been guilty of negligence in so delivering the goods, but had used reasonable care, their verdict should be for the defendants:

Held, a right direction.

Declaration contained two counts; the first alleged a delivery of certain bales of cotton by the plaintiffs to the defendants as carriers, and a failure to deliver them according to the contract, the second was for conversion of the same goods. Pleas traversing the allegations of the first count, and to the second not guilty and not possessed. Issues thereon. The trial took place before Kelly, C.B. at the sittings in London after Michaelmas Term, when the facts appeared to be as follows.

The plaintiffs were Manchester warehousemen. They had on various occasions had dealings with a company called the Southwark Indiarubber Company. A man named Nurse, who had been in the employment of this company as a traveller, but whose engagement had been terminated, wrote to the plaintiffs at Manchester an order purporting to be on behalf of the company for two bales of cotton duck. It was admitted that Nurse was not authorised to give this order, and, in fact, when it was given the company had ceased to carry on business.

In compliance with the order the plaintiffs sent by the defendants' railway the two bales in question, addressed to the Southwark Indiarubber Company, 87, Grange-road, Bermondsey. The goods were duly carried from Manchester to London, and on arriving at London were sent by the defendants to the above address. It was then found that there was a board put up on the premises announcing that the lease was for sale, and the only person there was a woman, who stated that she was not authorised to take any goods in, and refused to do so. The company had, in fact, then ceased to carry on business. The bales were then taken back to the defendants' station. The defendants, thereupon following their usual practice in such cases, sent an advice note directed to the Southwark Indiarubber Company, the consignees, at the address to which the goods had been consigned, stating that the goods had been consigned to them, and remained at the defendants' station at their risk and expense, and would be delivered up to them on production of the note. Nurse by some means or another got hold of this note, and on his producing it at the defendants' station, together with a delivery order signed by himself for the company, the bales were delivered up to him. The result was that they were never heard of afterwards, and the plaintiffs, on applying for payment to the Indiarubber Company, were told that they had never received them.

The learned judge left to the jury the question whether the defendants had been guilty of negligence in so delivering the goods to Nurse, and they found they had not. Upon that the verdict was entered for the defendants, leave being reserved to the plaintiffs to move to enter it for themselves for 122*l.*, the damages conditionally assessed, if under the circumstances the plaintiffs were in law entitled to the verdict.

A rule *nisi* had been accordingly obtained, and also on the ground that the verdict was against evidence.

Giffard, Q.C. and *McIntyre* showed cause. The defendants' liability as carriers had clearly ceased, for they had performed their contract as carriers by tendering delivery at the address to which the goods were consigned. They were obliged then to take the goods back again to their station, for they could not leave them on the pavement. They thus became what may be called involuntary bailees of the goods. They were not even warehousemen, for they held them under no contract; the only contract that existed between them and the plaintiffs was at an end. Under these circumstances they were not bound absolutely to deliver to the true owner only; they were only bound to use reasonable diligence in order not to do so to the wrong person. The plaintiffs have to show that what they did amounted to a conversion of the goods. The jury have found that they used reasonable diligence, and that finding is amply warranted by the evidence. They referred to

Birkett v. *Willan*, 2 B. & Ald. 357;
Wyld v. *Pickford*, 8 M. & W. 459;
Stephenson v. *Hart*, 4 Bing. 476.

Prentice, Q. C. and *Murray*.—The responsibility continues to be that of a carrier until responsibility as a warehouseman begins. These goods never were delivered to the consignees under the contract with the defendants as carriers. It will be urged that, delivery being impossible, their responsibility as carriers ceased when an attempt to deliver was made; it is contended that that is not so. Their responsibility as carriers for non-delivery to the consignees may have ceased, but their responsibility for delivery to a person who was neither the consignee nor the consignor remained. The liability remained that of carrier if that of a warehouseman had not commenced: (Story on Bailments, 7th edit. ss. 446, 528, 543.) The original liability continues until the assumption of another relation between the parties. But further, if they had become warehousemen of these goods they were equally bound not to deliver to the wrong persons. They are not, as has been suggested, involuntary bailees. They received the goods under a certain contract, and by that contract a relation is established between the parties which must continue until, by their conduct, some other is established. Whether as carriers or warehousemen, it was a duty imposed upon the defendants to deliver only to the consignees, according to the terms of the contract, or, if that were impossible, then to the consignors:

Stephenson v. *Hart*, 4 Bing. 476;
Duff v. *Budd*. 3 B. & B. 177.

If the defendants' contention be correct, still upon the facts the verdict was unsatisfactory. Nurse was a perfect stranger to the defendants, and they ought to have communicated with the plaintiffs before giving up the goods to him. They cited

White v. *Humphrey*, 11 Q. B. 43;
Crouch v. *Great Western Railway Comyany*, 26 L. J. 418, Ex.

KELLY, C. B.—I am of opinion that this rule must be discharged. The question is, whether the delivery of the goods to Nurse, necessarily as a matter of law, amounted to an actionable wrong, or whether it became a question of fact if the defendants, in making such delivery, had acted with reasonable care. The circumstances of the case were no doubt somewhat peculiar. The plaintiff was a manufacturer at Manchester, he consigned

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these goods by the defendants' railway to the Indian Rubber Company at a particular address in London. On their arrival, the defendants, in accordance with their contract, sent the goods to the address given. The person in charge of the house refused to take them in. The question is, what was the duty then imposed on the defendants. They could not deposit them on the pavement and leave them there; they were not permitted to put them in the house; they were therefore under the absolute necessity of taking them back to the station; on their arrival there the question arises what further duty was imposed on defendants. In point of fact the goods were some few days afterwards delivered to Nurse, and the question is whether that delivery was necessarily tortious, or whether it was a question for the jury, if the defendants had employed due care in making such delivery. It appears that the practice of the company in such cases is to put the goods in some safe and convenient part of their premises, and to give notice by letter, containing an advice note, that the goods remain in their hands at the risk and expense of the consignees, and will only be delivered to the persons producing the advice note. This advice note is sent by post, addressed to the consignees, the India Rubber Company, and within a day or two, is brought to their premises, and produced by Nurse, who had been engaged in the service of the Indian Rubber Company, but had been discharged. On its being so produced, and on demand of the goods, they are delivered to him. It is contended for the plaintiffs that in thus delivering the goods the defendants were guilty of what amounted in law to a conversion. No authority has been cited for that proposition. It is true that misdelivery by a carrier generally has the effect contended for, but here the character of carrier had ceased. The defendants had performed all their duties as carriers when they had offered the delivery of the goods. Their position then may most properly be described as that of involuntary bailees. The question is whether, under these circumstances, they were absolutely bound to deliver to the right owners. The only authorities are the cases of *Stephenson* v. *Hart*, and *Duff* v. *Budd*. They do not support the proposition contended for. In neither case was it held that the misdelivery amounted to a conversion, but it was held by the court, and treated at the bar as a question for the jury whether, under the circumstances, the defendants had conducted themselves with due and reasonable care. That question was here left to the jury. I think that the result is consistent with the justice of the case: it was the act of the plaintiffs that created the difficulty. They originally gave credit to Nurse, and so gave the directions which led to the goods being returned upon the defendant's hands. The defendants after that pursued their usual course. They sent the advice note addressed to the address given them as that of the consignees, and on production they delivered the goods. The cases on the subject, and the doctrines laid down by Story, all agree that a delivery under such circumstances, does not necessarily, as a matter of law, amount to a conversion, but it is a question of fact for the jury whether the defendants acted with reasonable care.

MARTIN, B.—I am of the same opinion. I think the right question was here left to the jury. The circumstances were these: A fraudulent person ordered goods in the name of a company who had given him no authority to do so. The plaintiffs at Manchester believed it to be a genuine order. If it had been a genuine order no contract would have arisen between the carriers and the plaintiffs; but between the carriers and the consignees. But here, as there was no real consignee, the property remained in the plaintiffs, and the defendants were bound to obey their orders. They did do so. The goods were brought to London, and sent to the address given. The defendants, therefore, had delivered the goods, or at least offered delivery, which was all that they could do. There was no one to receive it, and consequently they were obliged to take them back. Their position, therefore, may best be described as that of involuntary bailees. They wished to deliver, but the necessity of retaining the goods was forced upon them as a consequence of the plaintiffs' directions. The plaintiffs were not to blame, but still the result occurred through their act. The carrier who contracts to carry goods undertakes a most onerous duty, because he is held to be an insurer of such goods, but when he has done all he undertook to do with relation to such carriage, his responsibility as a carrier is at an end. Here the defendants had done all they undertook as carriers, but they remained in the possession of the goods which was thus forced upon them, and they were bound to use reasonable care not to deliver them to the wrong person. They send an advice-note to the very address given by the plaintiffs as that of the consignees. The goods are demanded by a person producing this very letter. I think that my Lord's direction was perfectly good, and the finding of the jury was in accordance with the facts.

CHANNELL, B.—The arguments for the plaintiff with respect to misdirection must go the length of saying that the delivery to Nurse amounted to a conversion. The authorities fail to satisfy me that any such duty was thrown upon defendants as to make such delivery a conversion. The cases in which the carriers had assumed the position of warehousemen are not in point. Here the possession of the goods was thrown involuntarily on the defendants, and the true question seems to me to be whether they acted with reasonable care.

Rule discharged.

Attorneys: *Murray* and *Hutchins*; *Blenkinsop*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 22.

(Before COCKBURN, C.J., BYLES and KEATING, JJ., PIGOTT and CLEASBY, BB.)

REG. *v.* HAPGOOD and WYATT.

Rape—Attempt to commit—Aiding and abetting.

H. was indicted for rape and W. for aiding and abetting, both were acquitted of felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H. in the attempt:

Held, that W. was properly convicted.

Case reserved by Pigott B., for the opinion of the Court for the Consideration of Crown Cases Reserved.

The prisoners were tried before me at the last Winter Assize at Taunton, upon an indictment which charged the prisoner Hapgood with rape, and the prisoner Wyatt with aiding and abetting in the above rape.

The jury acquitted both prisoners of the felonies charged, but found them both guilty of misdemeanor, Hapgood of attempting to commit the rape, and Aaron Wyatt of aiding Hapgood in the attempt.

The prisoner Wyatt's counsel submitted that this finding amounted to acquittal of Wyatt altogether,

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inasmuch as the case was not within the stat. 14 & 15 Vict. c. 100, s. 9.(a)

I overruled the objection and passed sentence upon him; but, at the request of the defendant Wyatt's counsel, I reserved the point for this Court.

The question is whether Wyatt was properly convicted of misdemeanor.

If the Court think he was not, then the verdict and judgment against him are to be vacated, and a verdict of not guilty is to be entered.

G. Pigott.

No counsel appeared on either side.

Cockburn, C.J.—The Court is of opinion that the conviction was right.

Conviction affirmed.

(Before Cockburn, C.J., Bovill, C.J., Kelly, C. B., Martin, B., Willes, J., Channell, B., Byles, Keating, and Blackburn, JJ., Pigott, B., Mellor, Lush, Hannen, and Brett, JJ., and Cleasby, B.)

Reg. v. Martha Falkingham and Mary Falkingham.

Abandonment or exposure of child—24 & 25 Vict. c. 100, s. 27.

The mother (one of the prisoners) told the putative father before the birth of an illegitimate child that she would father it on him, and he would have to pay for it. He said, "I will not pay for it, but if you send it to me I will keep it." About five weeks after its birth the prisoners put the child into a hamper carefully wrapped up, and left it at a railway station, and paid the fare. The hamper was addressed, and the words "with care, to be delivered immediately," added. The transit and delivery occupied about an hour. When opened the child was alive. It was taken to the workhouse and lived for three weeks afterwards, when it died from causes not attributable to the conduct of the prisoners:

Held, by a majority of the judges, that this was a case of abandonment and exposure of a child within the 24 & 25 Vict. c. 100, s. 27.

Case reserved for the opinion of this Court.

The prisoners were indicted at the Michaelmas Quarter Sessions of the North Riding of Yorkshire for a misdemeanor under the 24 & 25 Vict. c. 100, s. 27.

The following is a copy of the indictment:

The jurors for our lady the Queen upon their oath present that Martha Falkingham on the 25th Aug. 1869, unlawfully and wilfully did abandon and expose a certain child then being under the age of two years, whereby the life of the said child was endangered.

The prisoner, Mary Falkingham, was the mother of the child, which was about five weeks old at the time mentioned in the indictment, at which time both prisoners were residing together at Stockton-on-Tees.

It was proved that the prisoner Mary Falkingham about four months previous to the birth of the child, had an interview with the father of the child, who was then residing at Guisborough in this Riding, at which interview they had a conversation relative to the maintenance of the child after it should be born. She told him that she should father the child on him, and that he would have to pay for it, to which the man replied, "I will not pay for it, but if you send it to me I will keep it." Nothing was said by either of them as to the time at which or the mode by which the child was to be sent.

On the day named in the indictment, both prisoners put the child into a hamper wrapped up in a woollen shawl, and packed with shavings and cotton wool, and the prisoner Mary Falkingham, with the knowledge and connivance of the other prisoner, took the hamper by a passenger vessel on the river Tees, from Stockton, where they resided, to Middlesbrough (a distance of about four or five miles), at which latter place she took the hamper to the booking office of the railway station, and there left it, paying sixpence for the carriage thereof, and telling the clerk to be very careful of it, and to send it to Guisborough by the next train, which would leave Middlesbrough in ten minutes from that time. She did not say anything as to the contents of the hamper. The hamper was addressed "Mr. Carr's, Northoutgate, Guisborough, with care to be delivered immediately," at which address the father of the child was then lodging.

The hamper was carried by the ordinary passenger train from Middlesbrough to Guisborough, leaving the former place at 7.45 p.m., and arriving at Guisborough at 8.15 p.m. At 8.40 p.m., it was delivered by a railway porter at its address. On its being opened, it was found to contain the child alive, and packed in manner before mentioned, with a paper on which was written, "Please take care of this child, for George Beaumont is the father of it."

The child was taken by the relieving officer the same evening to the union workhouse, where it lived for three weeks afterwards, at the expiration of which period it died from causes not attributable to the conduct of the prisoners or either of them. It was proved to have been a delicate child.

The prisoner's counsel objected that, upon these facts there was no evidence to go to the jury that the life of the child was endangered, and, secondly, that there was no abandonment, and no exposure of the child within the meaning of the statute.

The court overruled the objections, and left the case to the jury, who found both prisoners guilty.

At the request of the prisoner's counsel this case was granted by the court for the opinion of the Court of Criminal Appeal whether the prisoners were rightly convicted.

Both prisoners were admitted to bail to appear at the next Court of Quarter Sessions for the North Riding of Yorkshire, to receive judgment if called upon. John R. W. Hildyard, Chairman.

No counsel appeared for the prisoners.

Shepherd was instructed to argue on behalf of the prosecution, but was not called upon.

The 24 & 25 Vict. c. 100, s. 27 enacts that whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Cockburn, C. J.—This was an indictment and conviction of the prisoners for abandoning and exposing an infant child, and having been informed that the case was not to be argued on the part of the prisoners, the Judges have considered the point before coming into Court, and as the majority of the Judges are of opinion that the conviction should be affirmed, it will be unnecessary to hear the learned counsel in support of it. At the same time all the Judges are of opinion, looking to the peculiar cir-

(a) That statute enables a jury to find a person guilty of an attempt to commit the offence, on an indictment for felony or misdemeanor, if it appears that the person charged did not complete the offence, but was guilty only of an attempt to commit the same.

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cumstances of the case, and to the fact that this is the first case of the kind that has arisen under the statute, and to the possibility that the prisoners were not aware that they were committing an offence, that a lenient sentence would meet the exigencies of the case.

Conviction affirmed.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Dec. 21.

(Before Lord PENZANCE.)

In the Goods of FRASER.

Will—Memorandum of revocation—Incorporation refused.

A testator shortly before his death executed on his will a memorandum of revocation in these words, "This will was cancelled this day," &c.

The court refused to include it in the grant of administration.

T. Fraser (late of 21, Bolton-street, in the county of Middlesex), died, leaving a will duly executed on 24th July 1866. On the 19th Oct. 1869, being resident at Florence for the benefit of his health, he executed the following memorandum on the will:

This will was cancelled this day in the presence of Dr. Robert Fraser, Esq., physician, and Margaret Rielly, nurse.
THOS. FRASER.

We have witnessed the signature of Thomas Fraser, both being present, and have signed it as witnesses.—ROBT. FRASER, M.D.; MARGARET RIELLY, nurse, her + mark.

Tristram now moved that the memorandum be included in the grant of administration to the widow, and cited

In the goods of Hicks, L. Rep. 1 Prob. 683;
In the goods of Hubbard, 35 L. J. 27, P. & M.; L. Rep. 1 P. & M. 53.

Lord PENZANCE.—I think this case goes further than the previous cases. I had serious doubts in *In the Goods of Hicks*, where there were words declaring an intestacy, but ultimately I was induced to grant probate. In this case, what the court has got before it is nothing but a paper stating that the deceased revoked a former will. The 28th section of the Wills Act says "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same." The statute draws a distinction between "wills and codicils" and "some writing." I am clearly of opinion that this is some writing declaring an intention to revoke a previous will, and, being only a writing of that character it cannot be called a will. It disposes of nothing, it throws no light on the testamentary intentions of the deceased, it does not declare an intestacy. It simply revokes one particular paper. The application, therefore, must be refused.

Solicitors, *Fielder* and *Sumner*.

In the Goods of PORTER.

Contingent will—Probate refused.

A contingent will is where a testator refers to a period of time or some possible calamity which may happen within that time, not as a reason for making his will, but in language which makes the disposition of property depend upon that event.

A testator being obliged to leave England suddenly executed a testamentary paper in which he said, "should anything unfortunately happen to me while abroad, I wish everything I may be in possession of at that time, or anything I may be possessed of hereafter, to be equally divided," &c.

The court held that the words "at that time" limited the disposing powers of the will to the contingency of his dying abroad, and refused probate.

Colonel Porter died March 1869, leaving a testamentary paper duly executed and bearing date April 1862. It commenced in these terms:—

Being obliged to leave England to join my regiment in China, and not having time to make a will, I leave this paper, containing my wishes and desires. Should anything unfortunately happen to me while I am abroad, I wish every thing that I may be in possession of at that time, or anything appertaining to me hereafter, whether in lands, goods, chattels, or money to be equally divided between my two children, F. C. A. Porter and Ellen C. Porter, share and share alike.

And it concluded by appointing Mrs. Mary Perch, their grandmother, and Mr. Wm. Perch, their uncle, to be the joint trustees and guardians of his children. Col. Porter returned to England in 1863, and died in 1869, having made no other will.

C. A. Middleton, now moved for a grant of probate to Mrs. Perch and Mr. Wm. Perch, as the testamentary guardians of the children of the deceased. The question was, whether this was a contingent will or not. He submitted that it was not contingent, and relied on the words, "appertaining to me hereafter." The words "at that time" referred to anything in the possession at the time of his being abroad, but the words "appertaining to me hereafter," implied a period of time more extensive, and referred to a period subsequent to the time of his being abroad. The words, "being obliged to leave England," &c., were mere introductory averments only intended to assign a reason why the testator did not make a more formal will. He cited

In the Goods of Martin, L. Rep. 1 P. & M. 330; 17 L. T. Rep. N. S. 32.
In the Goods of Dobson, L. Rep. 1 P. & M. 88; 13 L. T. Rep. N. S. 758.

Lord PENZANCE.—I am obliged reluctantly to refuse this application. It appears to me that the court is bound to hold that this will is contingent. In looking at the cases which bear upon the point, this appears to me to be the distinction between them. By far the larger part of the cases of contingent wills are cases in which a testator refers to some possible impending calamity in connection with his will, and the question is whether the testator, in referring to the imminence of that event, intends to limit the operation of his will to the period in which that calamity can happen. If the language used be language which by the reasonable construction of the court can be considered to mean that he refers to this calamity, or to the period of time during which it may happen as a reason for making his will, then only the will is not contingent. But if a testator refers to a calamity, or the possible occurrence of an event, in language which is so mixed up with the disposition of property, that he makes the disposition of the property depend upon that event—then the court must hold the will to be contingent, because, if it did not, it must violate the language of the will. The only question is in which category does this instrument fall. Passing

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in review the previous cases, the first are, *In the Goods of Winn*, 2 S. & T. 157, and *Roberts* v. *Roberts*, 2 S. & T. 357. In both of these the will was held to be contingent, and in both the disposition of property was only to take effect in the event of something happening which did not happen. The strongest case is one cited in the last edition of Williams on Executors, *In the Goods of Thorne*, 34 L. J. 131, P. & M. In that case the testator directed his property to be disposed in a certain way "in the event of my death while serving in this horrid climate, or in the event of any accident happening to me." That will was held to be contingent, the facts being that though the man did not die abroad, he was invalided and reached England only just in time to die. There are two other cases in which the court held a will not to be contingent, but in both of them the language used in the will may be referred to the intention of the testator merely to give a reason for making his will. In the case, *In the Goods of Martin*, L. Rep. 1 P. & M. 380, the event of the testator's death is given as a reason for not making the will. The question is whether that is the case in the paper before me. The first sentence alone would have placed it in that category—"Being obliged to leave England to join my regiment in China, and not having time to make a will, I leave this paper containing my wishes and desires. Should anything unfortunately happen to me while I am abroad——" If it had stopped there the court might have said those words are merely intended to give the testator's reason for making a will. The words which create the difficulty are these—"I wish everything that I may be in possession of at that time." Now what time? Clearly the time when, should something unfortunate happen to him, he wishes his property to be disposed of in such and such a way. It is plain that the disposition was to take effect, at the time mentioned, namely, the time of his decease abroad. It is said that the subsequent words, "and anything appertaining to me hereafter," enlarge the scope of the will. I do not think so. It is plain that what he means is this—I wish everything I have in my possession at the time of my death abroad to be disposed of in a certain way, and also anything which may come to me after my death. The words "at that time" in my opinion, tie up the disposing part of the will to a period of time when a certain event was to happen, namely—"his death abroad." The court, therefore, holds the will to be contingent.

Solicitor, *A. G. Blake.*

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister-at-Law.

Nov. 13 and 23.

THE NORTHUMBRIA.

Damage — Limitation of liability — Computation of Interest.

In all cases where the liability of the owner is limited, this court will give interest on the limited amount from the time of the collision.

This was a suit for the limitation of liability. Plaintiffs were the owners of the ship *Northumbria*, which, on the 20th Aug. last, had come into collision with the barque *Hesperia*, and she, with her cargo, was lost.

The *Northumbria* pleaded that the collision occurred without the actual fault or privity of the owners; that the *Hesperia* had instituted a suit against her for the recovery of a sum of 12,000*l.*; that one of the owners of the cargo had also brought an action against her, and that she had reason to believe other suits would be brought by other owners; therefore she prayed limitation of her liability, under the statutes, 17 & 18 Vict. c. 104, s. 504; 25 & 26 Vict. c. 63, s. 54; and 24 Vict. c. 10. s. 13. The *Hesperia* did not now contest the right to the limitation of liability, but claimed interest on the amount as limited, and her costs, which latter claim the *Northumbria* did not oppose; and the questions before the court were admitted to be these: Whether any interest was payable on the limited amount, and, if so, from what period the interest was to be reckoned.

Butt, Q. C., and *Steavenson*, for plaintiffs.—No interest is payable in collision cases till after the damages have been assessed. In cases of tort, no court, except under the 3 & 4 Will. 4, c. 42, can award damages, which, however, does not apply to collisions at sea. Interest here, if payable at all, can only be recovered as damages, and by the Merchant Shipping Act Amendment Act, the amount of the liability for damages is fixed at a definite amount:

Mayne on Damages, p. 69;
Chitty on Pleading, 412, 7th edit.;
Sedgwick on Damages, pp. 263, 434, 446;
Higgins v. *Sargent*, 2 B. & C. 348.

The Dundee, 2 Hagg. Adm. 137, does not apply; it was founded on the 53 Geo. 3, c. 159. Even if interest is paid for the ship, there can be none for the freight, which is interest on the shipowner's capital, namely, the ship; and interest upon interest cannot be paid: (*Attwood* v. *Taylor*, 1 Mac. & G. 279.) But suppose interest can be given, such interest is not payable from the date of the collision, but from the time when the vessel would, under ordinary conditions, have arrived at her port of destination:

The Amalia, 5 N. R. 164 (note), 34 L. J. 21, Ad.; 8 L. T. Rep. N. S. 805;
Straker v. *Hartland*, 34 L. J. 122, Ch.; 11 L. T. Rep. N. S. 622;
Nixon v. *Roberts*, 30 L. J. 844, Ch.; 4 L. T. Rep. N. S. 679.

Clarkson for the *Hesperia*—This is a question of lien, the plaintiffs have a lien in a damage suit, which comes into operation at the moment of the collision. It has been the practice of this court, since the time of Lord Stowell, to allow interest from the date of the collision, when it is demanded:

The Bold Buccleugh, 7 Moo. P. C. C. 267;
General Iron Screw Collier Company v. *Schurmanns*, 29 L. J. 877, Ch.; 4 L. T. Rep. N. S. 138;
Harman v. *Bell*, 7 Moo. P. C. 267;
African Steam Company v. *Swansy*, 2 Kay & J. 660; 25 L. J. 870, Ch.

The Acts limiting liability do not withhold interest, though they do not expressly give it, and the law as laid down in the *Dundee* (*sup.*) was well known at the time of the passing of the last Act, wherein if it had been the intention of the Legislature to withhold the right to interest there would have been some special enactment. The question remains from what time is this interest to be computed? No doubt from the date of the collision. The rule referred to in *Straker* v. *Hartland* (*sup.*), that the interest is only payable from the time the ship would reach her port of destination, does not apply in cases of limitation of liability; but only in cases where the owners of the injured vessel receive compensation in full for their lost freight. Interest is given in Chancery from the date of the collision:

Bustin v. *Glasebrook*, 1869, Stuart, V.C. (not reported).

Gainsford Bruce for owners of cargo.—This court will not be governed by the rules of the common law courts in reference to interest, which are extremely technical. The court, by virtue of its equitable jurisdiction, has full power to give interest: (*Tyne Improvement Commissioners* v. *General Steam Navigation Company*, 16 L. T. Rep. N. S. 452.) The principle of the civil law is that interest is due upo

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the simple ground that one person delays the payment of money due to another: (Lindley, Study of Jurisprudence, app. 97.) In America, even, the common law courts have acted on this principle to some extent: (Hilliard, on Torts, vol. 2, p. 134, n. 3.)

Nov. 23.—Sir R. PHILLIMORE.—It is not disputed that the practice of this court has been invariable as to allowing interest, but it is contended that this practice is erroneous, at variance with the common law, both before and since the passing of the statute 3 & 4 Will. 4, c. 42, and, moreover, opposed to the enactments of 25 & 26 Vict. c. 63 (The Merchant Shipping Act Amendment Act). I was referred to the case of *Higgins* v. *Sargent*, 2 B. & C. p. 348, and to Chitty on Pleading, p. 412, 7th edit. to show that no interest was allowed at common law in cases of contract, with certain exceptions, or in cases of tort; and that it was not till 3 & 4 Will. 4, c. 42 (An Act for the further Amendment of the Law and the better Advancement of Justice) was passed, that in certain actions the jury could give damages in the nature of interest (sect. 29), and that in these instances the wrong-doer had not destroyed, but taken possession of the goods; and therefore the Legislature allowed interest to be recovered. If it were necessary to examine this proposition, I should find it difficult to reconcile with the recent case of the *British Columbia Saw Mill Company* v. *Nettleship*, L. Rep. 2 C. P. 409; 18 L. T. Rep. N. S. 604. But it appears to me quite a sufficient answer to these authorities to say that the Admiralty Court, in the exercise of an equitable jurisdiction, has proceeded upon another and a different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee, when payment was not made, *ex morâ* of the obligor; and that, whether the obligation arose *ex contractu* or *ex delicto*. The American common law has been more liberal than the English. Mr. Sedgwick, in his work on Damages, 4th edit., p. 443, remarks: "There is a considerable conflict and contradiction between the English and American cases on this subject. But, as a general thing, it may be said that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the courts of the United States, on the other hand, have shown themselves more liberally disposed, making the allowance of interest more nearly to depend on the equity of the case, and not requiring either an express or implied promise to sustain the claim."

I have now to consider whether the practice of the court has been affected on this point by the limitation of liability Acts. In the case of the *Dundee* (reported 2 Hagg. 137), Lord Stowell decided that the statute 53 Geo. 3. c. 159, s. 1., limiting the liability of owners to the value of the ship, appurtenances, and freight, applies only to the original claim for damage, and does not extend to costs and interest. The words of the statute on which Lord Stowell gave his decision, were, substantially, and for the purposes of this case, the same as those of the stat. 25 & 26 Vict. c. 63, invoked on this occasion; unless these words in the 54th section "shall not be answerable in damages" (which are identical with those of 17 & 18 Vict. c. 104, s. 504), constitute a difference. The contention is, that interest is part of the damages, and that therefore the court is precluded by the statute from giving it, in addition to the statutory limitation of 8*l.* per ton. The answer to this contention appears to me conclusive; first, if it were necessary, I should be inclined to dispute the axiom; but in truth the application of it is at variance both with the decided cases in the Court of Chancery, as well as in the Court of Admiralty, and with the principle on which they are founded; that principle being that the lien attaches from the moment when the injury has been inflicted: (*The Bold Buccleugh*, 7 Moo. 267.) The cases are, in the Court of Chancery, *The African Steamship Company* v. *Swanzey and Kennedy*, 25 L. J. N.S. 870, decided in 1856; *The General Iron Screw Collier Company* v. *Schurmann* (*sup.*), decided in 1860; *Nixon* v. *Roberts* (*sup.*), decided in 1861. All these cases were decided upon the provisions of 17 & 18 Vict. c. 104, s. 504, and I think it was well remarked by Mr. Clarkson that the Legislature, when it passed the subsequent and last Merchant Shipping Act, must be taken to have been aware of these decisions, and in this last Merchant Shipping Act the words of the former Act, "shall not be answerable for damages," are repeated, without any provision that they shall be deemed to include interest. The cases under this last Act are *Straker* v. *Hartland*, in the Court of Chancery (*sup.*), decided in 1864, and the *Amalia*, the best report of which appears to be contained in a note at p. 164 of 5 New Rep. In all these cases in the Court of Chancery it is to be observed that they have avowedly followed the practice of the Court of Admiralty. I arrive, therefore, without hesitation, at the conclusion that, notwithstanding the statutes of limitation some interest is payable on the limited amount. I entirely agree with the observations of Wood, V.C., in *Straker* v. *Hartland*, "It was quite clear that justice required that a debt which was due, but the payment of which was delayed, should carry interest." The important question remains to be considered as to which perhaps there may be more doubt namely, the period from which the interest is to be reckoned. In order to arrive at a clear understanding on this point it is necessary to consider the practice under the old law, and the practice since the Statutes of Limitation. The practice under the old law, which decreed a *restitutio in integrum* by the wrongdoer to the sufferer was as follows:—In the case of a vessel sunk with a cargo on board the *restitutio in integrum* was effected by a calculation of the probable value of the ship at the end of her voyage, and of the freight she would have earned, making at the same time certain deductions as to the expenses which the owner must have incurred in order to complete the voyage, such as the wages of the crew, &c., and also making a deduction for discount, if the value found were paid before the probable end of the voyage. In the event of the vessel sunk having no cargo, then interest upon the value of the ship from the day of the collision was given; the reason being, that in the former case by giving freight, you had really given the interest on the use of the vessel during the interval between the collision and her arrival in port; whereas, in the case of there being no cargo, there was no freight to represent the interest, and it was therefore expressly given. So that in the first case to have given interest as well as freight would have been to place the sufferer in a better position than he would have been but for the collision, and in the second case to have refused him interest would be to place him in a worse position on account of the collision than he would otherwise have been; whereas the principle of *restitutio in integrum* is to replace the sufferer in the condition in which he was at the time when the wrong was done to him. The question is, how are these principles affected by the statutes which limit the liability of the wrongdoer? In these statutes the Legislature introduced a new principle, the object of which was to give more protection to the owner against the wrong-doing of his servant, the master of the vessel. They preserved the principle of *restitutio in integrum* in cases

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where "with his actual fault and privity," the damage had been inflicted on the sufferer; but with this exception they limited his liability for the act of his servant to a certain definite sum. In the latter case, therefore, this limited amount took the place of the *restitatio in integrum*; but the principle still remains that the liability for this amount attaches from the time of the collision; and there seems no reason why interest shall not accrue on the delay to pay that limited amount as well as in the case where the amount was unlimited. Indeed the equity of the thing is the other way, for to refuse this interest would be to diminish still further the natural right of the sufferer to full compensation for the injury which he had sustained. It is to be observed that the sufferer does not, when interest is awarded, obtain interest on the amount of his damage, but on the limited amount to which the statute has restricted the liability of the wrongdoer. Therefore, in the case of a vessel without cargo, it is clear that the interest would date from the time when the liability attached, that is from the moment of the collision. Nor, when the case is examined, does it appear that a different rule ought to apply when the vessel carries cargo. Under the rule of *restitutio in integrum* the cargo-carrying vessel did not obtain interest from the date of the collision, because she received it in the shape of freight at the port of delivery; but where the amount of the liability is limited, and the sufferer does not receive full compensation, the reason which fixed the date of interest from the port of delivery does not apply. In the case of the *Amalia* Dr. Lushington remarked, "Upon what grounds then was interest given? Interest was not given by reason of indemnification for the loss, for the loss was the damage which had accrued, but interest was given for this reason, viz., that the loss was not paid at the proper time. If a man is kept out of his money, it is a loss in the common sense of the word, but a loss of a totally different description, and clearly to be distinguished from a loss which has occurred by damage done at the moment of a collision:" (5 New Rep. p. 164.) This case was cited as an authority for the opposite opinion; but in truth it is not so; the judge in that case gave all that was prayed; and no decision on this point was involved in his judgment. With respect to some of the earlier cases in Chancery, it would seem, from the form of the decree, that a distinction was taken between vessels with or without cargo, but the point seems never to have been raised or formally adjudicated upon; and in the latter cases the practice of the Court of Admiralty appears to have been followed; and that practice, I learn from the registrar, has for some time been to treat the date of the collision as the period from which interest accrues, without discrimination whether the vessel has or has not carried cargo. No such discrimination was attempted to be made either in the case of the *Spirit of the Ocean* (Bro. & Lush. 336), or in the more recent case of the *City of Buenos Ayres*. I am of opinion that, in all cases where the liability of the owner is limited, interest should be given upon the limited amount from the date of the collision, and I decree in this case accordingly.

Dec. 9 and 21.

THE SAME

Limited liability—Jurisdiction when vessel not under arrest.

The court has jurisdiction in suits for limiting liability where bail has been given by her owners, though no arrest has actually taken place.

This case came again before the court on a question as to the jurisdiction of the court. The vessel not having been technically under arrest when the suit was instituted, the owners had taken out a *caveat* warrant, and given bail, and the formal warrant of arrest became unnecessay.

The section of the Admiralty Court Act 1861, which gives the court jurisdiction, is as follows:—Section 13.

Whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England by the 9th part of the Merchant Shipping Act 1854.

Sir R. J. PHILLIMORE.—In the present case the vessel has not been under arrest, because the owners, under rule 55 of this Act, took out a *caveat* warrant, and offered to give bail. Bail having been given, the formal warrant of arrest became unnecessary. Stripped of these technicalities, the plain meaning of this language is this:—The defendant says to the plaintiff, "Don't arrest my ship; I will consent to give that bail which would have released my ship if the warrant had been served upon her." There can be no doubt, I think, what was the intention of the Legislature in the section to which I have referred—namely, that whenever the court was seised of the *res*, the jurisdiction as to limitation of liability should attach. The bail is the representative of the *res*, and to all intents and purposes the court is as much seised of the possession as if the *res* itself had been under warrant of arrest and released. According to the old practice, the jurisdiction of the Queen's Bench was in certain cases only founded on the fact of the defendant being in the custody of its marshal; but this principle was holden to be satisfied by the defendant's appearance, or by his putting in bail, "for," as Mr. Smith observes, "in those cases, though not in the real, he was in the constructive, custody of the marshal:" (Action at Law, 1857, p. 7.) And surely, in the case before me, the *res* is in the constructive, though not in the real, custody of the marshal of the court. But even if this analogy be unsound, which it does not appear to me to be, I should still be of opinion that, looking to the whole scope and tenor of the Act, the jurisdiction of this court was intended to be founded in suits of this description, when it is in possession of the bail which represents the *res*, whether the *res* has been released in the giving of bail after the arrest, or whether the owner has been prevented, as in this instance, by such a *caveat* as has been issued in this case.

Decree accordingly.

Attorneys for plaintiffs, *Hillyer* and *Fenwick*.

For owners of *Hesperia*, *Lowless* and *Nelson*.

For owners of cargo, *Waltons*, *Bubb*, and *Walton*.

Jan, 11 and 18.

LADY OF THE LAKE.

Co-owners—Jurisdiction—24 Vict. c. 10, s. 8.

Where plaintiff, before the institution of the suit, had disposed of all his shares in a vessel:

Held, that this court has jurisdiction to adjust the accounts between him and defendant, one of the owners of the vessel, who had been co-owner with him previous to the sale of his shares.

This was a cause of co-ownership, and came before the court on a motion to reject the plaintiff's petition. The facts and arguments are fully set out in the judgment.

Cohen for plaintiff.

Clarkson for defendant.

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Sir R. J. PHILLIMORE.—This is a motion by the defendant to reject the plaintiff's petition. The petition states that the plaintiff was the sole owner of the *Lady of the Lake*; that he sold half the shares in the vessel to the defendant on the 18th July 1868; that the defendant sailed the vessel under his command on a voyage from Sunderland to Brazil; that she returned with a homeward cargo on the 9th Aug. 1869. The plaintiff prays that the 8th section of 24 Vict. c. 10 may be put in force on his behalf, and that this court will decide the questions, and settle the accounts outstanding between him and the defendant as co-owners. But the plaintiff in his petition also states that on the 31st Aug. 1869 he sold all his shares; that is, the other half of the vessel, to one William Snowball, and it is upon this averment that the defendant contends that the whole petition ought to be rejected, inasmuch as the plaintiff has no *persona standi* under the statute, which it is contended only confers jurisdiction upon the court in the case of persons who are co-owners at the institution of the suit. The 8th section is as follows: "The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship, or any share thereof, to be sold, and may make such order in the premises as to it shall seem fit." It was argued on behalf of the defendant that neither according to the letter nor according to the spirit of this enactment had the court jurisdiction in this case; not according to the letter, because the plaintiff had ceased to be a co-owner; not according to the spirit, because it was the duty of the court to adjust the accounts between the co-owners; and that if it should turn out in this case that the plaintiff was indebted to the defendant, there were no shares of the plaintiff brought into court to answer a decree in favour of the defendant, and the practice of the Court of Chancery upon questions of this kind was referred to. To this it was replied that the jurisdiction of the court was not determined by the status of the plaintiff at the time when the suit was instituted, but by his status at the time when the cause of action accrued. Thus, under the 6th section, the owner or consignee of the cargo at the time when the damage was done to it might bring this suit, though he had subsequently parted with his interest in it; and the mariner might bring his claim for his wages as master, though he had ceased to discharge the duties of, or had been discharged from, that office. In the other sections of the Act, the 4th, 5th, and 6th, the words "at the time of the institution of the cause" are inserted, which are wanting in the 8th section, and were inserted in these other sections for the protection of the defendant. In the case of *The Idas* (Br. & Lush, 65) my learned predecessor decided that, under the 8th section, this court might order an account to be taken between co-owners relating to matters which occurred before the date assigned for the Act to come into operation, and also relating to a ship lost before the institution of the cause; and it will be difficult to maintain, according to the argument of the defendant in this case, that there were any co-owners after the ship was lost. I am of opinion that I am not prevented by the letter of the statute from taking cognizance of this cause; nor will my exercise of jurisdiction be at variance with the spirit of the enactment, for if the defendant in his answer should claim a balance in his favour, I shall, in pursuance of the provision in the section, make the order in the premises which I think fit, and which in this case will be, that bail to the amount of the other moiety of the shares be given by the plaintiff before the accounts are referred to the registrar for his investigation and report. As this is the first time in which this question has been raised before me, I shall make no order as to the costs of this motion.

Decree accordingly.

Proctor for plaintiff, *Rothery.*

Proctors for defendant, *Clarkson, Son,* and *Greenwell.*

COURT OF BANKRUPTCY.

Reported by A. A DORIA, Esq., Barrister-at-Law.

Thursday, Jan. 20.

(Before the CHIEF JUDGE.)

Ex parte KENNARD AND OTHERS; *Re* HUMPHREYS.

Paying out distress—Right to be recouped.

A person who has paid off a distress on the bankrupt's property, and made other payments after adjudication, whereby the bankrupt's estate is benefited, and the creditors have the advantage thereof, is entitled to be repaid the same before the creditors receive any dividend out of the said estate.

This was a motion on behalf of creditors who had proved their debts under the bankruptcy, "that an order might be made *nunc pro tunc*, for liberty to Mr. Cutten, the auctioneer, to pay to the landlord of the house and premises of the bankrupt, situate and being No. 123, Holloway-road, in the county of Middlesex, the amount of which might be duly claimed for rent and expenses due to him from the bankrupt in respect of the said house and premises, and that the amount so paid by him (Cutten) might be repaid to him out of the first assets of the bankrupt's estate, and the costs of this application and consequent thereon might be paid out of the estate of the bankrupt." Notice of the application had been served upon the creditors' assignee under the bankruptcy and his solicitor.

The facts were shortly as follows:

The bankrupt was adjudicated upon his own petition in Nov. 1869. Prior to such adjudication, namely, on the 23rd Nov., the Birkbeck society, who were the landlords of the bankrupt, issued a distress upon his goods and stock-in-trade for arrears of rent to the amount of 230*l.* 10*s.*, together with costs of levy and possession money, amounting altogether to the sum of 242*l.* 18*s.* The messenger of the court reported the facts as above stated to the official assignee; thereupon he requested Mr. Cutten, who previously to the passing of the Bankruptcy Act 1861, was an officer of the court, to ascertain whether there was upon the bankrupt's premises sufficient property to satisfy the distress. Mr. Cutten reported to the official assignee (no creditors' assignee having then been chosen) that there was more than sufficient to pay off the distress if the goods and stock-in-trade were not sold at a forced sale. Mr. Cutten then made an offer to some of the principal creditors of the bankrupt at once to pay out the distress, and it was ultimately agreed that he should do so, and that those creditors should, in case they or their nominee should be appointed creditors' assignee, allow Mr. Cutten to sell the property by auction and recoup himself the moneys to be advanced by him. Before, however, the choice meeting could be held, the Birkbeck Society, upon application made for the purpose, declined to wait, unless secured by the guarantee of some responsible person. Mr. Cutten thereupon paid the rent and costs, and the messenger of the court took possession of the premises, goods, and stock in trade of the bankrupt. At the meeting for

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choice of assignees a creditor was chosen who declined to recognise the agreement between Mr. Cutten and the creditors.

A special meeting having been called to consider a proposal by the bankrupt to pay a composition to his creditors, and annul the bankruptcy, the same was held before Mr. Registrar Hazlitt, on the 14th Jan. Mr. Cutten attended at the meeting, and put in a claim for the sum of 242*l.* 18*s.*, the amount paid by him to the Birkbeck Society. This claim being opposed by several creditors, the learned registrar gave leave to the parties to refer the matter to the Chief Judge, and the motion now came on for hearing.

Bagley appeared in support of the application.

Terry (solicitor) objected on behalf of the creditors' assignee to the proposed order upon the ground that Mr. Registrar Hazlitt had only referred this matter to the Chief Judge upon the question as to the *locus standi* of Mr. Cutten to be heard at a meeting of creditors, the object of such meeting being the consideration of the bankrupt's proposal. He contended that if Mr. Cutten were paid the amount of his claim it would be necessary to sell the estate of the bankrupt, and thus the contemplated arrangement would be frustrated. Mr. Cutten had benefited not the estate of the bankrupt, but the property of the trustees of the Birkbeck Society.

Shapland (solicitor), who appeared on behalf of creditors, also opposed.

The CHIEF JUDGE said there could be no doubt as to the justice of Mr. Cutten's claim, and although he should decline to make an order *nunc pro tunc* as applied for, he would direct that an order should be drawn up reciting the facts as stated, and directing payment of the sum of 242*l.* 18*s.* to Mr. Cutten out of the estate of the bankrupt when sold, as well as the costs of this application. This would not interfere with any arrangement which might be arrived at between the bankrupt and his creditors, but any such arrangement must have been subjected to the consideration of the court which would not allow any arrangement to be carried into effect until Mr. Cutten's claim had been paid or provided for.

Ordered accordingly.

Solicitors for the application, *Morris, Stone, Townson,* and *Morris.*

Re A DEBTOR'S PETITION.

The Bankruptcy Act 1869, *sect.* 125—*Liquidation—Issuing execution by creditor—Application by debtor to restrain.*

The court will not, in the case of liquidation upon a debtor's own petition, interfere to restrain creditors from pursuing their legal remedies without proper notice being given to them.

Jones (solicitor) applied under the 260th General Order, on behalf of a debtor who had, on the 19th Jan., filed a petition under the 125th section of the Bankruptcy Act 1869 for an order to restrain a creditor from issuing execution against the estate of the debtor, the creditor being in a position to issue the same this day. This was a case of emergency, and it was submitted that under the 50th General Order the court would dispense with the usual formalities. [The CHIEF JUDGE.—Do you produce an office copy of the debtor's petition?] I do not.

The CHIEF JUDGE decided that although an affidavit was produced in support of the application, there was no evidence before the court of any such petition being on the file. The court would, at the request of the applicant, but at his risk as to costs, grant a rule *nisi*; but as the creditor was only acting upon his legal rights he must have proper notice of any hostile application.

Solicitors, *Kent* and *Jones.*

Jan. 24 and 25.

Re TIDEY.

Bankruptcy Act 1869, *sect.* 13—*Interim injunction to restrain sale by sheriff.*

The court will, after the presentation of a petition, interfere to restrain a sale of the property of the bankrupt by the sheriff, although the sheriff was in possession prior to the adjudication.

Reed applied under the 13th section of the Bankruptcy Act 1869, *ex parte*, on behalf of the bankrupt for an interim order to restrain the sheriff of Middlesex from selling the property and effects of the bankrupt. The bankrupt was adjudicated on the 21st Jan., and the meeting for the choice of a trustee fixed for the 11th Feb. next. On the 14th Jan. the sheriff of Middlesex had taken the property and effects of the bankrupt in execution under a *fi. fa.*, for a judgment-debt of 400*l.* and costs recovered in the Court of Exchequer, and the sale was advertised to take place on the 25th Jan.

The CHIEF JUDGE granted an interim injunction till the next day, the 25th Jan., and directed that such order should be served upon the sheriff and the execution-creditor.

Jan. 25.—*Reed* applied for an injunction to restrain all further proceedings under the judgment. It appeared from the affidavit of the bankrupt in support of the application, that there were four actions pending against him at the suit of one creditor. Notice had been given both to the sheriff and the execution-creditor.

The CHIEF JUDGE said he would grant the injunction, but only strictly in accordance with the terms of the notice of motion. The affidavit in support ought to have contained some evidence that the estate would suffer materially from the proposed sale by the sheriff as advertised.

Ordered accordingly.

Solicitor, *H. A. Reed.*

Tuesday, Jan. 25.

Re DAVIES (a bankrupt).

The Bankruptcy Act 1869, *s.* 13—*Injunction—Receiver—General Orders, power to make—Sect.* 78.

The court will, on the motion of the petitioning creditor, restrain creditors from proceeding in their actions against the debtor, provided it has some guarantee that the petitioning creditor will proceed with his petition.

The General Orders are made by the Lord Chancellor under the 78th section of the Bankruptcy Act 1869, *and no question as to their validity can be entertained by the court.*

Webb (solicitor) applied on behalf of the petitioning creditor to restrain proceedings under certain actions then pending against the bankrupt, in which, however, no judgment had been obtained. The application was approved of by a considerable number of creditors of the bankrupt. He produced an affidavit in support, setting forth that the bankrupt's

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estate would be prejudiced by such actions being proceeded with to execution.

Harris (solicitor) on behalf of the creditor suing the bankrupt, objected that the General Orders were inconsistent with the terms of the Act of Parliament.

The CHIEF JUDGE.—I cannot hear you upon that point, although I will hear any other argument which you may wish to make. Under the 78th section of the Bankruptcy Act 1861, the Lord Chancellor has ample powers to make any order for carrying into effect the objects of this Act.

Harris suggested that the creditor would be prejudiced by being restrained in the prosecution of his common law rights.

The CHIEF JUDGE.—He will not be prejudiced in the least. I have nothing before me to show that in case I should make the order asked for, the proceedings in bankruptcy will be carried on. If the creditors will now nominate a receiver to protect the estate, I will make the order.

Webb named a person on behalf of the creditors as receiver.

The CHIEF JUDGE.—If that person accepts the office in writing, the order to restrain may be granted. The order must, however, be drawn up and signed to-day.

Ordered accordingly.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Nov. 26 *and Dec.* 6, 1869.

(Present: The Right Hon. Lord CHELMSFORD, Sir JAMES W. COLVILE, and Sir JOSEPH NAPIER.)

THE GENERAL STEAM NAVIGATION COMPANY (the Owners of the Steamship *Velocity*, apps.) *v.* THOMAS, GEORGE, and WILLIAM HEDLEY (the Owners of the Steamship *Carbon*, resps.)

THE VELOCITY.

Admiralty—Collision—Rule 14—*Vessels "crossing."*

The ship V. was going down the Thames on a usual and proper course. The ship C. was coming up the river, and her captain wrongly assuming, from the appearance of the red or port light of the V. as she rounded a curve in the river, that the V. was in the act of crossing the river, put the helm to port. The captain of the V., seeing the danger of a collision, first starboarded the helm and then put the helm hard-a-starboard, with the purpose of getting his vessel on shore and saving the lives of those on board. A collision then occurred. In a cause of damage consequent thereon:

Held (*reversing the judgment of the Admiralty Court*), *that the C. was alone to blame for the collision, and that the ships were not "crossing" within the meaning of rule* 14 *of the Regulations for Preventing Collisions at Sea.*

This was an appeal from a decree of the Court of Admiralty, dated the 26th Dec. 1868, in a cause of damage promoted by the respondents in consequence of a collision which occurred between the steam vessel *Velocity* and the steam vessel *Carbon*, on the 5th Sept. 1868.

Early in the morning of that day, the *Velocity*, a steamship of about 179 tons register, and drawing about 9ft. of water, left London, bound for Calais, with a light cargo, and with twelve passengers on board. After passing Cuckold's Point, up to which point the *Velocity* had been proceeding along the south shore of the river, she crossed the river, and then kept along the north shore, passing Millwall Pier at a distance not greater than a ship's length. She rounded Millwall Pier under her starboard helm, and continued under the starboard helm so as to hug the north shore. The river there takes a considerable bend, necessitating a vessel going down the river using her starboard helm.

When the *Velocity* was off the Millwall Pier as aforesaid, a vessel showing a green light, which afterwards proved to be the *Carbon*, was observed by the master of the *Velocity* about the distance of a quarter of a mile, bearing two points on the starboard bow, and to the south of mid-channel.

When the master of the *Velocity* observed the *Carbon* as aforesaid, there appeared to him to be, and there was in fact, no risk of collision; and, accordingly, he did nothing but starboard his helm a little, for the purpose of keeping as near to the north shore as the depth of water would allow.

Very shortly afterwards, however, the helm of the *Carbon* was ported, so as to make her come right across the river. It was then impossible for the *Velocity* to have avoided a collision with the *Carbon*, whereupon the master of the *Velocity* put his vessel's helm hard-a-starboard, in order to run her ashore, and thereby save the lives of the passengers. The collision, which had thus become inevitable, took place close to the north shore, the stem of the *Carbon* striking the starboard bow of the *Velocity*, and both vessels taking the ground.

On the 22nd Oct. 1868, the appellants brought an action in the Court of Exchequer against the respondents, to recover damages for, or in respect of, the aforesaid collision; the respondents pleaded that they were not guilty, and issue being joined on this plea, the said issue came on for trial on the 11th and 12th Dec. 1868, before the Lord Chief Baron and a special jury at the Guildhall sittings after Michaelmas Term. On such trial the jury found a verdict for the appellants.

On the 22nd Dec. 1868, this cause came on for hearing in the court below, and at such hearing the contention on behalf of the respondents was that the *Carbon* was right in porting, and that the two steamships were crossing ships within the meaning of the 14th of the sailing and steering rules.

After hearing the evidence adduced by the appellants and respondents, the judge and Trinity masters were of opinion that the two steamers were crossing each other within the meaning of the 14th of the steering and sailing rules, and that the *Velocity* was solely to blame for the collision, and the learned judge decreed accordingly.

From this judgment the present appeal was brought.

The question turned on the construction of rules 13 and 14 of "The Regulations for Preventing Collisions at Sea," issued in pursuance of the Merchant Shipping Act Amendment Act 1862. These rules are as follows:—

13. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

14. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Nov. 26.—*Milward*, Q. C., *Brett*, Q. C., and *Cohen*, argued for the appellants, and

Dr. Deane, Q. C., and *Clarkson*, for the respondents.

Cur. adv. vult.

Dec. 6.—Judgment was delivered by Lord CHELMSFORD.—This is an appeal from a decree of

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the High Court of Admiralty in a cause of damage instituted by the owners of a steam-vessel, the *Carbon*, against the owners of the steam-vessel the *Velocity*, for the damage done to the *Carbon* in a collision between the two vessels, for which collision the learned judge held that the *Velocity* was alone to blame, and decreed accordingly. In the course of the argument of the appeal their lordships were informed by the counsel for the appellants that the owners of the *Velocity*, had brought an action-at-law against the owners of the *Carbon*, and had obtained a verdict with damages. That upon an application to the Court of Exchequer for a new trial the Chief Baron (who tried the cause) expressed his entire satisfaction with the verdict, that the court would not grant even a rule *nisi* to set it aside, and afterwards refused to give the defendants leave to appeal. This verdict must have proceeded upon the ground of the *Carbon*, having been solely in the wrong; because, if there had been any fault contributing to the collision on the part of the *Velocity*, although there was even a greater degree of blame imputable to the *Carbon*, the owners of the *Velocity* would not have been entitled to succeed at law. It is, perhaps, difficult to resist the influence arising from the successful issue of this proceeding at law by the appellants, but their Lordships have endeavoured to confine their minds entirely to that which alone is properly before them, the evidence given in the Court of Admiralty, and the reasons stated by the learned judge for the decree which he pronounced. The collision took place in the River Thames a little below Millwall Pier, at about 3.45 a.m., 5th Sept. 1868. It was a fine moonlight morning, and the tide was about high water, and slack. The *Velocity*, a steamship of 179 tons, was going down the river on her way to Calais. The *Carbon*, a screw-steamer of 399 tons, was proceeding up the river to London with a cargo of coals. The *Velocity* had been on the south side of the river until she arrived at Cuckold's Point, when she crossed over to the north shore, and just before the collision was rounding Millwall pier and making her way along the north shore under a starboard helm. The *Carbon* was going up the river in mid-channel, and at about a quarter of a mile distance saw the red or port light of the *Velocity* bearing a little on her starboard bow. The helm of the *Carbon* was immediately ported which carried her towards the *Velocity*. The captain of the *Velocity*, seeing the danger of a collision, first starboarded the helm and afterwards ordered it to be put hard-a-starboard, so as to get his vessel ashore, and save the lives of those on board, and the *Carbon* ran into her starboard bow and cut her from the deck down to the keel. It was admitted on both sides that this was not a case of two steam-vessels meeting end on, or nearly end on, so as to require each of them to put the helm to port, in obedience to the 13th article of the Regulations for Preventing Collisions at Sea. But it was considered by the learned judge of the Court of Admiralty that the 14th article applied, and that the two vessels were "crossing so as to involve the risk of collision," and that it was therefore the duty of the vessel which had the other on her starboard side to keep out of the way. The learned judge, in delivering his judgment, said: "We" (that is, himself and the elder brethren of the Trinity House by whom he was assisted) "think that the evidence establishes that the *Carbon* saw the mast-head and port light of the *Velocity* alone. The vessels were therefore crossing under the rule to which I have referred" (the 14th), "and it was therefore the duty of the *Carbon* to get out of the way of the *Velocity*. The course which the *Carbon* adopted was to port, and the Elder Brethren think that this was the only mode of getting out of the way in the circumstances. But the fact of the *Carbon* having seen the port light of the *Velocity* does not necessarily prove that the *Velocity* was crossing the river as the learned judge and his assessors seem to have thought. The relative position of the two vessels when they first came in sight of each other must not alone be regarded, but also the bend of the river in the part where the collision took place. A vessel rounding the curve of the north shore would necessarily, during some part of her course, have her head slightly inclined towards the south shore, so as to exhibit her port light to a vessel in mid-channel coming in a contrary direction; and, in fact, the *Velocity* was not crossing, or intending to cross, the river when she was seen by the *Carbon*, but was pursuing the regular course along the north shore; keeping as near to that shore as was convenient under a starboard helm. The appellants alleged that this was the well-known customary track for vessels going down the river, and to establish their case in this respect they called Capt. James, the principal harbour-master of the river, who said, "It is the custom that vessels going down, whatever be their tonnage or their cargo, and whether at flood or ebb tide, invariably keep on the north side, and vessels coming up invariably keep on the south side." The quartermaster of the *Dreadnought* hospital ship, which is moored not far from the place where the collision occurred, also stated that the regular course of steamers going down the river is to keep on the north side; and the captain of the *Velocity*, who has been thirty-three years in command of vessels belonging to the Steam Navigation Company, said that for twenty years he had always, in going down the river, gone as close as he could to the north shore, as his usual track and the shortest way. That there has been a practice for vessels going down the river to prefer the north to the south shore is proved by the above evidence, but that there was any custom of this kind in the strict sense of the word, to which all vessels would be bound to conform, is certainly not the fact. On the contrary, from the year 1854 down to the year 1862 the rule laid down by Act of Parliament required vessels going down the river to keep towards the south shore. By the 297th section of the Merchant Shipping Act 1854 it was enacted that, "Every steamship, when navigating any narrow channel shall, whenever it is safe and practicable, keep to that side of the fair way or mid-channel which lies on the starboard side of such steamship." Therefore, the captain of the *Velocity*, in running down the river on the north shore, which he stated to have been his invariable practice for twenty years, was, for some of those years, acting in direct disobedience to the Act of Parliament. But, in 1862, by the Merchant Shipping Acts Amendment Act, the 297th section of the former Act was repealed, and vessels navigating the river were left at liberty to go on whichever side of it they pleased, taking care, of course, to observe the regulations for preventing collisions. The *Velocity*, at the time when she was seen by the *Carbon*, was where, under the existing law, she had an undoubted right to be, and was pursuing her regular course along the north shore, when her red light presented itself to the *Carbon's* view. Now, if the persons in charge of the *Carbon* knew, as they ought to have known, the bend of the river in that part, and also knew that it was usual for vessels going down the river, to steer their course along the north shore, they had no more right to assume that the *Velocity* was in the act of crossing the river than that she was pursuing an ordinary course in her way down the river. The learned judge of the Court of Admiralty held that as the vessels were crossing, the *Carbon* ought to have kept out

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of the *Velocity's* way. And the counsel for the respondents argued that, if this were the case, the *Velocity*, by the 18th article of the regulations, ought to have kept her course, which they interpreted to mean that she should have followed the direction in which her head happened to be turned at the time she was seen by the *Carbon*. But such an interpretation of the rule would lead to constant uncertainty and perplexity, as the course of a vessel would be continually varying whenever she had to turn out of the way to avoid any other vessel, or might be compelled to follow the turns and windings of a river. If the 18th article applies, the *Velocity* was bound to keep her course down the river on the north shore, and this course she kept till collision with the *Carbon* was imminent, when she put her helm hard a starboard to run herself on shore. Their Lordships are of opinion, however, that this was not a case in which either the 13th or the 14th article of the regulations was applicable. It was admitted that this was not a case of two ships under steam meeting end on, or nearly end on, under the 13th article, and in their Lordships' judgment the *Velocity* and the *Carbon* were not "crossing" within the 14th article. But putting the regulations aside, they are at a loss to discover what possible blame can be imputed to the *Velocity*. She had a perfect right to be where she was, and she was pursuing an usual course of navigation down the river, from which she never deviated until forced to do so by the peril of a collision, into which she was brought by the sudden change of course of the *Carbon*. On the other hand, the *Carbon* appears to their Lordships to be wholly to blame. She knew, or ought to have known, that a vessel going down the river had a right to run down on the north shore, and that in the position in which she was the appearance to her of the red light of a vessel on that side of the mid-channel was no indication that the vessel was in the act of crossing the river; and yet, there being nothing else to justify the belief, she acts at once upon her hasty and erroneous conclusion, and so occasions the collision. Even supposing the *Carbon* to have excusably mistaken the course of the *Velocity*, how can she recover unless she show that the *Velocity* was in fault? Their Lordships (as already observed) are unable to discover that any degree of blame can be attributed to the *Velocity*, either by her having pursued a course which she was not at liberty to pursue or having been handled in any way which the course down the north shore did not prescribe. They will therefore recommend to Her Majesty to reverse the decree appealed from, to dismiss the appellants from the suit, and to condemn the respondents in the costs in the court below, and also in the costs of this appeal.

Judgment reversed.

Proctors for the appellants, *Cattarns* and *Jehu*.
Proctor for the respondents, *H. G. Stokes*.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Thursday, Nov. 25, 1869.

(Before Lord Justice GIFFARD.)

Re THE BANK OF HINDUSTAN, CHINA, and JAPAN (LIMITED);

KINTREA'S CASE.

Company—Transfer — Registration of — Subsequent winding-up — Transfer collusive—Rectification of register—Companies' Act, 1862, *sect.* 35—*Costs under.*

In June K., the holder of 145 *shares in the above bank, upon which there was a liability to calls amounting to 75l. per share, executed a transfer to M., which was in proper form on the face of it, and stated that the consideration paid to K. was* 195*l. The transfer was laid before the directors, who had, by the articles of association, absolute power to refuse to register it; but they, without making any inquiry, approved, and registered the name of M. as the holder of the shares, and when the company was ordered to be wound-up in the following December his name was still upon the register. The official liquidator discovered that M. had never paid any consideration to K., and that he was a person without property, earning about* 1*l. a week:*

Held (affirming the decision of Stuart, V.C.), that under sect. 35 *of the Companies' Act*, 1862, *the court had jurisdiction to rectify the register, and that K.'s name must be substituted for M.'s; and further, that as the application was made in a winding-up, the general practice in Chancery applied, and the court could order the appellant who had failed to pay the costs of all parties, apart from any enactment as to costs in the* 35*th section.*

Where a name is not properly on the register, that is being upon the register "without sufficient cause" under that section,

A summons to rectify the register of a company in course of winding-up, should be issued on the application, not of the official liquidators, but of the company itself.

This was an appeal by Mr Archibald Kintrea against an order of Stuart, V.C., by which his Honour ordered that the appellant's name should be substituted upon the list of contributories of the above-named bank for that of a Mr Alexander M'Lachlan as the owner of 145 shares, although before the winding-up of the company commenced, those shares had been transferred by Mr Kintrea to Mr M'Lachlan, who at the date of the winding-up was on the register as the holder thereof.

The circumstances were as follows:

The transfer took place in June, 1866, when the deed of transfer was laid before the directors. On the face of it, it was stated that the consideration was 195*l.*, and that it had been paid by M'Lachlan to Kintrea. Without inquiry or further examination, the directors approved the transfer, and it was duly registered. The shares were nominally of 100*l.* each, on which 25*l.* only had at that time been called up, but the price of the day was about 3*l.* 15*s.* per share.

Five months after the transfer, the winding-up order was made, and official liquidators were appointed. In settling the list of contributories, circumstances came to their knowledge which led to further investigation, when they discovered that M'Lachlan was a steward on board a steam vessel at a salary of 1*l.* a week, and that he had nothing in the world beyond his earnings; that he had paid nothing whatever to Kintrea; and that (as the Lord Justice concluded from the evidence) it never was Kintrea's intention, from first to last, to part with his interest in the shares.

The learned Vice-Chancellor took the same view as to the appellant's intention, and on the application of the official liquidator by name, and not of the company, as would have been regular, directed the register to be rectified by inserting Kintrea's name in place of McLachlan's, ordering Kintrea to pay the costs.

The original summons was heard in chambers by the Vice-Chancellor in person, who declined to have it re-argued in court. His Lordship, after expressing much reluctance, consented to hear the appeal against this order preferred by Mr. Kintrea.

Hardy, Q. C. and *Higgins*, for the appeal, relied chiefly upon *Re The Joint-Stock Discount Company, Sichel's Case*, L. Rep. 3 Ch. App. 119; 17 L. T. Rep.

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N. S. 363, which, they argued, showed that when a company had accepted and registered a transfer they could not afterwards dispute it. The official liquidator had no right beyond that of his company. The transfer was not shown to be collusive, nor was it shown that the appellant retained any interest whatever in the shares. And though the shares were at a discount in June 1866, there was nothing to show that the bank was embarrassed, and, in fact, the winding-up order was not made till the following December. The Act of 1862 provided that the person on the register was to be deemed the member of the company: (ss. 23, 30, 74 of Companies Act 1862.) If Kintrea's name was to be substituted for McLachlan's, that could be done only under sect. 35 of the same statute, which gave the court no jurisdiction to order costs against him. But, at all events, the order must be varied, as it was wholly informal that such an order should be made on the application of the official liquidator, and not of the company. They referred to

Bugg's Case, 2 Dr. & Sm. 452; 12 L. T. Rep. N. S. 696;
Re The Anglesea Colliery Company, 15 L. T. Rep. N. S. 127;
Re The Bahia and San Francisco Railway Company, L. Rep. 3 Q. B. 584;
Ex parte Ward, L. Rep. 3 Ex. 180; 18 L. T. Rep. N. S. 445;
Ward and Henry's Case, L. Rep. 2 Ch. App. 431; 16 L. T. Rep. N. S. 254;
Re The British Sugar Refinery Company, 3 K. & J. 408;
Hyam's Case, 1 De G. F. & J. 75; 1 L. T. Rep. N. S. 115;
De Pass's Case, 4 De G. & J. 544; 33 L. T. Rep. 322;
Weston's Case, L. Rep. 4 Ch. App. 20; 19 L. T. Rep. N. S. 337;
Lumsden's Case, L. Rep. 4 Ch. App. 31; 19 L. T. Rep. N. S. 437.

Greene, Q.C. and *Lindley*, for the official liquidators upon costs only, relied upon the analogy of the Trustee Relief Act, and cited

Re Woodburn's Will, 1 De G. & J. 333.
Ex parte Barry, 2 Dr. & Sm. 321; 11 L. T. Rep. N. S. 691.

The court had jurisdiction under sect. 35, but, if not, sect. 170 provided that, in the case of a winding-up, the ordinary jurisdiction should be in force until the court had made rules concerning the mode of proceeding.

Hardy, Q.C. having replied on this question,

GIFFARD, L. J. said: It is to be regretted that this case was not discussed before the court below, because it is always of the greatest advantage to this court to have the benefit of the learned judge's observations on the case in the court below, and to that I think I may add that it is really the right of the suitor that he should not come here to have his case considered by the appellate court, from which there is no appeal except to the House of Lords, otherwise than after he has had the benefit of a complete discussion in the court below, and an expression of the opinion of the learned judge in the court below, in such a way as that this court may have an opportunity of really reviewing it. I think this is to be regretted.

However, I cannot say that I feel any difficulty whatever in any part of this case. The greater part of the argument has been directed to the 35th section of the Act of 1862, and the material cases which have been referred to may be readily disposed of. Two cases at law were referred to—one was the case of the *Bahia and San Francisco Railway Company*, and that was simply a case in which the court of law considered that the company had estopped itself by what it had done. The court there, it appeared, had received certain forged transfers, issued a certificate in conformity with those forged transfers, and some third party dealt on the faith of that certificate. As the position of the third party was altered, the court of law applied under those circumstances the doctrine of estoppel, which is perfectly well known. It is quite clear that that has nothing to do with this case.

The next case was that of *Ex parte Ward*, and there again the application was refused. That was an application by a member of a company, who said that the company of which he became a member were not to carry on business until the whole of the shares were subscribed, and that they were carrying on business, notwithstanding that all the shares had not been subscribed, and he sought to be relieved on that ground. Kelly, C.B., in his judgment there says that the power, alluding to the 35th section, is given only under certain circumstances, amongst others, when, he says, the plaintiff's name has been put on the register "without sufficient cause." If he had been induced by fraudulent misstatements, or fraudulent suppression, to become a member, and thereupon the name had been entered on the register, that undoubtedly would have been "without sufficient cause." That at all events is a decision of a court of law that, if there is a fraud, or if the transaction is such that it cannot stand, it is equivalent to the name being on the register "without sufficient cause."

Then we have the two cases in this court. First, *Ward and Henry's* case, in which Turner and Lord Cairns, L.JJ., somewhat differed in their view of the 35th section. Lord Cairns put a narrower construction than Turner, L.J., but I do not apprehend that anything fell from either of those learned judges in that case which would in the least degree interfere with the rule. Turner, L.J., thought the section would extend to equitable owners undoubtedly. There there was a particular name registered; the man whose name was on the register had sold to some one who did not get himself registered, and that some one had sold to some one else. In that state of things the Lord Justices held that there was a proper case to interfere merely under the 35th section. That has nothing to do with the present case.

The last case it is necessary to refer to is *Sichel's* case. That was clearly a case in which the company, having laid by and taken no steps for a great length of time, all of a sudden turned round, being themselves entirely in default, and sought to put a shareholder's name on the register. Lord Cairns said, as might well have been expected, "You have been in this default; you cannot come here and rectify the register, when in point of fact the state of the register is owing to your own negligence." Those are all the cases, and to my mind they do not touch the present case.

With regard to the section of the Act, whether you consider the latter part of the section as controlled by the former, as was Lord Cairns's view, or whether you take the wider view adopted by Turner, L. J., the result, as regards this case, is, to my mind, quite the same; because, *ex concessis*, we have a right to inquire whether the man's name is on the register "without sufficient cause," or, to put it in other words, is it or is it not properly on the list of members, because if it is not properly inserted, that is being on the register of shareholders "without sufficient cause."

Now, what are the facts? We must take it that the directors have done their duty (that is the intent), and the facts are these: There is presented to the directors a transfer which states on the face of it that 195*l.* had been paid by M'Lachlan That appears on the face of it to be an ordinary

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transaction of sale and purchase as between Kintrea and M'Lachlan, and when that representation is made the directors may well trust to it, and may be excused for not asking any questions about it. They are not bound to ask a question. As was said, I recollect, by Lord Cranworth in one of the cases, no man can complain when he makes a representation to other parties, that those other parties happen to believe what he says. I must take it that, in this case, the directors did believe what was said, and, that being so, I must take it that it was not in the least the duty of the directors to inquire further, and that, in the ordinary course of their duty, there being a sale, it would have been wrong if, when there was a *bona fide* sale, it was to be said, because a man was not rich, he should not be put on the register of shareholders. But that alternative must be taken as the inducing cause, taking that by itself. If the facts had been told to the directors of the company; it is reasonable to suppose that they would have made inquiry. And what are the facts?

First of all, the 195*l.* never passed at all. Not a sixpence was paid. The next thing discovered would have been this, if they had made the least inquiry, that M'Lachlan was steward on board a steamer, that he had not a halfpenny in the world, that his wife earned 10*s.* a week, and this further fact, that it never was the intention of Kintrea, from first to last, to part with his interest in these shares. It was simply his desire to put these shares into the name of M'Lachlan for purposes of his own. Mr. Kintrea has not come forward to say what those purposes were, and, therefore, all we can do is to try to come to a reasonable conclusion from the facts of this case as to what those purposes were. And the reasonable conclusion is this. On these shares 25*l.* each had been paid, and they were worth at that time about 3*l.* 15*s.* They were 100*l.* shares, and on every one of the 145 there was a liability of 75*l.* And though true it is that these shares could possibly have been sold in the market for 3*l.* or 3*l.* 15*s.* per share, it is evident that the object of the transaction was this, to put them into the name of a man who was in no degree responsible, to take the chance of the market, but to take it in such a way as that any further liability should be escaped.

That is the reasonable construction of such a transaction as this. Then let us go a step further. Supposing the facts had all been told to the directors, could Mr Kintrea have said now, that his name should not be taken from the register? If this had been done by arrangement with the company, it would have been what in this court is looked upon as a fraud upon the company—a colourable transaction which this court could not allow to stand. That being so, it seems to me to follow, as a matter of course, that Kintrea's name must be restored, and M'Lachlan's name taken from the list. I put it on two grounds. First, it being clear that if a man chooses to make a representation which is untrue, but which reasonably induces the directors to register a name, and it afterwards turns out that that representation is wholly and utterly untrue, he cannot complain of any consequences following upon the directors believing his representation. The other ground consists of those circumstances which bring this case entirely within *De Pass's* case and *Hyam's* case. I really should not have thought it worth while to allude much to other parts of the case, but that it has been said in the argument that there is some doubt as to whether the court could, under the 35th section, take upon itself to act upon *Hyam's* case and *De Pass's* case.

I do not hesitate to say that I have no doubt whatever that this court can act under the 35th section in such cases as *Hyam's* and *De Pass's*, just as much as it could without the passing of that 35th section. And for this simple reason: the other names would be on the register "without sufficient cause," or (as I have explained by what was meant "without sufficient cause") improperly on the register. I have, therefore, no hesitation whatever in putting Mr. Kintrea in the place of Mr. M'Lachlan.

Then there only remains the question of costs, and that is quite a matter of course. I had forgotten the 170th section, but when one comes to consider that section, and when one considers that this is an application under the Winding-up Act, I quite agree I might have have had considerable difficulty if there had been no winding-up, and if I had been confined entirely to the 35th section; but considering that this is under the Winding-up Act, I have just the same jurisdiction as I should have without the 35th section. I have no doubt upon that, and therefore without going to cases under the Trustee Relief Act, which also would probably enable me to do it, I can clearly do so under the 170th section.

Therefore, I am of opinion that the order of the court below is perfectly right, and that this appeal must be dismissed with costs. There is only one formal matter in which it is wrong; that is, it so happens that the application is made in the name of the liquidator by summons, and the order is drawn up as being simply on the application of the liquidator. In point of form that is wrong. It does not affect the merits in the slightest degree; the objection was not taken in the court below, and of course one would not have the case delayed, or make any difference as to costs, because of that question of mere form. But in order that the matter may be perfectly right, the summons will be amended by putting the company in the place of the liquidator, and the order will also be amended by putting it on the application of the company instead of the liquidator. Subject to that the appellant must pay all the costs, except those of amending the summons.

Solicitors for the appellant, Kintrea, *Lewis, Nunn, Munns*, and *Longden*.

Solicitors for the respondents, *Ashurst, Morris*, and *Co.*

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Dec. 8 *and* 9, 1869.

Re POOLEY HALL COLLIERY COMPANY.

Company — Winding-up — Debenture-holders — Simple contract creditors—Priority—Debentures issued ultra vires—Lien for moneys advanced to maintain the property of the company.

By the articles of association of a company, extended by a special resolution, the directors were empowered to incur debts and to borrow on mortgage and other securities to an amount not exceeding 8000*l.* *They issued a number of debentures at a time when the liabilities of the company exceeded* 8000*l.*:

Held, that the debentures were not voidable, but absolutely void, and that the holders of them could only come in pari passu with the simple contract creditors for the amounts secured by their debentures.

Three of the directors, in whom the lease of the company's premises was vested in trust for the company, had expended their own moneys in payment of rent, workmen's wages, &c.:

Held, that they were entitled to be repaid in priority to all other claimants all sums which they could have been compelled to pay, but that they were not entitled to priority in respect of any moneys voluntarily paid by them on behalf of the company.

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Re The Exhall Coal Mining Company, 14 *L. T. Rep. N. S.* 280; 35 *Beav.* 449; *explained.*

Adjourned summons.

This was an application by certain debenture holders of the above company, which was being wound-up under supervision of the court, that the liquidators might be directed to apply the moneys arising from the sale of the lease of the colliery, subject to the costs of liquidation, towards payment of what was due to the debenture holders upon their debentures in priority to all other claims.

Under the articles of association, the directors were empowered to incur debts in the ordinary course of business of the company, and to borrow on mortgage and other securities to an amount not exceeding 5000*l.* By a special resolution passed at a general meeting in Nov. 1865, and subsequently confirmed, the amount up to which the directors might incur debts and borrow on mortgage, &c. was extended to 8000*l.*

The debentures in question were issued on and after the 2nd Jan. 1866, under the sanction of a general meeting of the company, and purported to be a first charge on all the property, present and future, of the company.

The application of the debenture-holders was opposed by Messrs. Crux, Alcock, and Trapp, three of the former directors of the company in whom the lease of the colliery was formerly vested in trust for the company, and who claimed a lien on the property for liabilities incurred by them on behalf of the company for rent, workmen's wages, &c. The application was also opposed by the simple contract creditors of the company, who contended that the debentures were invalid, because, at the date of their issue, the liabilities of the company exceeded the limited amount of 8000*l.*, and that the debentures could, therefore, only be treated as simple contract debts, and that their holders could only rank *pari passu* with the simple contract creditors.

There was evidence that at the date of the issue of the debentures the liabilities of the company did considerably exceed 8000*l.*

Roxburgh, Q. C. and *Rowcliffe*, in support of the application, submitted that the debentures being on the property, and not on the capital of the company, were entitled to priority over all other claims, and that the directors had no lien for moneys expended by them for the purpose of keeping the concern going. They cited

Re The Marine Mansions Company, L. Rep. 4 Eq. 601; 17 L. T. Rep. N. S. 50;
King v. *Marshall*, 10 L. T. Rep. N. S. 557; 33 Beav. 565;
Re New Clydach Sheet and Bar Iron Company, L. Rep. 6 Eq. 514.

Jessel, Q. C. and *Lindley*, for the simple contract creditors, contended that the debentures were invalid, as at the date of their issue the liabilities of the company exceeded the amount authorised by the articles of association, and that they were therefore nothing more than simple contract debts. They cited

Re The German Mining Company, Chippendale's Case, 4 De G. M. & G. 19.

Charles Hall, for the official liquidators, took no part in the argument.

Sir *Richard Baggallay*, Q. C., and *W. W. Karslake*, for the directors, Crux, Alcock, and Trapp, claimed priority in respect of moneys advanced for rent, workmen's wages, &c., on the principle that the trustees of a commercial concern are entitled to a lien for moneys expended by them for the purpose of keeping the concern going. They cited

Clack v. *Holland*, 19 Beav. 262;
Re The Exhall Coal Mining Company, 14 L. T. Rep. N.S. 280; 35 Beav. 449.

Dec. 9.—Lord ROMILLY.—Mr. Roxburgh, I wish to hear you in reply; but before you commence there are one or two things I can state which will clear the way very much with respect to what Sir Richard Baggallay has said. I will state as clearly as I can what I conceive to be the principles which affect these debentures. In the first place, where a person, whether a member of a company or not, takes a lease at the request of the company and for the benefit of the company, it necessarily follows that all those sums which he is liable to pay compulsorily, which he cannot help paying, and which the lessors can extort from him by action, must be paid by the company in priority to everything else, and that the persons who take a charge upon the land, or a charge upon the lease, who know that the person is a mere trustee for the company, and is liable to pay rent upon an action or the like, take it subject to that liability. They are aware of that liability, and they cannot afterwards complain, if the property is sold, that that liability is first paid. That is what I decided in *Re The Exhall Coal Mining Company* (*sup.*), and I still retain that opinion. My opinion is, that his priority is limited to such compulsory payments, and that if he pays anything at the request of the company for the purpose of keeping up the mines, none of those sums is he entitled to have in priority to persons having charges upon them, or to the general creditors of the company; he is a mere general creditor; he is a mere simple contract creditor with respect to such payments, and he can only come in *pari passu* with the simple contract creditors. It is not for him to determine whether the lease shall be forfeited or not; he has no concern with that. It is for the company to determine whether the lease shall be given up or not, and he cannot exercise any discretion on the subject; but he is to be saved harmless, and is not to be put into a situation in which the lessor can put his hand into his pocket and take his money for payment of rent, and yet afterwards say that he is merely in the same situation as the other creditors of the company. He has a charge on the land for that, and he is entitled to have that paid in priority; but beyond that he is entitled to nothing. If he has voluntarily worked the mine, and paid the wages of the workmen, and the like, he is a mere person who has made a loan to the company, and he is a creditor of the company in respect of that. But suppose the company had granted him permission to carry on the mine entirely for their own benefit; then a new state of things arises, and of a different description. Then, no doubt, they are only entitled to come against him for the profit which he makes; and that profit cannot be ascertained without allowing to him all the expenses he has incurred in carrying on the mine. I do not understand that that arises in the present case. Unquestionably, if (which may arise in this case after the voluntary winding-up of the company) these gentlemen were allowed to carry on the mine by the assent of the creditors, then I am of opinion that they could not come upon them for any payment without allowing them all the expenses which they had incurred on the mine. Having stated that opinion, Sir Richard Baggallay, I would in the order refer it to chambers to ascertain what sums are due to you; because you have paid rent, and I am quite clear that you are entitled to receive the rent. You are entitled to receive the rent from the date of the lease in 1866, but not the premium which you gave for that lease, which is put under the form of a lease from 1863 upon payment of all the back rents, which you were not liable to pay, and which were merely sums of money advanced to the company to enable them to obtain the

lease. I now wish to hear from Mr. Roxburgh how he can support these debentures, if it be true that the permitted liabilities of the company had been already exceeded at the date of the issue of the debentures.

Roxburgh, Q.C., in reply, contended that the clause which restricted the amount of liabilities which the directors were to incur, meant only liabilities on bond, mortgage, &c.; but assuming that ordinary business debts were included in the clause, and that the total liabilities of the company at the date of the issue of the debentures, did exceed 8000*l.*, the issue had been sanctioned by a general meeting, and the simple contract creditors, the debts owing to whom had been incurred subsequent to the issue of the debentures, could not be heard to say that the debentures were issued *ultra vires*, as, under sect. 43 of the Companies Act 1862, they could know at any time what the mortgage-debts of the company were, and must, therefore, be taken to have had notice of the debentures.

Lord ROMILLY.—With respect to the debenture holders, I think the validity of the debentures depends upon the fact of whether the liabilities did or did not exceed 8000*l.* at the date of the issue. That was the amount which was fixed as the limit. It is impossible to say that the liabilities of the company are not to be taken as including all the debts which are incurred in the ordinary course of business. The very passage limiting the amount refers to it. They are to do all things which are due and proper for carrying on the business of the company, and also to incur debts in the ordinary course of business, borrow money on bonds, mortgages and other securities, and issue bills of exchange and promissory notes, but so that the liabilities of the company shall never without the sanction of a general meeting, exceed the sum of 8000*l.* It is quite clear that the debts which are incurred in the ordinary carrying on of the business are expressly included, and are considered to be included, in that amount .But it is impossible to say that a debt which a man owes for carrying on his household concerns is not a liability. Can anyone say that he does not owe his butcher for yesterday's meat, whatever may be the balance at his banker's? Therefore I am of opinion that if the liabilities of the company exceeded 8000*l.*, they had no power to issue these debentures; that they are not voidable, but that they were absolutely void, the directors having had no authority to issue them. Then in reply Mr. Roxburgh has argued the question which was somewhat new to me, as if the creditors had waived this objection. I have not heard anything in the statement that amounts to a waiver of the objection. If the debentures were absolutely void, I do not think that the mere fact of their advancing money, even if they knew the debentures to be void, would amount to a waiver of the objection. I am of opinion that the debentures are void in this sense as against the simple contract creditors, and they must come in *pari passu* with them for the amount of their debts; and so also I think must the greater part of the claims by Sir Richard Baggallay's clients. I think of making the order in this form to make the matter clear and distinct: "The court being of opinion that Messrs. Crux, Alcock, and Trapp are entitled to be repaid in priority all sums of money paid by them on the lease of the 22nd Nov. 1866, but that they are not entitled to any priority in respect of any moneys voluntarily paid or advanced by them, or any or either of them, for or on behalf of the company, whether they were so advanced for the purpose of carrying on the said mine or otherwise, refer it to chambers to ascertain what is due to them, and each of them, distinguishing between such moneys as are due as were compulsorily paid, and such as were voluntarily paid as aforesaid, and the court being also of opinion that the debenture-holders have no priority over the simple contract creditors, and that the company had no power to issue such debentures, inasmuch as the liabilities of the company exceeded the sum of 8000*l.* at the time of the issue thereof respectively ——" If you dispute that, Mr. Roxburgh, you shall have an enquiry to ascertain the fact, but it will be at your own risk. It is to be understood that in drawing a distinction with respect to Sir Richard Baggallay's clients between payments compulsorily made and payments voluntarily made, I treat all those payments as compulsorily made which they might have been compelled to make. The circumstance that the payments were made without being enforced by a suit or action, does not take them out of the designation of compulsory payments. All parties must have their costs.

Solicitors for the debenture holders, *Gregory, Rowcliffes*, and *Rawle*.

Solicitor for the directors and other creditors *J. Elliott Fox*.

Saturday, Jan. 15.

Re RUSH (a Solicitor).

Solicitor and client—Balance due from solicitor—Writ of attachment—Act for Abolition of Imprisonment for Debt (32 & 33 *Vict. c.* 62), *s.* 4.

The Act for the Abolition of Imprisonment for Debt (32 & 33 *Vict. c.* 62) *does not prevent a writ of attachment from issuing against a solicitor who has made default in payment of a sum which he has been ordered by the court to pay.*

The common order for taxation of a bill of costs delivered by John Roger Rush, a solicitor, to one of his clients, had been made against the solicitor, and by his certificate, the taxing-master had found a balance of upwards of 27,000*l.* due from the solicitor to his client. Mr. Rush having been ordered to pay this amount, and having made default in doing so, the client now applied for leave to issue a writ of attachment against him. Some doubt had been raised at the Records and Writs Office as to the propriety of issuing the writ on account of the recent Act for the Abolition of Imprisonment for Debt (32 & 33 Vict. c. 62), by the 4th section of which it is provided that, with the exceptions thereinafter mentioned, no person shall, after the commencement of the Act, be arrested or imprisoned for making default in payment of a sum of money. Amongst the six exceptions to this enactment, the 4th is as follows: "Default by an attorney or solicitor in payment of costs, when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order."

And the section closes with the following provisoes, first, that no person shall be imprisoned in any case excepted from the operation of the section for a longer period than one year; and, secondly, that nothing in the section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money.

F. H. Colt, in support of the application, submitted that this was a case of "default by an attorney or solicitor in payment of a sum of money, when ordered to pay the same, in his character of an officer of the court making the order," and that, the order having been made under the summary

jurisdiction of the court, it came within the 4th exception of the 4th section of the Act, and that the writ of attachment ought, therefore, to issue.

Lord ROMILLY.—I think this Act does not prevent you from issuing a writ of attachment, though the language of the Act is not free from obscurity.

Solicitors: *Langley* and *Gibbon*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Dec. 16, 17 and 19, 1869.

THE CITY BANK v. LUCKIE.

Mortgage—Security for current cash credit—Bills of exchange—Right of holders of to security.

A mortgage to secure a current cash credit as between the mortgagor and mortgagee.

Held not available as a security to the holders of bills drawn by the mortgagor, and accepted by the mortgagee.

The question in this case was whether the holders of certain bills of exchange were entitled to the benefit of a mortgage, which purported to be a security for a current cash credit, as between the drawer and the acceptor of the bills. The facts were these.

The bill was filed by the City Bank on behalf of themselves, and the other holders of the bills in question, against George John Luckie, Edward Kynaston, Robert Sutherland, Harriett Luckie, and Lavinia Luckie. The defendant, George John Luckie, carried on business in London as a merchant under the firm of Luckie Brothers and Co. The defendants, Edward Kynaston and Robert Sutherland, also carried on business in London as merchants under the firm of Kynaston, Sutherland, and Co. The bills in question, which were renewals of previous bills, were all drawn by Luckie Brothers and Co. upon Kynaston, Sutherland, and Co. The plaintiffs were holders of three of these bills to the amount of 7000*l*. The first was drawn and accepted on the 8th March 1866, for 2000*l*., to become due on the 11th June 1866. The second on the 16th March 1866, for 2000*l*., to become due on the 19th June 1866. The third on the 20th April 1866, for 3000*l*., to become due on the 23rd July 1866. Besides these, there were other bills amounting to 5500*l*., drawn and accepted by the same parties.

The bill stated that previously to the date of the bills it was arranged and agreed between the defendants G. J. Luckie and Kynaston that payment of the bills should be secured by mortgages on two estates in Demerara belonging to the defendant George John Luckie, and known respectively as the plantations of La Jalousie and Johanna Cecilia, in the colony of British Guiana. These mortgages, though acknowledged in favour of the defendant Kynaston only, were agreed between the defendants Kynaston and Sutherland to be held as partnership property and for the purpose of securing payment of the bills.

The first of the mortgages was dated the 25th Nov. 1865, and after reciting (*inter alia*) that it had been agreed upon by G. J. Luckie and Kynaston, that Kynaston should, through the firm of Sutherland and Co., grant unto Luckie a current cash credit to the extent of 75,000 dols. current money of the colony, bearing interest at the rate of 5 per cent. per annum, to be secured by a first mortgage in favour of Kynaston upon the said plantation. And that in pursuance of the said agreement Luckie had already received from Kynaston, through his said firm, divers sums of money on account of the said cash credit, amounting to the sum of 5000 dols., and it had been agreed that the said several sums so already advanced, and all other sums to be thereafter advanced to Luckie upon the said cash credit, under deduction of payments or proceeds of sales of produce by or on account of Luckie, should form and be from time to time the capital or principal sum secured by the said mortgage, the balance of interest appearing at the end of each year against Luckie upon the account current thereinafter mentioned, to be carried forward as capital to the next year's account. The said George John Luckie did thereby bind himself, his heirs, executors, administrators, and representatives, within six months' notice given as thereinafter mentioned, to pay or cause to be paid to the said Edward Kynaston, his heirs, executors, administrators, representatives, order, or assigns, such sums of money as should then be due or owing by him (Luckie), his heirs, executors, administrators, and representatives, under and by virtue of the said mortgage, not exceeding the said sum of 75,000 dols. And, as a security for the due and punctual payment of the several sum and sums of money, principal and interest, secured by the said mortgage as thereinbefore mentioned, the said George John Luckie did thereby bind his property in general, his heirs, executors, administrators, and representatives, and more especially, with right of first mortgage, the said plantation of La Jalousie.

The other mortgage (that on the Johanna Cecilia plantation) was dated 19th May 1866, and was in terms similar to the first, except that it purported to be a security for 15,000 dollars.

These mortgages were not executed in the form of deeds, but were passed before one of the judges of the colony in the usual manner in which such securities are there made effective. After the execution of the last mentioned mortgage, both the drawers and acceptors of the bills became involved, and their estates were being wound up.

The bill set out the following letter, written by the defendant Kynaston, to the secretary of the City Bank:

Dear Sir,—Referring to our conversation this morning with respect to bills for 12,500*l*., drawn by Messrs. Luckie Brothers and Co. on my firm of Kynaston, Sutherland, and Co., I beg to assure you that the mortgages on the Demerara estates executed by Mr. George John Luckie in my favour, were done on the understanding that they were to be held as collateral against such acceptances, should produce fail to arrive in sufficient quantity in time to meet and cover the drafts, and that such security is now held by me for your benefit, and I doubt not that it will be found more than sufficient, under careful and judicious management, to reimburse you fully with interest for your temporary lock-up. I shall only be too glad to render any assistance in my power to accomplish this.

No such produce as that referred to in the above letter had arrived.

The plaintiffs, by their bill, charged that they and the other holders of the bills of exchange for 12,500*l*. in the whole were entitled to all the right and interest of the defendants Kynaston and Sutherland, or of Kynaston only, under the above mortgages, and in and the properties comprised therein respectively.

The defendants Harriett and Lavinia Luckie claimed some interest in the mortgaged property, and were therefore made parties to the suit.

The bill prayed for a declaration that the plaintiffs and the other holders of the bills, for 12,500*l*., were entitled to the benefit of all the right and interest defendant Kynaston, or of him and his copartners in the hereditaments and premises comprised in the said mortgages, and so far as was necessary for the payment of all sums due or to become due upon the said bills; and that they were entitled to have the sum secured by the said deed realised and paid to the plaintiffs, and the said other bill-holders respectively, or applied rateably between or amongst them in discharge and satisfac-

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tion, so far as the same would extend, amount of the of such bills, without prejudice to their right and title to have and receive the balance or surplus of the amount of such bills, and that the rights and priorities of the plaintiffs and other bill-holders on the one hand, and the defendants Harriett Luckie and Lavinia Luckie might be ascertained and determined. That a receiver might be appointed to receive and get in the rents and profits of the said hereditaments and premises, and to manage the said property, and to sell the said hereditaments and premises for the purpose of realising sufficient to pay the amount due or to become due on the said bills. That in the mean time the defendants might be restrained from receiving the rents and profits of the said hereditaments and premises, and from dealing with the said hereditaments and premises in any manner inconsistent with the rights of the plaintiffs and the other holders of the bills. That so far as might be necessary, an account might be taken of what was due and owing by the defendant G. J. Luckie to the defendants Kynaston and Sutherland; and if it should be necessary that an account might be taken of what, if anything, was due to the defendants Luckie and Lavinia Luckie upon the security of the said mortgaged hereditaments and premises. And that for the purposes aforesaid all necessary accounts might be taken, inquiries made, and directions given.

The defendants denied that it was ever arranged or agreed between them that the bills in question, or any other bills, should be secured by the mortgages. The defendant, George John Luckie, deposed that the bills held by the plaintiffs were at his personal request discounted by the plaintiffs, and that he did not before, or at the time of their being discounted, or at any other time, mention or refer to the mortgages, or in any way agree to transfer to the plaintiffs any benefit or interest under the mortgages; and to the best of his knowledge and belief their existence was wholly unknown to the plaintiffs until after his (the defendant's) firm had suspended payment.

The defendant Kynastou deposed that the mortgages were executed in his favour in consideration of his granting to Luckie, through his firm, a current cash credit to the amount mentioned in the mortgages respectively, and also to secure to him the due payment of any balances that might at any time be due from Luckie on the cash credit account in the mortgages respectively expressed. There was no agreement between himself and Luckie, either before or after the execution of the mortgages that they should be securities collaterally or otherwise, for the payment of any bills whatsoever. In explanation of his letter addressed to the plaintiff's secretary, he said, that previously to the stoppage of his firm, he had always supposed that the bills in question would be duly paid at maturity by him or his firm, and that in that case Luckie would be brought into his debt on the balance of the account between them, and that the mortgages would then be a security for such balance within the terms of such mortgages. At the time that the letter was written he was largely indebted to other creditors, on bills, and otherwise, irrespectively of the bills held by the plaintiffs; which other creditors and bill holders were partly secured by property in Ceylon, and what he intended to express to the plaintiffs by his letter was that he held the security referred to in his letter for their benefit, to the exclusion of his other creditors, who were secured by the property at Ceylon. He further stated that at the time he wrote the letter he had not considered whether as between himself and Luckie he was correct in stating that the security therein referred to was held, or could be held, by him for the benefit of the plaintiffs, and all that he meant to express by his letter was, that if any of his creditors could in any manner benefit by the mortgages, such creditors would be the plaintiffs in preference to his other creditors, who were secured by the Ceylon property.

Dickinson, Q.C. and *Westlake*, for the plaintiffs, submitted that they had clearly by their bill established a right to the relief prayed. The mortgages were intended as a security for past and future advances on the part of the acceptor of the bills. Those advances had previously to and after the execution of the mortgages been made in the form of bills, and it was evident, upon the construction of the terms of the deeds, that "the current cash credit" was meant to include bills. The acceptor of the bills had in the first instance a clear equitable right to the benefit of the security, and the plaintiffs as the holders of the bills were entitled now to stand in his shoes.

Osborne Morgan, Q.C. and *Bagshawe*, for the defendants (George John Luckie and Harriett and Lavinia Luckie), contended that upon the construction of the terms of the deeds alone the plaintiffs' case must fail. Bills could not be considered cash, and moreover a mortgage for future advances in any shape was of doubtful validity. The equity which the plaintiffs endeavoured to establish was only applicable to the administration of an estate in bankruptcy, and must entirely fail when applied to the case of a bill holder who was in no way connected with the transaction under which he was desirous of enforcing his security. Further, the plaintiffs had failed to make out their case. The evidence clearly showed that there was no such arrangement or agreement between the defendants as that set up by the bill. They cited

Powles v. *Hargreaves*, 3 De G. M. & G. 430;
Laycock v. *Johnson*, 6 Hare 199;
Ex parte Waring, 19 Ves. 344.

Marten, for the other defendants.

Dickinson, Q. C. in reply.

The VICE-CHANCELLOR.—I think it is impossible to bring this case within the equitable principle which would entitle the holders of these bills, that is, the plaintiffs, to the benefit of the security in question. The case of *Ex parte Waring* (*sup.*) certainly does not go that length. In order to make out the equity of the holder of bills to have the benefit of a security which is held by a person who enters into a transaction upon the bills, I think that the security must by contract be connected with the transaction upon the bills. Lord Eldon, in *Ex parte Waring* (*sup.*), points out the general extent to which the equity was argued in that case, and expresses his doubts upon it as a general equity. I confess, however, that the inclination of my own mind would rather be to support the general equity and carry it to its fullest extent. In all cases where a person is called upon to pay a debt for which he is not primarily liable, as, for instance, the holder of a bill of exchange, the doctrine which applies to the case of surety seems to me to apply to a case of the kind. If a surety pays off the debt of the principal debtor he is entitled to the benefit of all the debtor's securities. That is stated in a loose and general way, but I rather think that the proper application of the doctrine is that the surety who pays off the debt is entitled to the benefit of all securities held for that particular debt, but not to all the securities of a more general kind. That I think was the principle in *Wright* v. *Morley*, 11 Ves. 12, and has been acted upon ever since. But in this case it seems to me impossible to connect a general mortgage transaction for a cash balance that may be due from time to time with a particular bill of exchange which happens to be unpaid by

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the person primarily liable. Therefore, in my opinion, the equity of this case fails, and the bill must be dismissed, with costs, as a matter of course. The case of *Powles* v. *Hargreaves* (*sup.*), I think, is important in this point of view: it extends the equity where the case occurs for it beyond the case of bankruptcy or insolvency. It is an equity that does not seem to depend upon that at all, though a notion did prevail, after *Ex parte Waring*, that it was a case applying only to bankruptcy, or even to a double bankruptcy. That is not the law of this court. I apprehend where you can establish an equity of this kind, it is independent of any considerations which arise from the law of bankruptcy or insolvency; although no doubt the equity may be modified by what happens in bankruptcy and insolvency. The case of *Powles* v. *Hargreaves*, which I decided in the first instance, seemed to be a new case in that respect, and although I had no doubt about it, it was very satisfactory to me that it was carried to the Court of Appeal, and that the Court of Appeal supported the view that I took, which was that the equity was not destroyed by reason of a bankruptcy.

Solicitors for the plaintiffs, *Linklaters*, *Hackwood*, and *Addison*.

Solicitors for the defendants, *Parker* and *Clarke*; *Thomas* and *Hollams*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET, Esq., and Hon. ROBERT BUTLER, Barristers-at-Law.

Wednesday, Jan. 12.

BOUN v. STROUD.

Specific performance—Part performance—Receipt for, and as a deposit—Statute of Frauds—Title—Compensation in damages—Cairns' Act.

An agreement in writing cannot be qualified or altered by subsequent conversations or a presumed intended departure from the terms of the original agreement.

A receipt for the deposit, duly stamped as an agreement, is sufficient to support a bill for specific performance of the contract.

This was a bill filed by Mr. Edward Boun, and stated the following facts:—On the 23rd March 1868 the defendant, Samuel Stroud, alleging himself to be entitled to the residue of a term of ninety-nine years, from Christmas 1810, of two dwelling-houses, Nos. 19 and 20, Chichester-place, Wandsworth-road, agreed to sell to plaintiff the lease and fixtures of said messuages for 620*l.* That plaintiff, by his agent Hancock, paid defendant by way of deposit 10*l.*, and at the same time a memorandum in writing was signed by defendant and delivered to Hancock.

The memorandum of agreement was as follows:

March 23, 1868—Received, this day, of Mr. Boun, the sum of 10*l.*, as deposit upon purchase money for lease of two houses, being 19 and 20, Chichester-place, Wandsworth-road, S., the purchase money being 620*l.*, including fixtures, 630*l.*, purchase money, 620*l.*, deposit 10*l.*, balance 610*l.* to pay.
23/3/68. JAMES STROUD.

The signature to this receipt by the defendant was not denied.

The defendant's solicitors shortly afterwards sent to plaintiff the draft of a further contract in writing, containing stipulations and restrictions as to title and for payment of certain expenses which the plaintiff's bill alleged were properly payable by the defendant, and not by the plaintiff.

On this, the plaintiff's solicitors applied to defendant's solicitors for an abstract of defendant's title to said lease, and, thereupon, the following correspondence took place:

Staple-inn, W.C., 24th April 1868.

Dear Sirs,—Stroud to Boun. We beg to acknowledge the receipt of your letter. The title we can make to this property is the same as that under which we purchased, and further than that, we can make none. We therefore inclose memorandum of agreement for your perusal, and before we deliver an abstract it must be signed. We would, however, if for your information you require explanation as to any of the clauses of the agreement, we shall be most happy to give you it. COMBE and WAINWRIGHT.

The answer to this was—

We return the draft referred to in yours of yesterday's date, and beg to refer you to our letter of the 18th inst. We must request that you will furnish an abstract of your client's title to us at once. WATSON and SONS.

This elicited the following reply:

Our client can only make such title as the draft contract we forwarded to you provides for; and unless your client is willing to accept the title as here stated, and we hear from you to that effect to-morrow, we shall deliver no abstract, but hereby rescind the contract, and we are prepared to return your client the deposit of 10*l.*, and shall proceed to resell the property. We wish you to understand that, unless you comply with the terms of this letter as above stated, the contract is hereby rescinded.
COMBE and WAINWRIGHT.

This called forth the following:

We must confess that we are quite at a loss to understand how it is possible for you or your client to rescind the contract herein without the concurrence of our client. All we can say is, that unless we receive an abstract of your client's title on or before Saturday next, there will be no alternative but to commence the necessary proceedings to compel a specific performance of the contract. WATSON and SONS.

The following concluded the correspondence:

30th April 1868.

We can only refer you to our last letter to you.
COMBE and WAINWRIGHT.

The defendant subsequently let one of the houses to a tenant. The plaintiff, wanting possession of the houses, was put to considerable expense to obtain other suitable places to carry on his business as a boot and shoe maker, and it was alleged that the possession of such house was of extreme importance to plaintiff.

The bill as amended, prayed that defendant Stroud might be decreed specifically to perform the agreement of the 23rd March, 1868, and make out a good and marketable title to the lease (the plaintiff being ready and willing &c.), and that if the said defendant should be unable so to do, or to deliver possession to the plaintiffs of the house, No. 20, he might be decreed and ordered to pay to plaintiff such damages as the court might think fit to award.

The defendant by his answer set out the particulars of several meetings and conversations between the plaintiff and his solicitors, Messrs Combe and Co., endeavouring to raise the question that the agreement set forth in the bill was only a preliminary contract, and that something else remained to be done; but it was not denied that no formal or other agreement in writing was ever entered into between the parties.

The evidence of Hancock and his nephew, who were present at the time of the signature of the contract, and payment of the 10*l.* deposit, confirmed the statements in the bill.

The receipt of the 10*l.* deposit was signed on a common receipt stamp, but the memorandum had been stamped as an agreement.

The cause now came on for a hearing.

Amphlett, Q. C. and *Shebbeare*, for the plaintiff, asked for the common decree for a specific performance, and contended generally that a parol agreement could not be set up to explain the terms or alter the proper construction of a formal written contract, and they asked for an order for compensation in respect of damages in the usual manner, in accordance with the decisions under Lord Cairns' Act. They referred as to the stamp to *Evans* v *Prothero*, 1 De G. M. & G. 572. They also cited *Kay* v. *Johnson*, 2 Hem. & M. 118.

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Eddis, Q.C., and *Robinson* for the defendant, contended that it was manifest from the statements in the plaintiff's bill itself, and from the evidence in the cause that the agreement set up was not a complete and final agreement, and that something evidently remained to be done to make it so. The question as to the title of the defendant was clearly in abeyance, and a good and marketable title, as prayed for by the bill, was utterly inconsistent with the whole facts of the case. The payment of the deposit was not a part performance within the provisions of the Statute of Frauds: (*Ogilvie* v. *Foljambe*, 3 *Mer.* 53.) The plaintiff must be held to have waived specific performance: (*Colombine* v. *Chichester* 2 Phill. 27. The character of the damages claimed at the bar was not the same as that stated and alleged by the bill.

The VICE-CHANCELLOR said it was quite clear that a person's rights under a written contract could not be taken away by a subsequent parol agreement, which, in fact, was the question which the answer of the defendant set up. The plaintiff was entitled to the common decree for a specific performance of the agreement, and a reference to chambers when a good title could be made by the defendant to the houses in question, the plaintiff not requiring the investigation of the original lessor's title. If a good title could not be made, reserve further consideration as to damages, account of principal and interest on one side, and rents and profits or occupation rent on the other. Defendant to pay plaintiff's costs.

Decree accordingly.

Solicitors: *Watson* and *Sons*, Bouverie-street; and *Combe* and *Wainwright*, Staple-inn.

Monday, Jan. 17.

SYKES *v.* DYSON.

Practice—Writ of sequestration—32 & 33 Vict. c. 62, ss. 4 and 8.

The proper mode of enforcing obedience to an order for payment of money into court is, having regard to the 32 & 33 Vict. c. 62, ss. 4 and 9, by writ of sequestration only, and not of attachment.

By an order of Vice-Chancellor James, James Dyson was ordered to pay into court on or before the 31st Dec. 1869 the sum of 475*l.* 0*s.* 4*d.*, found due from him as the legal personal representative of the testator in the cause. The order served upon him contained the usual notice that if he neglected to obey it within the time limited, he would be liable to be arrested under a writ of attachment, and also to have his estates sequestered. Default was made by Dyson in payment of the money as ordered. A writ of sequestration was then applied for, but the clerk of records and writs refused to issue one until the new practice under the 32 & 33 Vict. c. 62 (Abolition of Imprisonment for Debt Act 1869) should be settled by the issue of general orders By the 32 & 33 Vict. c. 62 s. 4, it is enacted:

With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment—

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:
2. Default in payment of any sum recoverable summarily before a justice or justices of the peace:
3. Default by a trustee, or person acting in a fiduciary capacity, and ordered to pay by a court of equity any sum in his possession or under his control:
4. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order:
5. Default in payment for the benefit of creditors of any portion of a salary, or other income, in respect of the payment of which any court having jurisdiction in bankruptcy is authorised to make an order.
6. Default in payment of sums in respect of the payment of which orders are in this Act authorised to be made:

Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money, except as regards the arrest and imprisonment of the person making default in paying such money.

And by sect. 8 it is enacted that

Sequestration against the property of a debtor may, after the commencement of this Act, be issued by any court of equity in the same manner as if such debtor had been actually arrested.

F. G. Wood referred to the above stated sections of the Act, and suggested that the right course would be to issue a writ of sequestration without issuing a writ of attachment.

The VICE-CHANCELLOR was of opinion that, having regard to the provisions of the Act, a writ of sequestration, and not of attachment, should be issued.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

Nov. 16 *and* 17, 1869.

POUPARD *v.* FARDELL.

Patent—Injunction—Novelty—Sufficiency of specification—Practice—Admissibility of evidence.

In Feb. 1859 *P. obtained a patent for skids or shoes for skidding wheels, with a tail piece projecting from the back part and top of the skid-chamber, carried entirely through the part of the shoe, P. finding the best results from carrying it upwards, but not limiting himself to so shape it, the skid forming a segment of a circle. In* 1866 *F. made and used skids substantially similar to P.'s, but, being remonstrated with, he had the tails cut off; but after two years again used them by having the tails either drawn out from the existing iron or put on again. The evidence of user was directly conflicting, P.'s witnesses swearing to non-user previously to the patent, and F.'s to actual user for many previous years. Evidence of artillerymen and others on behalf of P. was admitted, after the hearing had commenced, but the admission of evidence to rebut that refused, chiefly on the question of value and novelty:*

Held, that the invention was valuable, novel, and the patent valid, and the evidence as to prior user failed, the witnesses being unworthy of credit.

Semble, a specification of a patent may consist of figures, or one figure only, or of a description aided by a figure or figures, and it is not bad if the specification is not complied with, irrespective of the drawings.

This bill was filed by William Poupard, of Blackfriars-road, engineer, against Thomas Fardell, of Hermitage-street, Wapping, carman, to restrain the defendant from making or using any skids or shoes made upon the principle of or according to the pattern of the plaintiff's invention, and from in any manner making or using the plaintiff's said invention, or any copy or imitation thereof. That the defendant might be decreed to give up upon oath any skids or shoes in his possession, made according to the principle or pattern of the plaintiff's said invention or a copy or imitation thereof, and for an account, damages, and costs. The bill stated that the plaintiff was the first and true inventor of a certain invention for an improved skid or shoe for the skidding of wheels in descending inclines, and by letters patent, &c., dated 19th Jan. 1859, the sole privilege was given to him in

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the usual way during the term of fourteen years to use and vend the invention. The specification was as follows:—"My invention consists in constructing a skid or shoe for the skidding of wheels in descending inclines, with a tail-piece projecting from the back part and top of the skid chamber. This tail-piece may be carried entirely through the front of the shoe. I prefer to form it of wrought iron or steel, while the body of the shoe may be made of cast or wrought iron. I find the best results to be obtained where the projecting tail-piece is carried upwards, but I do not limit myself to so shaping it."

This was accompanied by outline sections of the skid, showing it with a wheel entering it, with the usual references to the drawings by letters. The specification also contained this passage:—"And having now decided the nature of the said invention, and in what manner the same is to be performed, I declare that I claim the construction of a wheel-skid or shoe, with a tail piece projecting from the back part and top of the skid chamber, as hereinbefore described and illustrated in the accompanying drawings." The bill then alleged that the plaintiff's invention acquired considerable reputation, and was largely used, and became of considerable value to the plaintiff, and he made and sold large numbers of skids or shoes, made according to the said invention. That the defendant was a carman, carrying on an extensive business in the city of London in the neighbourhood of the docks, and using various vans, waggons, carts, and other carriages for the conveyance of goods and merchandise. That in Feb. 1868 the plaintiff discovered that the defendant was using skids and shoes for skidding the wheels of his vans and waggons, made according to the principle and pattern of the plaintiff's invention, which were not made and sold by the plaintiff, and were in fact direct copies or imitations of the skid or shoe so invented by the plaintiff, for the protection of which invention the letters patent were granted; and upon inquiry the plaintiff discovered that the said skids or shoes so used by the defendant were made by his direction by his own workmen. On the 11th Feb. 1868 the plaintiff brought an action against the defendant in the Court of Exchequer to recover damages, and the defendant entered an appearance; but on inquiry the plaintiff discovered that the making and using of skids in imitation of the plaintiff's by the defendant was on so extensive a scale that it was necessary to apply to this court to restrain such use, and thereupon the plaintiff discontinued the action and filed the bill, alleging further that the patent was in full force, and the contined invasion of it by the defendant, and praying as above. On the motion for the injunction coming on, the case stood over until the present hearing.

The plaintiff's evidence was, that having by chance seen the inefficient way in which an ordinary skid acted one day on Blackfriars-bridge—the carter being obliged to use a wisp of straw, the object of keeping the wheel in the skid even then not being effected; on his return home the idea struck him as to how the difficulty might be obviated. The result was that he constructed the skid (for which he afterwards took out the patent), and tried it at night down all the London hills with perfect success. He then took out his patent, and his skid was supplied to between 500 and 600 omnibuses, besides other carriages. The plaintiff continued to make his skids according to his patent until 1866, when, having discovered that the defendant was using similar ones, which he had caused to be manufactured for his carts, being a carman in Hermitage-street, Wapping, the plaintiff remonstrated with him by letter, and the use of the skids was discontinued—in this sense, that the tails of the skids were cut off. In February 1868 the plaintiff again became aware that the defendant was using skids shaped as before, and the result was the present suit. One hundred and ten witnesses were examined by affidavit, and some others in court. The latter were the plaintiff, some of the defendant's witnesses, Col. Philpot, of the Royal Horse Artillery, and several artillerymen. A great number of skids, models, and articles which had been actually used, or capable of being used, were made exhibits and produced in court, and these might be divided into three classes—the ordinary skids used before the date of the patent, the plaintiff's patented skids, and the field-service skid used by the Artillery for their guns. The old skids were formed flat, with raised sides, a handle, with an eye behind, and finishing at the other end somewhat abruptly, so as to form a sort of short trough for the wheel. Upon that there were improvements by bevelling off the corners or the raised sides, or, in their places, substituting two pairs of lugs or ears, and sloping off the substance of the floor of the skid. The field-service skid was very massive, also with a straight or level bottom, and a large subtension of the hinder part, with an eye in it to hook on to the gun carriage, and two pairs of lugs or ears, one pair having eyes in them. The plaintiff's were formed of two pieces of iron, or one of iron and one of steel, as described in his specification, with a projecting tail-piece of the upper plate, with two lugs or ears standing alternately or in pairs, and the whole chamber or course of the skid between the lugs forming a segment of a circle.

The evidence on behalf of the plaintiff went to show that the invention was a new one, and its action most successful, the idea having occurred to the plaintiff as above stated, and he not being able to discover from all the inquiries he had made that such a skid had ever been made or used. The defendant's witnesses admitted on cross-examination that in 1866 when the defendant was remonstrated with, by his orders the tail pieces of the skids were cut off; but after a lapse of time, nothing further being heard of the matter, they were resumed in the lengthened shape, by drawing out, as smiths technically term it, the iron if there was substance enough, or if not, as the witnesses said, "shoving" on another piece. A question arose as to the admissibility of evidence on behalf of the plaintiff after the cause had come to a hearing, but this being decided in favour of the plaintiff, the evidence was admitted. This consisted of the Royal Artillery witnesses and some others, all examined in court *viva voce*, and an application subsequently made on behalf of the defendant by *W. W. Mackeson*, Q C. to allow the examination of the witnesses to rebut this testimony was refused, the Vice-Chancellor considering it inadmissible, as in fact it amounted to new evidence; but he also considered that if admitted it would have made no difference in his view of the case. As to the service skid, it amounted to this, that in place of the tail-piece there was a massive eye-piece, which, being there only for the purpose of hanging on to the gun, was in the way and acted detrimentally, and was dangerous when used by a novice; whereas all the artillerymen, including Col. Philpot, considered the principle of the plaintiff's invention totally different and much better than the service skid. The defendant's evidence was that the plaintiff's invention, so-called, was not new, but had been known for some years antecedently to the patent, and the plaintiff's inquiries had been limited to London, it not being pretended that he had inquired either in Liverpool or Edinburgh—had he done so the result would have been probably different; that the principle of the plaintiff's and the field service skid was precisely the same; that the incline was also the same when

used; and that in 1854-5 the defendant had his skid altered and lengthened by a tail-piece put on the upper plate with a curve. The defendant's witnesses were some of them his workmen, but others were quite independent. George Burrows, a wheelwright for forty years, swore that from 1835 to 1843 he was employed as foreman by Mr. Hamilton, a large coach proprietor at Hampstead, and afterwards by one Basil, of Clerkenwell, and he had superintended the making of skids during that time substantially the same as the plaintiffs, with a tail-piece extending four or five inches from the top plate, which was sometimes riveted and sometimes welded, and he referred to the plaintiff's skid as an exhibit. Other witnesses, workmen of the defendant, swore substantially also to prior user, while there were others produced by the plaintiff who distinctly denied that fact. There was, therefore, a direct conflict on this material question of user.

Glasse, Q.C. and *Bovill*, for the plaintiff, upon the evidence, contended that the value and novelty of the invention had been sufficiently made out, and that it had also been distinctly proved that the defendant had used skids made by his order precisely like the patented article, and that therefore the plaintiff was entitled to what he asked. The evidence of Burrows and the other witnesses was entirely met, and was unworthy of credit.

W. W. Mackeson, Q.C., *Stevens*, and *W. W. Cooper* for the defendant.—The question is the novelty of the plaintiff's invention, whether the patented principle of the plaintiff's skid was in use before Jan. 1859; not whether it was better than skids previously in use, not whether it was serviceable, or a better article than that used by the defendant; or the field service skid used at Woolwich, but whether the patented principle was to be found as clearly developed in one as in the other. If that principle was found in any one skid before Jan. 1859 the plaintiff's patent was bad, therefore it was most material for the plaintiff's case to ascertain what that patented principle was, and if even there was a plain principle it was the plaintiff's. The skill of the invention, or of the description of it was not denied; but he was not the first inventor of what he so clearly described. He had separated the essential feature from all the rest, which were merely useful adjuncts. The words of the specification sufficiently showed what it was, viz., "a tail piece projecting from the back part and top of the skid chamber as hereinbefore described." The curvature of the skid and tail were simply useful adjuncts, but not the principle. Therefore a straight tail piece and skid would be as much an infringement as a curved one. It was not stated that the tail was to be long or short, the depth of the side was no part of it, nor the welding nor bolting; and that all these things were mere adjuncts was shown by the concluding sentence: "I prefer to form the tail piece of a curve, &c., but this shape can be varied." Now it had been said that this curvature was the essential feature, and yet the plaintiff, in purchasing the fourteen years' monopoly, distinctly said it was not. The words "hereinbefore described" referred to the "tailpiece," and to nothing else. He told the public it was only a curve that he preferred, and therefore he left the "tailpiece," the naked principle. Drawings might be used for reference, but the principle must be found in the specification itself: *Ex parte Fox*, 1 Ves. & Beames, 67, where Lord Eldon held that the specification must contain the patented principle without the drawing. Suppose the plaintiff did not know of any other skids, and that he did invent the patented one; if it was not new he was not in a better position, because he was ignorant. [The VICE-CHANCELLOR referred to *Fox* v. *Jones*, 15 W. R. 195.] None of the Woolwich witnesses had ever seen the specification before they went into the box: (*Crompton* v. *Ibbitson*, Coryton on Pat. 132, Dan. & Lloyd 33.) A patent which fails in any one particular failed entirely:

Jordan v. *Moore*, L. Rep. 1 C. P. 625;
Reg v. *Arkwright*, Dav. Pat. 106;
Simpson v. *Holliday*, 12 L. T. Rep. N. S. 99; L. Rep. 1 H. of L. Cas. 315;
Young v. *Fernie*, 10 L. T. Rep. N. S. 861;
Manton v. *Manton*, Dav. Pat. 350.

The description was exactly that of the Woolwich field service skid, and anyone following the specification, and making a skid after that description, would be misled.

Glasse, Q.C. in reply.

The VICE-CHANCELLOR.—This is a very expensive litigation, the case having occupied six days in hearing, as to the validity of a patent taken out by the plaintiff, there being no less than 110 affidavits and twenty witnesses examined *viva voce* for the first time at the hearing. The litigation is to be regretted, because the testimony is clear, the facts scarcely being disputed by the defendant's counsel. The improvement introduced by the plaintiff is of great public utility, and extensively adopted and acquiesced in by the public for ten years before the bill was filed. The value of the patent to the plaintiff is, probably, considerable, while the success of the defendant would only lead to this, that during the three remaining years of the patent, which expires in Jan. 1873, he would be entitled to manufacture skids without purchasing them from the plaintiff; the defendant using ten annually, for which he would pay the plaintiff 6*l.*, on which the plaintiff would, probably, make a profit of 5*s.* each; the defendant, therefore, in four years, would be 10*l.* or 12*l.* in pocket. Almost all skilled in this matter have borne testimony to the value of this improvement. The defendant and the plaintiff have no business connection, and the case being most fairly conducted by counsel, why it should be so litigated by the defendant it was difficult to see, for any how he must have considerable costs to pay, and it is deeply to be deplored that I have to perform the function of a judge and jury, to decide on the facts and evidence, on the conflict of testimony, and on the law of the case. With respect to the merits of the improvement they are not in question, the defendant's counsel candidly admitted that it was an improvement, and the use of it by the defendant was the best evidence that he thought it so. The validity of it is in question upon two grounds. First, that the plaintiff was not the first inventor, and therefore that it was not novel; that it is important is not in dispute. Secondly, with regard to the insufficiency of the specification, it was very remarkable that that part was mainly insisted on by the defendant's three counsel, all being men of considerable experience. As to the novelty, the plaintiff asserts, and the defendant denies it, and relies on prior user. On the facts there was the evidence as to user by a Mr. Hamilton, a coach proprietor at Hampstead, by a Mr. Basil, at Clerkenwell, as to the field service skid, of the Royal Artillery, and of the defendant himself. As to Mr. Hamilton, that depends on the evidence of George Burrows, a wheelwright for forty years, who deposed that he was foreman to Hamilton from 1835 to 1843, and he swears that the work being performed under his direction, the skids most commonly in use for Paddington omnibuses and gentlemen's carriages, had a top-plate, with a tail-piece nearly four or five inches long, so formed that the tip caught the wheel, being sometimes welded and sometimes

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riveted, and that for thirty-two years and upwards [The Vice-Chancellor referred to the evidence.] I need scarcely say that if I believe this witness there is an end of the patent, because the law is clear, as Gibbs, C. J. expresses it that if one witness proves the use of the patented article before the date of the patent, it is bad. But I do not require such citation. Is this evidence true? On the probabilities, if this skid was used for thirty years on carriages so notorious as those running on the Hampstead-road, it must have been known, and yet the testimony of employers of the Omnibus Company was that they had never heard of it, which, if it had been so, is simply impossible. Contrast Burrows's evidence then with that of the other witnesses, and they swore they had never heard of it. He was cross-examined, and the result was most unsatisfactory. I do not mean to say he intended to commit perjury; but from beer, or some other cause, his brain was confused, and he told me he could not remember what took place a week ago. His demeanour was also most unsatisfactory, as was that of another witness, and if it depended on his evidence I should come to the conclusion as I do, that it is not to be relied upon. Other witnesses came and stood the severest test, and they deposed that he was not foreman, and pointedly contradicted him in the most important particulars. Then there were the Royal Artillery witnesses, Col. Philpot, a scientific gentleman, Sergt.-Major Henderson, as intelligent and straightforward a witness as I ever saw, and others; and they all swore that although in the field service skid there is a tail-piece, it is not to guide the wheel, but to hook it to the gun carriage; and although so-far important, was not an advantage, but detrimental. This evidence goes to this, that it is distinct from the plaintiff's, which is far superior and of great public utility, and that they never saw anything like it before. Therefore, on this evidence, on Burrows's and the other witnesses', I come to the conclusion that the case of prior user entirely fails. There are the same number of witnesses on each side, one set saying that it was used years before the patent, the other set that it was not; and I must believe one set and disbelieve the other. The defendant was largely engaged in trade, and employed many vehicles and skids from 1859 till 1866, when the plaintiff wrote to him; and if he had used such as the plaintiff's from 1854, why did he not at once say so. He was not himself cross-examined, but others were, and the evidence was overwhelming, that if the defendant had used any such skid, it must have been known, and it was not. Why cross-examination on this point was abandoned was incomprehensible, for the evidence was diametrically opposed to that of the defendant. [The Vice-Chancellor referred to the evidence.] The evidence is this, that the defendant brought the letter into the forge and said they were going to be transported, and the laugh went round, but the result was that the skid tails were all cut off. This evidence was perfectly satisfactory, and I come to the conclusion, without any hesitation, that the defendant is wrong when he states that from 1854 to 1856 he used and made skids of this description, and involving the same principle with a tail piece, and curvature. This invention, therefore, is properly the subject of a patent, is novel, and that it is important is admitted. Then there is that testimonial signed by eighty of the largest firms and the acquiescence of the public in the user for ten years. On these grounds justice requires that any court before which such a question arises shall incline to support rather than destroy such a patent. That is my view of the law; and if ever there was a case in which the specification required a benignant interpretation this is that case. There are misstatements of the defendant's which amount to untruth, and his objections are most frivolous; and it would have been far wiser to have purchased of the plaintiff and obtained his licence to make, instead of vexatiously opposing him. But, however this may be, the law must be strictly administered; and however great the merits of the plaintiff, and however much the public may have acquiesced, if he fails to comply with the law and has not fulfilled the bargain which he made by the Crown with the public, that, in consideration of the granting of the patent, he should make a full and fair disclosure, so as to enable persons ordinarily skilled, by taking up the specification with the drawings, to produce the subject of the patent, he must fail. Has he complied with the law? I think the argument that he has not, completely falls to the ground. The case relied on is *Ex parte Fox* (*sup.*), where Lord Eldon laid down the rule that the specification must be complied with, irrespective of the drawing; and if not the patent is bad. Now, of course I should be most reluctant to suppose that anything laid down by Lord Eldon was wrong, but I confess, although that was the rule then, the great improvements of science since that time, as instanced by the inventions of locomotives, electric telegraphs, &c., have made it impossible that it can be now adhered to. Look at any of these modern inventions, they are utterly unintelligible, even to a skilful engineer, without the drawings; and therefore it is not surprising that that rule can be no longer the law. A specification may consist of figures or one figure only; or it may consist of a description aided by the figure or figures. [The Vice-Chancellor then referred to Coryton on Patents, 140.] That rule, therefore, is no longer a rule, and a specification may be good although it consists of a drawing only. The specification here, although it has had various objections made to it, is very short. [The Vice-Chancellor read it.] I do not think that any ordinarily skilled workman upon perusing it would have any difficulty in reproducing the article for which the plaintiff claims a patent. The specification is, therefore, I consider, sufficient, and there is nothing in it calculated to mislead the public. I cannot come to the conclusion that the addition of the words at the end vitiate the patent, although, perhaps, they had been better omitted. On the rule, therefore, laid down in *Lewis* v. *Marling*, 10 B. & C. 27, the specification complies with the law, and the plaintiff is entitled to a decree for a perpetual injunction, with an account and a reference as to damages. The defendant must pay the costs of the suit, including the costs of the motion.

Solicitor for the plaintiff, *C. Wilkin.*

Solicitors for the defendant, *Marriott, Jordan,* and *Cooper.*

Friday, Nov. 19.

WARD v. WARD.

Practice—Partition—Demurrer—Joint-owner—Retention of bill for a year.

W. alleged a joint ownership of copyholds by two persons for twenty years and present possession by one of them (who survived the other) and by herself as joint-owners, and, claiming particular shares on special allegations, prayed for declaration of rights and a partition in the usual way. On general demurrer to this bill:

Held, that the allegation of present possession as joint-owners must be taken to mean in fee, and as, on a petition the court might direct an inquiry as to the rights, and the plaintiff might be declared entitled, the demurrer must be overruled. Also, that even if the court considered W. ought first to prove her title

at law, the bill would not be dismissed but retained for a year to give her that opportunity.

This was a general demurrer to a bill filed by Caroline Ward against Robert Ward and William Brown praying that the rights and interests of the plaintiff and defendants in certain copyholds might be ascertained, and for a partition. The bill stated that Robert Lenton being seised in fee of certain copyholds holden of the manor of Gretton, in Northamptonshire, and having surrendered the same to the use of his will, executed that testament dated 28th Feb. 1795, by which, *inter alia*, he gave and devised to his wife Jane Lenton, all the rest of his copyholds situate in Gretton, which he had surrendered to the use of his will, for her life, and from and after her decease he gave and devised the same unto his son-in-law Bryan Ward and his daughter Rebecca, his wife, for the term of their natural lives, and from and after the decease of the survivor of them, then he gave and devised the same to the use and behoof of all the children of his said daughter, Rebecca the wife of the first Bryan Ward, both male and female, in equal proportions, they to take and enjoy the same as tenants in common and not as joint-tenants.

The bill further stated that the testator died the 5th April 1796, and the plaintiff was advised, and it was the fact, that the children of the said Rebecca Ward took only estates for their lives as tenants in common under the will, and the reversion descended to the testator's customary heir. That the widow was admitted at a court holden on the 17th Oct. 1796, and that no admittance had been subsequently made. That on the death of the widow, which occurred shortly after 1796, Rebecca Ward, the second tenant for life took possession, and it was occupied jointly by her two sons, Robert Lenton Ward and Bryan Edward Ward, who paid her rent in equal moieties up to the death of Robert Lenton Ward in Aug. 1836, and thenceforth his son, Robert Ward, and Bryan Edward Ward continued in possession up to the death of Rebecca Ward on the 9th Oct. 1841, her husband Bryan Ward having died in her lifetime, she having only three children, the two sons and Rebecca, who married one Muggleton, and secondly one Laxton. That on the 30th June 1837 15a. 3r. 4p. were awarded by the Inclosure Commissioners to Rebecca Ward in lieu of her copyhold rights and the lands directed by the Act to be inclosed. From the death of Rebecca Ward on the 9th Oct. 1841 up to the death of Bryan Edward Ward on the 12th May 1862 (a period of upwards of twenty years), the defendants Robert Ward and Bryan Ward occupied the entirety of the estates as joint owners without paying any rent (except the quit rents), or making any acknowledgment of title to any person, and without any claim being made by any other person to any part, or share of or in the said estate. That Rebecca Laxton, the only daughter and last surviving child of Rebecca Ward, died in August 1862. That from the death of Bryan Edward, her son John Thomas Ward, and the defendant Robert Ward, continued to occupy the entire estate as joint owners without paying rent (except quit rents) or making acknowledgment, or any person making a claim. That John Thomas Ward by his will, dated in July 1867, devised all his real estates to his wife Caroline Ward (the plaintiff) in fee, and all his personal estates (subject to debts, &c.) to her absolutely, and appointed her sole executrix. That John Thomas Ward died in January 1869, leaving the plaintiff surviving, who proved his will in April following; and by the 10th paragraph of the bill that since his death and to the present time the defendant Robert Ward and the plaintiff had continued and now were in the possession and enjoyment of the said copyholds as joint owners. That the customary heirs of the said Robert Lenton at his death were his three daughters, Mary the said Rebecca Ward, and Jane. Mary was twice married, and had issue first two daughters only, who both died, and, secondly, an only son, William Brown. That Mary Brown died in 1811 intestate (having survived her second husband), and leaving William Brown her customary heir. That he married and had issue a son, William Brown, who died an infant, aged five months, in 1820, and a second son William Brown (the defendant), who on his death intestate he left his customary heir, and also customary heir of Mary Brown. The bill then alleged the deaths of Rebecca Ward (intestate as to real estate), of her eldest son, and of her second son, intestate as to real estate, and leaving the husband of the plaintiff his customary heir. That questions had arisen regarding the rights and shares of the several parties in the copyholds; the defendant William Brown claiming as customary heir of his father or of his grandmother, and as one of the customary co-heirs of the testator's widow, to three equal undivided one-sixths; whereas the plaintiff insisted, and it was the fact, that she and the defendant Robert Ward were entitled by reason of such possessions of Robert Ward and Bryan Edward Ward, and John Thomas Ward, and of the plaintiff, and of the Statute of Limitations, in equal shares to three equal undivided one-fourths in the said copyhold property, and the defendant William Brown to the remaining one equal one-fourth, and the bill prayed a declaration of right and partition as above.

Cole, Q. C., and *Horsey*, in support of the demurrer, for Robert Ward and William Brown, insisted that the particulars of the title alleged must be shown:

Cartwright v. *Pulteney*, 2 Atk. 350;
Potter v. *Waller*, 2 De G. & Sm. 417;
Bolton v. *Bolton*, 19 L. T. Rep. N. S. 298; L. Rep. 4 Eq. 296, note to *Slade* v. *Barlow*.

Where the legal estate is in question, that cannot be made the subject of an ejectment or partition. The plaintiff's case was founded solely on the statute, and confined to one-third. In 1841 two persons were in possession—one as owner and the other as a stranger as to this one-third—*i.e.* Robert Ward as customary heir, Bryan Edward Ward as a stranger. Therefore, occupying till May 1862, they acquired a title under the statute, and the bill alleging them jointly entitled in fee on the death of Bryan Edward Ward, the one-third survived to Robert Ward; but then it was alleged that his son, John Thomas, continued to occupy with Robert Ward jointly, and therefore it was useless to talk of the statute. On the death of John Thomas, therefore, Robert continued sole owner; and by the allegations of the bill the plaintiff only alleged a title in herself, not showing how she was in possession, and the title therefore centred in Robert Ward.

Glasse, Q.C., and *Townsend*, in support of the bill, contended that the defendants, one as occupier and the other as a stranger, could not join in a demurrer to a bill for a partition. The demurrer must be allowed of both or none. Joint ownership was not joint tenancy, and, being copyhold, there could be no disseisin, except as to the lord. One being in possession rightly, the other wrongfully, there could be no joint tenancy; and from 1841 there was adverse possession by those under whom the plaintiff claimed, and a continuing title; and the bill was filed with the consent of one of the demurring defendants. If there was only a *prima facie* title, it might be necessary to go to law; but then, as in *Bolton* v. *Bolton* (*sup.*), and *Slade* v. *Barlow* (*sup.*), the court would retain the bill for

a year. The words "equal moiety" showed that there could not be a joint tenancy. There was uninterrupted possession since 1841, and the statute barred both the remedy and the rights.

Cole, Q.C., was heard in reply.

The VICE-CHANCELLOR.—The allegations in this bill place matters in a great state of confusion. I have seldom seen anything less clear. I need not say that I shall not allow this demurrer, unless I consider that the plaintiff is not entitled to any relief on the allegations in the bill at the hearing. This is a bill for a partition and sale, and that the rights, interests, and shares of the parties may be ascertained and declared under the direction of this court. The case set up was one of adverse possession. I cannot overlook the tenth paragraph of the bill, which I can only read as an allegation that the plaintiff and Robert Ward had continued and now were in possession as joint owners in fee, and, if so, the right of the plaintiff to a partition was a matter of course; but the bill goes on with allegations which raise doubts on the subject. Now, with respect to a suit for partition, what is the practice? It is an inquiry what are the respective rights, and upon the result of that inquiry the plaintiff may turn out to be entitled at the hearing, and, if so, if there is a chance of that it is impossible to allow the demurrer. It may be that the court will not make a decree, but allow the plaintiff to try the case by an action; but it may be otherwise, and it is impossible to say, therefore, that she may not be entitled to some relief. I agree with Mr. Cole that it is for the plaintiff to say what the title is; but, even if she should be put to the legal remedy, the practice is not to dismiss the bill, but, as was decided in *Bolton* v. *Bolton* (*sup.*), by Vice-Chancellor Stuart, which was confirmed by the Lords Justices on appeal, to retain it for a year, in order that the plaintiff may take such proceedings as he may deem necessary to establish his title. The same point came before Vice-Chancellor James, in *Slade* v. *Barlow* (*sup.*), and he followed *Bolton* v. *Bolton* (*sup.*), and directed the bill to be retained for a year, with liberty to the plaintiff to bring an action. Now it may be at the hearing that the court will dismiss this bill; but I cannot see that sufficiently clearly to allow the demurrer. It must therefore be overruled in the usual way.

Solicitor for plaintiffs, *Robert Southee*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Nov. 3 and 4, and Jan. 12.

KNOX v. TURNER.

Grant of annuity to secure a loan—Assurance on grantor's life—Policy effected by grantee with grantor's money—Repurchase of annuity—Grantee's right to policy.

Where the grantor of an annuity upon repurchase of the annuity, and the extinction of all his obligations to the grantee, filed a bill to have delivered up to him a policy of assurance effected on his life by and in the name of the grantee, but with the money of the grantor;

The court, following the decision in Gottlieb *v.* Cranch, *dismissed the bill, but without costs.*

Observations on Gottlieb *v.* Cranch, 4, *De G. M. & G.* 440.

The question in this case was as to the right of a grantor of an annuity upon repurchase of the annuity to have delivered up to him a policy of assurance which had been effected on his life by the grantee, under these circumstances:—

By an indenture dated the 26th June 1839, and made between the plaintiff, Brownlow William Knox, of the one part, and William Turner, deceased, of the other part, after reciting (*inter alia*) that the plaintiff had contracted with the said William Turner for the absolute sale to him of an annuity of 318*l.* sterling to be paid to him the said W. Turner, his executors, administrators, or assigns, during the life of the plaintiff, but repurchasable upon the terms thereinafter expressed, and that the sole and *bona fide* consideration to be given for the purchase of the said annuity was the sum of 3999*l.* sterling; and reciting that upon the contract for the sale and purchase of the said annuity of 318*l.* it was agreed that the same should be secured by an assignment unto the said W. Turner, his executors, administrators, and assigns, upon the trusts and with the powers thereinafter contained of the dividends to become due during the life of the plaintiff from certain sums of stock to which he was entitled under his marriage settlement. And reciting that upon the contract for the sale and purchase of the said annuity it was further agreed that the same should be secured by a judgment to be entered up against the plaintiff at the suit of the said W. Turner, his executors, administrators, and assigns, by means of a warrant of attorney thereinafter recited. And reciting that in pursuance and further performance of the said recited agreement the plaintiff by his warrant of attorney had authorised his attorneys to suffer judgment to be entered up against him for the sum of 7998*l.*, money borrowed, besides costs of suit, and that judgment was intended to be forthwith entered up against the plaintiff under the authority of the said warrant, subject nevertheless to such defeasance as therein contained and thereinafter noticed. The dividends and interest of the said sums of stock were assigned to the said W. Turner, his executors, administrators, and assigns upon certain trusts for securing payment of the said annuity. And the plaintiff for himself, his heirs, executors, and administrators covenanted with the said W. Turner, his executors, administrators, and assigns, that he would at any time thereafter, when required by the said W. Turner, his executors, administrators, or assigns, personally attend at any office or offices of insurance in London or Westminster for the purpose and to the end that a policy or policies of insurance might be obtained by and at the expense of the said W. Turner, his executors, administrators, or assigns on the life of him, the said plaintiff. And further that he the plaintiff should not nor would at any time during the continuance of the said annuity go on the seas or in any parts beyond the seas, or enter or engage, or be employed in actual service in any military or naval capacity, without giving to the said W. Turner, his executors, administrators, and assigns, as early notice thereof as might be, and that in case the said W. Turner should have previously insured, or should insure, any sum or sums of money not exceeding 3999*l.* on the life of the plaintiff, and should pay any additional rate of insurance by reason of the plaintiff's going on the seas, &c., he, the plaintiff, his heirs, executors, or administrators, should reimburse the said W. Turner, his executors, administrators, or assigns, such sum or sums. And it was thereby declared and agreed between the said parties to the deed that the said warrant of attorney and the judgment to be entered up under and by virtue of the same, and also the deed itself were given, and to be entered up in consideration of one and the same sum of 3999*l.*, and not for securing several annuities of 318*l.*, and that no execution should be issued upon the judgment to be entered up as aforesaid until or unless the whole or part of some half-yearly or other portion of the said annuity thereby secured, or intended so to be, should be in arrear for twenty-

one days. And it was thereby further declared and agreed that in case the plaintiff or his assigns should, at any time after the expiration of one year from the date of the said deed, be desirous of repurchasing the said annuity, and should pay unto the said W. Turner, his executors, administrators, or assigns, the said sum of 3999*l.*, and also every sum of money which should be then due and owing for or on account of the said annuity, together with a proportionate part of the same annuity, if requisite, up to and inclusive of the day of paying the same; and likewise should pay unto the said W. Turner, his executors, administrators, and assigns, all such sums of money as should be then due and owing to them respectively, for or on account of such costs, charges, and expenses, as respectively should have been advanced, paid, or incurred, in or about the execution of the trusts aforesaid, or in, or about recovering, or enforcing payment of the said annuity, when in arrear, or in or about the payment of any such extra rate of insurance as aforesaid, then and in that case the said W. Turner, his executors, administrators, or assigns, should and would accept the said sum of 3999*l.*, as and for the price of re-purchase of, and satisfaction for the said annuity, and immediately after such re-purchase, the said annuity should cease and determine, and the said dividends, interest, and annual proceeds respectively thereby assigned, or intended so to be, should be re-assigned unto the plaintiff, or his assigns, and satisfaction should be acknowledged on the judgment to be entered up under the aforesaid warrant of attorney. Yet so that every or any such act, deed, matter, or thing, should be at the cost and charges in all things of the plaintiff, his heirs, executors, administrators, or assigns.

Contemporaneously with the execution of the above deed, judgment was entered up, upon a warrant of attorney, against the plaintiff, pursuant to the provisions contained in the deed.

The plaintiff, by his bill, alleged that the above transaction, although in form a grant of an annuity, was in fact a loan of 3999*l.* at interest; that it was agreed between himself and Turner that an insurance on his life should be effected in the name of Turner, but at his, the plaintiff's cost, as part of the security of the annuity, and that the amount of the annuity should be, and the same was fixed so as to include the amount of the premiums of the assurance. That accordingly either before, or contemporanously with, the execution of the deed, a policy of assurance on his (the plaintiff's) life for 4000*l.* was effected in the Legal and General Assurance Office in the name of Turner, but at his (the plaintiff's) cost, and that he (the plaintiff) paid, in advance, the premium for such assurance, amounting with duty to 112*l.* 3*s.* 4*d.*

William Turner died in Jan. 1867, and by his will dated 8th May 1865, he appointed his widow, the defendant Mary Anne Turner, his executrix. Shortly after her husband's death the widow assigned all her interest under the deed of June 1839, and in the policy of assurance, to the defendants James Richard Philip Hoste and Montague Turner.

On the 30th April 1868, the plaintiff repurchased the annuity, and thereupon the defendants re-assigned to the plaintiff the dividends interest, and annual proceeds of the said sums of stock, and caused satisfaction to be entered up upon the said judgment.

The plaintiff alleged that previously to, and as one of the terms of such repurchase, he required the defendants to assign to him the policy of assurance, which, with the bonuses, was now of the value of about 2110*l.* At first the defendants were willing to comply with this request, but subsequently they claimed to be entitled to keep the policy. Eventually it was arranged that the repurchase should be completed without prejudice to the question as to whether the plaintiff or the defendants were entitled to the policy.

The plaintiff further alleged that he had duly paid the annuity, including the premiums of the assurance on his life, up to the time of the repurchasing of the annuity, and he charged that the policy, the moneys thereby assured, and the bonuses thereon were in equity his property.

The bill prayed for a declaration that plaintiff was entitled to the policy, the moneys thereby assured, and the bonuses thereon. That the defendants might be decreed to assign and make over to the plaintiff the said policy, moneys, and bonuses, and that they might be restrained from surrendering, selling, or disposing of the same. That in case the defendants should have surrendered the said policy, moneys, and bonuses to the assurance office, then that they might be decreed to pay to the plaintiff the money received by them for such surrender, and that they might in the mean time be restrained from disposing or dealing with, or applying such money, or any part thereof, to or for their own use or purpose, and might be ordered forthwith to pay the money so realised for such surrender into court to the credit of the cause, to await the decision of the court, and that they might pay the costs of the suit.

The defendants by their answer denied the plaintiff's allegation that the transaction, though in the form of a grant of an annuity was in fact a loan of 3999*l.* at interest, or that it was agreed between the parties that, as part of the security for the same, an assurance on the life of the plaintiff should be effected in the name of Turner at the plaintiff's cost, or that the amount of the annuity was fixed so as to include the amounts of the premiums of such assurance. They admitted that the plaintiff had duly paid the annuity up to the time of the repurchase, but they denied that he paid any of the premiums of the assurance, or that the annuity included the same. They admitted that at the time of the repurchase of the annuity, the plaintiff required them to assign to him the policy and the moneys thereby assured, and the bonuses thereon, but they denied that they had then, or at any time, expressed their willingness to comply with the requisition.

Greene, Q. C, and *W. H. Townsend*, for the plaintiff, argued that although the transaction was in the form of a grant of an annuity, it was simply a loan on a security. No other construction could be put upon the terms of the deed, and, in point of fact, if the relationship of debtor and creditor did not exist between the parties, Turner could have had no insurable interest on the plaintiff's life: (14 Geo. 3, c. 48.) The debt had been paid off, and it followed, as a matter of course, that in the absence of any express contract to the contrary, the policy, one of the securities for the debt, must be delivered up to the debtor: (*Courtenay* v. *Wright*, 2 Giff. 337.) The defendants made it part of their case that the whole expense of effecting and keeping up the assurance had been borne by Turner, but the evidence, on the contrary, clearly showed that the policy had been effected at the plaintiff's cost, and that extra payment had been exacted from him for the purpose of paying the premiums. They also cited:

Drysdale v. *Pigott*, 8 De G. M. & G. 546;
Freme v. *Brade*, 2 De. G. & J., 582;
Lea v. *Hinton*, 5 De G. M. & G. 823.

Dickinson, Q. C. and *Bedwell*, for the defendants, contended that the plaintiff in order to succeed must show that a contract existed between himself and the grantee of the annuity that he was to have

the benefit of the policy after repayment of the money advanced by the grantee: (*Law* v. *London Indisputable Life Policy Company*, 1 K. & J. 223.) The deed contained no such contract, and there was none. The transaction was not a loan, but the purchase of an annuity. The ordinary relationship of debtor and creditor did not exist between the parties. By the terms of the deed there was no liability on the part of the grantor to repay the money advanced, but he was simply bound to pay the annuity; and there was no obligation on the grantee to effect the assurance. The case could not be distinguished from *Gottlieb* v. *Cranch*, 4 De G. M. & G. 440, which decided that where the grantee of an annuity assures the life of the grantor, the policy effected is the property of the grantee. Moreover, the plaintiff must fail on another ground. He was no party to the contract on the policy; there was no privity between him and the assurance office, and a contract on a policy of life assurance was not a contract of indemnity: (*Dalby* v. *India and London Life Assurance Company*, 15 C. B. 365.) It had been said that extra payment was exacted from the grantor for the purpose of securing and indemnifying the grantee against any expenses that he might be put to in effecting the policy. This the defendants denied. But assuming it to be the fact, it would not deprive the grantee of the full benefit of the policy. It was optional with him to have sold it any time before the redemption of the annuity, and if he had done so the grantor could not on redemption have claimed the proceeds of the sale. The policy was now of considerable value, and if it were to be delivered up to the grantor it would really amount to his receiving back a portion of the annuity which he had contracted to pay.

Greene, Q. C. in reply.

Jan. 12.—The VICE-CHANCELLOR.—This case is not distinguishable from the case of *Gottlieb* v. *Cranch* (*sup.*). If that case is to be considered as an authoritative decision, the duty of the court now is to dismiss this bill. In the present case, as in the other, the question was as to the right of the grantor of an annuity, upon the repurchase of the annuity, and upon the extinction by payment of all his obligations to the grantee, to have delivered up a policy of assurance effected by the grantee pursuant to a stipulation binding on the grantor but not on the grantee. If the case of *Courtenay* v. *Wright* (*sup.*) had been brought before the Court of Appeal, the objections there suggested as to the decision in *Gottlieb* v. *Cranch* might perhaps have been considered, and might perhaps have been removed on satisfactory grounds, if they are not well founded. In the present case, as well as in *Courtenay* v. *Wright*, the arguments took a wider range, and the question was discussed on grounds beyond those which appear in the report of *Gottlieb* v. *Cranch*. In the latter case the argument was cut short, and the instruction to be derived from the report is confined to the expression of strong and clear opinions, without the support of any argument, except that founded on the option given to the grantee as to the application of the money supplied by the grantor. What seems to me unsatisfactory as to the authority of that case is that it was assumed and stated by the court to be a general and undisputed rule that, where the grantee of an annuity insures the life of the grantor, the policy effected belongs to the grantee. There is certainly no trace of any such general rule. If there were such a rule, as all arguments are silenced by a peremptory rule, the question presented for the decision of the court need not have been argued. It was, however, upon the ground of the option in the grantee to apply the money of the grantor in effecting the policy that the decision was rested. There would be great force in the argument founded on the option were it not that the terms of the transaction and the contract show that the extra payment was unquestionably exacted for the purpose of securing and indemnifying the grantee at the expense of the grantor. The option which the grantee had of retaining the extra payment for his own benefit without effecting the policy is only the option of another mode of indemnity. The argument that the grantee might at his option sell the policy at any time before redemption, and that the grantor could not on redemption claim credit for the amount produced by the sale of the policy, is a very powerful argument to show that the policy is not a security for the benefit of the grantor. Certainly, if the grantee exercised his option in that way he would seem to exercise a legitimate option of destroying any right of the grantor. In this respect the policy, if it be a security held at all for the benefit of the grantor must stand on a different footing from an ordinary security as to which there can be no such option. But there remains the question whether the grantor can be treated as having no interest in the policy which he supplied money to effect, if the grantee has not exercised the option of selling it. This question seems to be the same which arises on the option in the grantee not to effect any policy at all; and both questions must be resolved on considering the effect of the proviso for repurchase as part of the general transaction, and the reciprocal rights under the whole contract. It has been argued that the grantor and grantee of an annuity of this kind do not stand in the relation of debtor and creditor. Considering the covenants and obligations of the deed, it is impossible to sustain this proposition. What is really meant is that the grantor is not a debtor for the price of the annuity, because he is not bound to repay the price, and that the repayment by repurchase is optional. But if he exercises the option of repurchasing, he has repaid the grantee and has extinguished his debt and obligation for payment of the annuity, and both parties are restored to their previous rights. The equity of a debtor who extinguishes and satisfies the claim of his creditor is to get back all securities exacted from him for the obligation which he has discharged. But it is said that the policy of assurance is not a security because its existence was optional, and its existence and nature as a security so peculiar that not only its creation but its continuance was in the option of the creditor, who, while he remained unpaid, might have sold it for his own benefit without being accountable for the profit. None of these circumstances deprive the policy of its character as a security. It is, however, said that if it be a security it never was the property of the debtor, but is property created by the creditor out of his own money and for his own benefit. The force of that argument seems to be destroyed by the consideration that, in point of fact, and according to the terms of the contract, the debtor supplied the money which purchased the security, and was compelled by the contract to assist in effecting the security. Property purchased with money supplied by the debtor and obtained by his active concurrence, which concurrence he was bound by the contract to give for securing the creditor, is no less a security because the creditor was not bound to procure the security, and after he procured it might, during the subsistence of the debt, sell the security without being liable to account for the proceeds. When the debtor exercises the right of re-purchase, and extinguishes all his obligations to his creditor, and finds the creditor in possession of the security obtained with his money, and at his expense, and by his concurrence, why is the creditor to retain

such a security, so obtained, when all his rights as a creditor are satisfied? Why is the equity of the debtor to have the security restored to be denied in such a case? In *Gottlieb* v. *Cranch* the argument, which was stopped in the appeal court, was very ably urged in the court below by the counsel for the grantee of the annuity. It mainly turned on the want of privity of the grantor as being no party to the contract on the policy. The same argument was urged in the present case, and supported by reference to the decision of the Exchequer Chamber in *Dalby* v. *India and London Life Assurance Company* (*sup.*), which decided that the contract on a policy of life assurance is not a contract of indemnity. That is very true, as between the parties to the policy; but where the policy is effected by a creditor on a contract with his debtor, who is no party to the policy, but supplies the money and the premiums, it is an entirely different question, and unless there be some stipulation to the contrary as between the debtor and creditor, it is a security and an indemnity. And as to privity, if it be part of a written contract between a debtor and his creditor that a policy shall be effected, and money sufficient to pay the premiums be contracted to be supplied, and is supplied by the debtor, it is impossible on any true view which has yet been shown to say that a debtor who has according to the contract concurred in effecting the policy and supplied the money to effect it, is a stranger and not privy to a policy effected on such a contract, or less interested in it when effected, because the creditor had an option not to have effected it, and an option while his debt was unpaid to sell it for his own benefit. If neither option be exercised, and the security at the time of payment is found in the creditor, the debtor's right seems clear, unless it can be shown to be no security at all. A security which a creditor is not bound to obtain, cannot be less a security when it is actually obtained. Nor can the debtor whose money is invested in purchasing the security be less interested in it because his creditor was not bound so to invest it or to preserve it. No true view can be taken of the question which depends so much on the optional nature of the contract unless there is embraced in the view the circumstance that the stipulation for redemption is also an option. The payment of the debt by redemption is no less an absolute satisfaction and extinction of the creditor's rights because it is optional than his right to the security which becomes absolute if he has not exercised any option to destroy it—if, in fact, he exercised the option to take it and to expend the money supplied by his debtor in preserving it. To assume that the question is decided by treating the policy as the property of the grantee of the annuity is to argue on the equivocal meaning of the word property. That he has a property in the security is clear enough, but that his property can be considered absolute and unqualified where it is created by contract between the debtor and the creditor, and created by moneys which the debtor was bound to supply for the purpose, does not seem to me to have yet been proved by any sufficient argument. A peremptory rule would make argument unnecessary. But no such peremptory rule as was assumed by the Court of Appeal in *Gottlieb* v. *Cranch* is anywhere recorded. In *Courtenay* v. *Wright*, the cases of *Lea* v. *Hinton* (*sup.*), and *Drysdale* v. *Pigott* (*sup.*), were considered and discussed. They are in some degree distinguished from *Gottlieb* v. *Cranch*. But the latter case is so entirely similar to the present, that if it is to be overruled, it must be overruled by the Court of Appeal. I have endeavoured to explain the difficulty I have felt as [illegible] principle involved in the decision, in the hope [illegible] the question occurs again before the Court of Appeal, there may be a more full judicial consideration and exposition of the doctrine. In the mean time, for the reasons which I have stated, it is with dissatisfaction and reluctance that I feel bound to dismiss the bill in the present case. It must stand dismissed, but without costs.

Solicitor for the plaintiff, *Henry Smith.*

Solicitor for the defendant, *Montague Turner.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET, Esq., and Hon. ROBERT BUTLER, Barristers-at-Law.

Tuesday, Dec. 21, 1869.

ALCOCK *v.* GILL.

Affidavit of documents—Further affidavit—Document referred to in an ex parte examination—Costs.

A railway company having been made defendants to a suit, an affidavit as to documents was made by their secretary, who was not a defendant. The company answered, and the bill was reamended, whereupon the secretary made a second and a third affidavit as to documents. He was then examined by the plaintiffs, ex parte, on their behalf, before the examiner; and in the course of such examination deposed to the possession of certain documents not mentioned in his affidavit.

Upon summons by the plaintiffs, that the company might be ordered to make a further affidavit accounting for the documents referred to by the secretary in his examination:

Held, that the application was irregular, and summons dismissed with costs.

The expression of Selwyn, L.J., in Wright *v.* Pitt (*L. Rep.* 3 *Ch.* 811), *that "such suspicion must be founded on the pleadings and affidavits" refers only to the affidavits as to discovery of documents, not to the general pleadings and affidavits in the cause.*

When a summons is dismissed with costs, the costs will, as a general rule, include all the costs, both of the adjournment and in chambers.

This was a summons adjourned from chambers, on behalf of the plaintiffs, Henry Alcock and Robert Barr, that the defendants, the Great Western Railway of Canada, might be ordered to make a further affidavit as to documents, accounting for the documents mentioned and referred to by the secretary in his examination in the cause before the examiner; and certain papers in his custody relating to a foreclosure suit in 1860 against the Detroit and Milwaukee Railway Company, and relating to the decree in that suit, and the letters of explanation relating to the same papers, also mentioned in the examination; and that the usual directions might be given.

The plaintiffs sued on behalf of themselves and all other the subscribers for free land shares of the Detroit and Milwaukee Railway Company in England, whose shares had not been returned; and the bill prayed for a declaration that the London trustees were bound not to dispose of any of the sums subscribed by the plaintiffs and other subscribers for free land shares until the transfer of 50,000 acres of land, and other arrangements had been completed, and the whole number of 20,000 free land shares allotted.

The bill was filed on the 3rd June 1865; in 1866 the Great Western Railway of Canada were made defendants.

On the 24th Sept. 1867 Mr. Brackstone Baker, the secretary of the railway company (who had not been made a defendant) made an affidavit as to documents in the possession or power of the company.

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On the 29th Nov. 1867 the company filed their answer, in which they said they were willing to make, by their proper officer, the ordinary affidavit as to the documents in their possession.

On the 21st Dec. 1868 the bill was re-amended and on the 11th March 1869 Mr. Baker made a further affidavit as to documents.

On the 28th June 1869 he made a third affidavit as to documents.

This summons was supported by an affidavit sworn the 3rd Nov., 1869, by a clerk to Messrs. Linklater and Co., the plaintiff's solicitors, who deposed that on the 6th Aug. previously, Mr. Baker, upon being examined *ex parte* on the part of the plaintiffs, before one of the examiners of the court, deposed that he had in his custody certain papers relating to the foreclosure suit, in 1860, against the Detroit and Milwaukee Railway Company, and relating to a sale under a decree. Deponent said he received them from time to time, no doubt, and they were accompanied by letters of explanation.

Upon the plaintiff's counsel proceeding to read this affidavit,

James Kaye (with him *Fry*, Q. C.), on behalf of the defendants, objected to its being read, on the ground that it was an affidavit in reply to an affidavit of documents, which, according to the established practice, the court would not allow.

Kay, Q. C., and *J. W. Chitty* for the application.—The rule is well settled that if it appears from any evidence in the suit that a person has documents and refuses to produce them, the court will order him to make a further affidavit. [The VICE-CHANCELLOR.—You have examined this gentleman, not as secretary of the company, but as your own witness. If the company make an affidavit through their secretary, and you choose to examine the secretary as a witness, have you any authority to say you can use the depositions? Can you call a public officer as a witness for the purpose of getting discovery from the company?] It is impossible to separate a man into two individuals. The case is the same as if Mr. Baker himself, the defendant to the suit, had put in an insufficient affidavit of documents, and then had himself been examined as defendant, after replication filed. The rule as to production of documents prevails through all stages of a cause, up to decree, after decree, and all through the suit. In *Noel* v. *Noel* (1 De G. J. & S. 468) Lord Justice Turner said he saw nothing in the Act to preclude the court from requiring more than one affidavit as to documents. In that case his Lordship thought there was enough to raise "a reasonable suspicion," that the defendant had further documents which might help the plaintiffs to make out their case.

Upon *Kay's* proceeding to read the affidavit, *Kaye* again objected that the statement was obtained from the witness *ex parte*, and the time for publication of the evidence had not yet arrived.

The VICE-CHANCELLOR said he thought it was irregular; the witness had been examined *ex parte*. The court could not look at his examination, because it was not time for it, and yet the court was asked to listen to some account of that evidence which was given by somebody who was not present.

Kay.—The publication is for our protection, not for that of the other side.

Fry.—We object to the depositions being published.

Kay.—His statement is made upon oath; it is not a mere hearsay conversation. In *Noel* v. *Noel* the further affidavit was made on a summons, as appears from the report. See also

Westminster and Brymbo Colliery Company (Limited), v. *Clayton*, 9 L. T. Rep. N. S. 534;
Wright v. *Pitt*, L. Rep. 3 Ch. 809; 19 L. T. Rep. N. S. 79.

It would be only doing justice to the parties to the cause, and not only violating no rule, but following the rule as to the balance of convenience which has been laid down by the court, to order this gentleman to make a further affidavit.

The VICE-CHANCELLOR.—The defendants, the company, and this gentleman, their secretary, are the best judges of what is most desirable for themselves. I am not going, as a benefit to them, to force them to make any affidavit. It seems to me that this application is a mere experiment, which the case of *Wright* v. *Pitt*, L. Rep. 3 Ch. 809, ought to have prevented being made. The rule seems to me to be clearly laid down by Selwyn, L. J. I quite agree with him that an unfortunate expression was used by Turner, L.J., in *Noel* v. *Noel*. You have a right to look at the whole thing—the pleadings and affidavits, that is to say, the pleadings and affidavits given by way of discovery, and the affidavit of documents, for the purpose of seeing whether there is anything upon the face of them to show whether by slip or otherwise, the discovery is not complete. To recur to the illustration which I have adopted throughout. Suppose a man refers to a schedule of documents and says it contains six documents, and it turns out there are only five. If it appears from the answer or affidavit that there is something further in his possession, then you ask for further discovery; but to accede to this summons would be simply to say that you can cross-examine upon an affidavit of documents. The mere fact that you call the man nominally as an *ex parte* witness, cannot make any difference. The real truth is, that you have called this gentleman, and you have cross-examined him as to the statement made in his affidavit. It is a violation of the practice, and the result is that the summons must be refused, with costs to be paid by the applicants.

Fry asked for the costs of the whole of the summons.

Kay said that was not the usual practice. The court usually gave merely the costs of the adjournment.

The VICE-CHANCELLOR.—I mean in future when I refuse a summons with costs, to do it wholly. I assume that the chief clerk would refuse it with costs. Until I have some reason to the contrary, I shall give the whole costs from the beginning.

Solicitors for the applicants, Messrs. *Linklater*, *Hackwood*, and *Addison*.

Solicitors for the company, Messrs. *Maynard*, *Son*, and *Co*.

Tuesday, Jan. 18.

HEALD *v.* WALLS.

Family arrangement—Bill—Declaration as to right of parties.

A. and B. were tenants in common of an estate in fee. A. in 1842, devised his moiety to B. for his life, with remainder to C. in fee, and devised the residue of his estate to B. in fee. C. died, living A., leaving D. her heir-at-law. B. and D., assuming that C. was originally entitled to the moiety intended to be devised to her, and that such her title had descended on D., entered into a family arrangement on that basis. In pursuance of that arrangement, B. devised his own moiety upon certain trusts for the benefit of D. and his

family, and devised the residue of his estate to the defendants. A bill was filed by mortgagees of the property in question, to ascertain the rights of all the parties thereto:

Held: That the moiety of A. which was erroneously assumed to belong on his death to D., as the heir-at-law of C., passed under the residuary devise in the will of B., and was dealt with accordingly.

The plaintiffs in this suit were mortgagees of the shares and interests of John Bridge and William Bridge (hereinafter mentioned) in the subject-matter of the suit.

The facts of the case were as follow:

John Heaton and Thomas Heaton were, in the year 1842, seised as tenants in common in fee of a piece of land and nine cottages, situated in the Scholes at Wigan. John Heaton, by his will, dated 3rd June, 1842, devised his moiety or share of the lands and cottages to his wife, Mary Heaton, for her life, and after her decease to his brother, Thomas Heaton, for his life, and after his decease to his sister, Jane Dickinson, the wife of William Dickinson, and to her heirs and assigns for ever. The testator devised all the rest, residue, and remainder of his estate and effects, whatsoever and wheresover, to his brother, Thomas Heaton, his heirs, executors, administrators, and assigns for ever, and appointed his wife and the said Thomas Heaton trustees of his will. The testator's wife, Mary Heaton, died in the lifetime of the testator. His sister, Jane Dickinson, also died in his lifetime, leaving John Bridge her heir-at-law. John Heaton, the testator, died on the 16th Nov., 1857. It was the belief of all parties interested under the will of the said John Heaton that, according to the true construction of that will, the devise to Jane Dickinson in fee in remainder after the death of Mary Heaton and Thomas Heaton did not lapse by reason of the death of Jane Dickinson in the lifetime of the testator, but that that moiety passed, under that devise, to John Bridge as the heir-at-law of Jane Dickinson, subject to the life interest of the said Thomas Heaton. Acting upon that belief, and considering that the other children of Jane Dickinson would not take any interest in the moiety so devised, Thomas Heaton, shortly after the death of the testator, John Heaton, proposed to John Bridge that he (John Bridge) should execute a deed by which that moiety should be settled upon John Bridge and his brothers and sisters, William Bridge, Mary Taylor, and the defendants, Thomas Bridge and Martha Widdows, in equal shares. As an inducement to John Bridge to accede to that proposal, Thomas Heaton agreed that he would make a will devising the other moiety of the same premises in such a manner that John Bridge and his said brothers and sisters should be entitled to the whole of the said cottages and premises in equal shares.

Accordingly, by a memorandum of agreement dated the 23rd day of December, 1857, and made between John Bridge of the one part, and the defendants Henry Walls and Thomas Taylor of the other part, after reciting the will of the said John Heaton, "and that John Bridge had become entitled to the said moiety on the death of the said Thomas Heaton, as heir at law of the said Jane Dickinson," John Bridge agreed to convey to the defendants Henry Walls and Thomas Taylor all his share and interest of and in the said premises, upon certain trusts therein, and in the indenture next hereinafter stated. That agreement was duly executed by John Bridge in pursuance of the aforesaid arrangement, and with the full consent and concurrence of Thomas Heaton.

[illegible] indenture dated the 3rd day of May 1858, [illegible] in pursuance of the aforesaid arrangement, and between John Bridge of the first part, the defendant Thomas Bridge, William Bridge, the defendants Martha Widdows (then Martha Bridge), and Mary Taylor of the second part, after reciting the will of John Heaton, the deaths of the testator's wife and of Jane Dickinson, and that "John Bridge was then entitled to the remainder in fee simple in one moiety of the said premises, expectant on the decease of the said Thomas Heaton," it was witnessed, that in consideration of the natural love and affection which John Bridge had towards the said Thomas Bridge, William Bridge, Martha Bridge, and Mary Taylor, John Bridge granted and conveyed to the defendants Henry Walls and Thomas Taylor, their heirs and assigns, all that the remainder in fee simple expectant and to take effect in possession upon the decease of the said Thomas Heaton, of and in all that said moiety of and in the said cottages and premises, and all the estate, right, and interest of the said John Bridge therein; to hold the same unto the said Henry Walls and Thomas Taylor and their heirs, upon trust that they the said Henry Walls and Thomas Taylor, and the survivor of them, and the heirs or assigns of such survivor, should, immediately on the said remainder taking effect in possession, and thenceforth, hold and apply the same, and the rents and profits thereof, upon certain trusts for the benefit of John Bridge, Thomas Bridge, William Bridge, Martha Widdows (then Martha Bridge), and Mary Taylor, and their issue.

Thomas Heaton, by his will dated the 18th day of May, 1858, devised "his moiety of the land hereinbefore mentioned, with the said nine cottages or dwelling houses thereon," to the said Thomas Taylor and Henry Walls, their heirs and assigns, upon certain trusts in the said will mentioned for the benefit of John Bridge, Thomas Bridge, William Bridge, Martha Bridge, and Mary Taylor, and subject thereto in trust for sale and application of the proceeds as therein mentioned. The said testator devised and bequeathed all other his real and personal estate to the said Mary Taylor and Martha Widdows absolutely. And he appointed the defendants Thomas Taylor and Henry Walls trustees and executors of his said will. Thomas Heaton died on the 7th March, 1860. The questions in the cause were whether, according to the true construction of the will of John Heaton, and by virtue of the indenture of the 3rd of May, 1858, the moiety of the said cottages and premises comprised in the will of the said John Heaton was vested in the trustees of the said indenture of the 3rd of May, 1858, upon the trusts thereof? or whether it had passed under the residuary devise in the will of Thomas Heaton to the defendants Martha Widdows and Mary Taylor?

The bill in the suit accordingly prayed that the rights and interests of all parties claiming under the said indenture of the 3rd day of May, 1858, might be ascertained and declared, and the trusts thereof carried into execution. The bill also prayed that the trusts of the will of Thomas Heaton remaining unperformed might be performed and carried into execution, and the rights and interests of all parties therein and thereunder ascertained and declared by and under the direction of this Court.

E. Fry, Q.C. and *North*, for the plaintiffs, having stated the facts, were stopped by the Court.

E. E. Kay, Q. C. and *C. Russell*, for the defendants contended that the only ground on which the agreement could be said to be invalid was that there was no consideration, or no sufficient one, for it. But *Williams* v. *Williams*, L. Rep. 2 Ch. 294, showed that in family arrangements consideration was always implied, and moreover, that if a sufficient motive for the arrangement is proved, the court will

not consider the quantum of the consideration. In *Stapilton* v. *Stapilton*, 2 White & Tud. 745, it was held that an agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards came out that the right was on the other side, is binding, and the right does not prevail against the agreement of the parties; for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement. The following authorities were also cited for the defendants:

Stewart v. *Stewart*, 6 Cl. & Fin. 911;
Can v. *Can*, 1 P. Wms. 723 & 727;
Naylor v. *Lynch*, 1 Sy. & St.;
Stockley v. *Stockley*, 1 Ves. & B. 30.

The VICE-CHANCELLOR.—The decree in this case must be to the following effect: First of all declare that the half part or moiety representing the interest of Thomas Heaton in the cottage and premises in question in the suit passed by the specific devise in that testator's will, and that the remaining one half part or moiety which John Bridge erroneously assumed to be his, and dealt with accordingly, passed by the residuary devise in the same will. Then there must be a decree that the trusts of the will, so far as they remain to be performed, may be carried into execution. Direct an inquiry whether any debts of the testator remain unpaid, and take an account of rents and profits since his death, not disturbing settled accounts. Subject to that declaration and decree, and to those inquiries and accounts, I am of opinion that the bill in this suit must be dismissed, but without costs, so far as the same alleges wilful default. The further consideration in the cause must be adjourned, with liberty to all parties to apply to the court as they may be advised.

Solicitors, *Norris* and *Allen*; *Greatorex*; *Gregory*, *Rowcliffe* and *Rawle*.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Monday, Nov. 29 1869.

(Present: the Right Hon. Lord CHELMSFORD, Sir JAMES W. COLVILE, and Sir JOSEPH NAPIER.)

THE OWNERS OF THE SHIP *Woburn Abbey* (apps.), *v.* THE OWNERS OF THE STEAM-TUGS *Superb* AND *Conqueror* (resps.)

THE WOBURN ABBEY.

Salvage—Direct and indirect services — Respective merits of salvors—Appeals as to amount of salvage awarded.

A collision having occurred between two ships, the W. A. and the B. T., two steam-tugs, the S. and the C. went to their assistance. In order to extricate the W. A. it was necessary that the B. T. should be towed away from her, and the pilot of the W. A. requested the captain of the S. to perform this service. The S. then towed the B. T., but the ships still dragged. The C. arrived about half an hour after the S., and the two tugs together held the B. T. and the S., and prevented the ships from dragging further.

Held (affirming the decision of the Admiralty Court), that the benefit received by the W. A. from the services of the S. was a direct and not an indirect benefit: (The Annapolis, 4 *L. T. Rep. N. S.* 418, *distinguished.*) *That there was no substantial difference between the merits of the S. and the C., and therefore that they were entitled to equal amounts of salvage. In appeals as to the quantum of salvage awarded, the court will not interfere with or moderate the amount awarded by the court below, unless that amount was exorbitant or excessive, though the Court of Appeal may be unable to affirm the principle on which the amount was assessed, or would have awarded a less amount than that given by the court below:* (The England, 20 *L. T. Rep. N. S.* 46, *followed.*)

This was an appeal from a decision of the Court of Admiralty pronounced on the 14th Jan. 1869.

In the court below the respondents sued the ship of the appellants called the *Woburn Abbey*, to recover salvage earned by the respondents during a collision between the ship *British Trident*, and the said ship of the appellants, the *Woburn Abbey*.

The case was heard before the judge of the Admiralty Court, assisted by Capt. Pelley and Capt. Close, Elder Brethren of the Trinity Corporation, on the 17th, 18th, and 19th of Dec. 1868.

The circumstances of the earning of the salvage are thus stated in the petition of the respondents filed in this cause in the court below.

The *Superb* is an iron steam-tug belonging to the port of Liverpool, fitted with disconnecting engines of 65-horse power nominal, but working up to 150-horse power, and has an ordinary crew of eight hands all told. She is of the value of 3000*l.* or thereabouts, and is kept up by her owners at a very great expense, expressly for the purpose of rendering assistance to vessels in distress as well as for general towage purposes, and has been recently fitted up with new boilers, wheels, and feathering floats.

The *Conqueror* is an iron built steam-tug belonging to the port of Liverpool, fitted with disconnecting engines of 70-horse power nominal, but working up to 170-horse power, with feathering floats, and is of the value of 3500*l.*, and is kept up by her owners at a great expense expressly for the purpose of rendering assistance to vessels in distress, as well as for general towage purposes, and has an ordinary crew of eight hands all told.

The *Woburn Abbey* is a ship of about 1572 tons register, and was on the night of the 29th Oct. 1868, deeply laden with rice, and lying anchored in the Sloyne, in the river Mersey.

The *British Trident* is a ship of about 1300 tons register, and on the night in question was lying at anchor in the Sloyne, in the river Mersey, to the southward of the *Woburn Abbey*, and was timber laden, with a heavy deck cargo.

About 11.45 p.m., while the steam-tugs *Superb* and *Conqueror* were lying at anchor in the Sloyne, in the river Mersey, those on board of them observed that the ships *Woburn Abbey* and *British Trident* were afoul and in collision, whereupon they slipped and buoyed their anchors and proceeded to the assistance of the said two ships.

The *Superb* arrived at the scene of collision first, and she found the *Woburn Abbey* at anchor with her head to the south, and the *British Trident* with her stern athwart of, and in collision with, the bows of the *Woburn Abbey*, the head of the *British Trident* being then about south-south-west. They were both dragging their anchors.

It was a 15ft. 2in. tide, and was high water about 10.28 p.m. At midnight and for some hours after, the ebb tide was running very fast and strong, and the wind was blowing a moderate gale from the WNW, with squalls and showers of rain and hail, and there was a nasty swell on the river.

There were several craft of different descriptions lying to the north, to the north-west, and to the north-east of the said two ships the *Woburn Abbey* and the *British Trident*, and they were dragging in the direction of some of them, and in particular in the direction of a large ship at anchor called the *Great Northern*.

The *Superb*, after great difficulty, on account of the eddy tide, got to the starboard side of the

British Trident, and asked the pilot on board of her if he wanted any assistance. And he said, "You had better go to the other ship," meaning the *Woburn Abbey*; "she is going to slip her chain." The *Superb* thereupon went to the *Woburn Abbey*, and those on board saw that her chain was under the keel of the *British Trident*, and that the two ships were about 100 yards from and to the south-east of the Halifax south mooring buoy, and dragging in that direction.

The captain of the *Superb* asked the pilot of the *Woburn Abbey* if he wanted any assistance, and thereupon the pilot said, "You had better go to the other ship and pull her from us," or words to that effect. He also said something to the effect that he was not ready or could not slip then.

Accordingly, the *Superb* was going to the *British Trident*, when the steam-tug *Resolute*, which had come up to the scene of the collision, being caught on her starboard side by the ebb tide, backed on the *Superb's* starboard side, and did her a very great deal of injury, and put the *Superb* in a position of great danger of being sunk.

The *Resolute* then got hold of the *British Trident* from the port bow, and commenced towing about south. The head of the *British Trident* had been, and was still, falling to the westward. During all this time both ships were dragging, and the *British Trident* was getting more and more broadside on to the ebb tide, which was running very strong.

The *Superb* then went close under the *British Trident's* port bow, and in doing so was obliged to put her engines out of gear at great risk, to enable her crew to get their own 9in. hawser on board the *British Trident*, which was at length accomplished after great difficulty, and it was made fast to the port bow of the *British Trident*.

The *Superb* was then ordered to tow ahead full speed, which she did after connecting her engines; this was about one a.m. The ships still continued to drag, though not so fast as they did before the *Superb* got hold, and about this time fouled the Halifax south mooring buoy, which they dragged with them.

After towing for about half an hour the steam-tug *Conqueror* came up and got hold of the *British Trident*, and assisted at towing at the said ship, the *Conqueror* being on the starboard side of the steam-tug *Resolute*, and by her aid the three tugs, after towing full speed for some time, held the *British Trident*, and prevented the two ships from dragging any further. The tide at this time was at its strongest ebb, and was very strong and powerful.

At about four a.m. the hawser of the *Superb* parted, and it was some time and with great difficulty, that it was again made fast to the port bow of the *British Trident*. The tugs then continued pulling until between four and five a.m., when the *British Trident* was pulled so far away from the *Woburn Abbey* that the latter ship was enabled to slip her chain, which she could not accomplish before, and was then taken away by two other tug-boats.

Before and during the time the *Superb*, *Conqueror*, and *Resolute* were towing, the ships had some of their sails set to endeavour to get clear of each other, and about from one a.m. to two a.m. the *Woburn Abbey* and the said ship *Great Northern* burned blue lights, and at the time the *British Trident* was towed away from the *Woburn Abbey* the two ships *Woburn Abbey* and *British Trident* were so close to the *Great Northern* that they must have come into collision with her in a very few minutes, and the *Great Northern* must then have been dragged from her anchor.

Just before the *Conqueror*, got hold of the *British Trident*, and while endeavouring to do so, the steam-tug *Royal Alfred*, one of the boats that subsequently towed the *Woburn Abbey* away after she had slipped her anchor, came into collision with the *Conqueror*, doing her great damage and putting her in great peril of being sunk.

The *Superb* lost two tides in recovering the anchors she had slipped when she first went to the assistance of the colliding ships.

The judge of the Admiralty Court awarded 350*l.* apiece to the *Superb* and the *Conqueror* for the services rendered by them to the *Woburn Abbey*.

Dr. *Deane*, Q. C., and *Clarkson* for the appellants.

Aspinall, Q.C., and *Temple* for the respondents.

Judgment was delivered by Lord CHELMSFORD.—There are two questions which arise on this appeal: first, whether the respondents are entitled to any salvage at all; and secondly, if they are, whether the amount awarded to them is excessive. The only question upon which their Lordships have felt any hesitation, and upon which they desired to hear the respondents, was whether the *Superb* and the *Conqueror* were entitled to any salvage services upon the principle upon which the claim against the *H. M. Hayes*, in the case of the *Annapolis* (1 Lush. 300; 4 L. T. Rep. N. S. 418) was rejected; that is, whether the services which were rendered to the *Woburn Abbey* were direct or only indirect services. Now, with regard to the case of the *H. M. Hayes*, it was perfectly clear there that the services were indirect, because the *Storm King*, which had been hired to tow the *Annapolis*, in the course of the performance of her services, brought the *Annapolis*, or the *Annapolis* drove upon the bows of the *Golden Light*; the vessels were entangled together, and they approached the *H. M. Hayes*, riding at single anchor. When at a short distance from her, the *Storm King* and another steamer called the *Lioness*, which had come to the assistance of the *Annapolis*, towed the *Annapolis* clear of the *Golden Light*. The *Storm King* continued towing the *Annapolis* for a few minutes, and then, leaving her in charge of the *Lioness*, went to the assistance of the *Golden Light*, which vessel meanwhile had fouled the *H. M. Hayes*, and with her had drifted to within a short distance of H.M.S. *Majestic*. No doubt the two vessels, the *Golden Light* and *H. M. Hayes*, were foul of each other. "Two small steamers had hold of the *Golden Light*, but were unable to hold her." The service which the *Storm King* rendered was, by coming to the assistance of the two steamers, and taking the *Golden Light* away from the *H. M. Hayes*, without any intention whatever of rendering services to the *H. M. Hayes*, which vessel, however, received benefit by being relieved from the *Golden Light*, which had fouled her. It is clear, therefore, that no other view could be taken of that case, than that the services which were rendered by the *Storm King*, were services which were rendered to the *Golden Light*, though indirectly beneficial to the *H. M. Hayes*. Now, what were the services in this case? It appears to their Lordships that the *Woburn Abbey* received a direct, and not an indirect benefit from the services of these steam-tugs. The two vessels, the *Woburn Abbey* and the *British Trident*, were in close contact with each other, and in such a position that it was impossible for the *Woburn Abbey* to slip her chain, because the *British Trident* was upon her. In order, therefore, to extricate the *Woburn Abbey* from her position, it was necessary that the *British Trident* should be taken off from her, and that was the particular service which it was suggested on the part of the *Woburn Abbey* should be performed by the *Superb*, the first steam-tug that came up. The captain of the *Superb* states that he went to the *Woburn Abbey*, "and I asked the pilot whether he would want any assist-

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ance; to which he answered, 'Not at present, we are not ready to slip, we can't, owing to the chains; but go to the next ship, the *British Trident*, and get hold of her, and try to get her from us; tow her clear.'" The same account pretty nearly is given by the pilot of the *Woburn Abbey*, who said, "I told him (the captain of the *Superb*) that we were not prepared for towing away, and that he could do no good at towing of us, but that he had better go to the other ship, and tow her up." The difference is striking between the case of the *H. M. Hayes* and the present. It is quite clear that the *Woburn Abbey* could not possibly have been extricated from her position except by relieving her from the *British Trident*, and this the pilot asked the captain of the *Superb* to do. In the case of the *H. M. Hayes*, the *Storm King*, without being asked to do anything to or for her, went and assisted the two other vessels which were not sufficient to take the *Golden Light* away; but the very thing which was absolutely necessary for the steam-tug, the *Superb*, to do for the safety of the *Woburn Abbey*, or at least, in order to extricate her from danger, was that the *British Trident* should be removed from her, and this service the *Superb* was expressly requested to perform. That being so, it is quite clear that the benefit she received from the services of the *Superb* was a direct, and not an indirect benefit. With regard to any alleged distinction between the *Superb* and the *Conqueror*, the *Conqueror*, it appears, did not come up until after the *Woburn Abbey* had been made fast to the Halifax buoy; but, at the same time, at that very moment, the *British Trident* was upon her, just in the same way, and the *Superb* could not have taken the *Trident* away without the assistance of the *Conqueror*. There is, therefore, no substantial difference between the merits of the two parties, the *Superb* and the *Conqueror*. If they are entitled to any salvage at all, they are entitled, their Lordships think, to an equal amount of salvage. It being then established that the liability to salvage exists, the only remaining question will be as to the amount which has been awarded by the learned judge. In the course of the argument attention was called to the principle upon which their Lordships deal with appeals from the judgment of the judge in salvage cases (see *The Chetah*, 19 L. T. Rep. N. S. 621; *The England*, 20 *Id.* 46); and their Lordships cannot see that there is anything so excessive or exorbitant in the amount of salvage which has been awarded by the learned judge as to induce them to interfere with and moderate that amount. Under the circumstances, therefore, their Lordships will recommend to her Majesty to affirm the sentence of the learned judge, and to dismiss the appeal with costs. Their Lordships do not mean to say that they affirm the principle upon which the damages were assessed; nor, perhaps, if they had been called upon to determine originally, that they would have awarded as large a sum as the judge has given, but they act entirely upon the principle which has governed the committee in cases of this kind, and say that they cannot interfere with the award which has been made.

Judgment affirmed.

Proctors for the appellants, *Toller* and *Sons*.

Proctor for the respondent, *Ayrton*.

Irish Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

THE CITY OF LONDONDERRY.

Tuesday, Feb. 9, 1869.

(Before O'BRIEN, J.)

*Bribery—Paying money to get a voter out of prison—Agency—*17 *&* 18 *Vict. c.* 102, *s.* 36*—Authority to canvass—Employment of cars—Payment of money at the revision courts—Costs—The Irish Representation Act* 1868 (31 *&* 32 *Vict. c.* 49), *ss.* 8, 12*—Effect of illegal voting on costs.*

On the trial of an election petition the question of agency as regards the responsibility of a candidate for the acts of his agent, under sect. 36 *of* 17 *&* 18 *Vict. c.* 102, *is not to be considered as it would be in an action for penalties brought against the candidate for the corrupt practices of his agent.*

P. was appointed by the Liberal Registration Society to conduct the business of the revision, which shortly preceded the election. D., the candidate, subscribed liberally to the funds of the society, and approved of P.'s appointment. The staff of the society, with P. at its head, was afterwards used in promoting the election. The committee of this society directed in a great degree the meetings of the electors, and D. on one occasion communicated directly with P. by letter with reference to the election:

Held, that P. was the agent of D., so as to render him responsible for bribery by P.

A charge of bribery cannot be sustained on mere suspicion, but must be supported by thoroughly satisfactory evidence. Dicta of Martin B. in the Warrington petition, 19 *L. T. Rep. N. S.* 812, *and of Willes, J., in the* Lichfield petition, 20 *L. T. Rep. N. S.* 11, *approved.*

McC. was arrested for debt and lodged in gaol the day before the polling day by a political opponent. On the polling day, when the election was virtually decided, two supporters of the respondent, McI. and H., went to the gaol, paid the amount of the decree, and openly conducted McC. to the booth, where he voted for the respondent:

Held, that this payment unexplained would have been an act of bribery, differing from the Ashburton case, 2 *W. & B.* 1.

Held, further, that the Ashburton case *cannot be regarded as establishing the rule that money paid to get a voter out of prison in order to "enable" him to vote should not, under the above circumstances, be considered as money paid to induce him to vote, and therefore an act of bribery.*

McI. canvassed with the respondent uninvited, and the respondent made several attempts to get rid of him. He also, at the invitation of the audience, seconded a resolution at a meeting of electors at which the respondent was present. On one occasion, also, the respondent requested McI. to leave a document for him at a certain place:

Held, that McI. was not an agent of the respondent, so as to affect him by acts of bribery, either expressly or by implication. The definition of agency in the Norwich case, 19 *L. T. Rep. N.S.* 618, *and the* Windsor case (*sup.*) *approved, but held not to apply.*

Section 12 *of the Irish Representation of the People Act* 1868 (31 *&* 32 *Vict. c.* 49), *declares the payment of money for the conveyance of voters to the poll to be illegal:*

Held, that such payment did not vitiate the election; but semble, that excessive payments for cars to induce the

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owners to vote would be bribery which would affect the election.

By section 8 of 31 & 32 Vict. c. 49, the paid employment of voters is made illegal and their votes may be struck off on a scrutiny. It was alleged that voters employed at the preceding revision received more than a fair remuneration for their services, and that the excessive payments were made corruptly:

Held, on the evidence, that the payments were not excessive; but, semble, that even had they been, it would not have been bribery, the voters so paid having long previously promised their votes to the respondent (Bradford petition, No. 2, 19 *L. T. Rep. N. S., per Martin, B.*)

The voting by several of those who voted for the respondent having been illegal, and time having been expended and costs incurred with reference to such votes, the time consumed being not less than two days:

Held, that the respondent was not entitled to receive his costs attending the inquiry on those two days.

O'Brien, J.—At the close of this protracted inquiry, and after having fully and carefully considered the evidence, it is now my duty to state the conclusion at which I have arrived. The petition contains several charges, some of actual bribery and undue influence by Mr. Dowse himself, or with his knowledge and consent, others of bribery by his agents, and others of intimidation. No evidence has been offered in support of the charge of intimidation, and the charges of bribery and undue influence by Mr. Dowse himself, or with his knowledge or consent, were, in the fullest manner, abandoned by petitioner's counsel, both in their opening statement and in their reply. It is, indeed, difficult to imagine conduct more to his honour or credit than that which Mr. Dowse pursued from the beginning of his canvass for the purpose of preventing any bribery or other corrupt practice. The law, however, for obvious reasons of public policy, provides that a candidate shall, so far as the validity of his election is concerned, be answerable for the corrupt practices of his agent, though committed without his knowledge or consent. And I do not concur in the doctrine so strongly urged by Mr. Palles, that, in considering the responsibility of a candidate under the 36th section of the Act of 1854, for the acts of his agent, we are to consider the question of agency as we would in an action for penalties brought against the candidate for the corrupt practices of his agent. That statute and the Elections Act of last session, recognise the distinction between the case of acts of bribery committed by the candidate himself, or with his knowledge and consent (which may be called a case of personal bribery), and the case of bribery committed only by the agents of the candidate, but not with his knowledge and consent. In the former case, the acts of bribery not only vitiate the election, but also disqualify the candidate from sitting in Parliament for seven years, and from voting and holding various offices. Whereas, in the latter case, the acts of bribery, besides vitiating the election, only disqualify the candidate from being again returned for the same constituency during the then Parliament. If, then, this question of agency was to be considered upon the principle contended for by Mr. Palles, the obvious intentions of the Legislature would, in my opinion, be defeated. I need not refer to the authorities on the subject, or to the decisions in various trials already held under the recent Act, which have been all uniform in that respect. In the present case most of the acts of bribery relied upon by the petitioners are alleged to have been committed by Peacock, and the first question which arises respecting them is, whether he was on agent for whose acts Mr. Dowse is to be considered responsible under the statute; and, in my opinion, he was. It appears to me that this is fully established by the evidence in the case. Mr. Dowse was the adopted candidate of the Liberal Registration Society; he subscribed largely to their funds; and Peacock was appointed by them to conduct the business of the last registration, with a view to the election that was immediately to follow. Mr. Dowse, though not actually a party to Peacock's appointment, subsequently approved of it, and we find that when the revision was completed, the funds and staff of that society, with Peacock as the principal of the staff, were, with Mr. Dowse's assent, used for the purpose of promoting the election, in the same manner as they had been employed for the purposes of the registration, and that various payments, first for the purposes of the revision, and, next, for the purposes of the election, were made by and through the hands of Peacock himself, out of moneys which had been given to him by this registration society. There is also the further fact that the committee of this society directed in a great degree the meetings of the electors, which were convened for the purpose of securing their support for Mr. Dowse; and again, we have the letter of Mr. Dowse to Peacock, which of itself would go far to imply that the relation of principal and agent existed between them. From these circumstances, therefore, I think it follows that Mr. Peacock should be considered as having been the agent of Mr. Dowse for the purposes of the election, so far as to render Mr. Dowse responsible under those two statutes for any bribery on the part of Mr. Peacock at the election. I have, however, next to consider a very different question, namely, whether any, and which, of the acts of bribery that are alleged to have been committed were, in fact, committed either by Mr. Peacock or by any other person who should be considered under the statutes as the agent of Mr. Dowse. And in entering upon this consideration, we should bear in mind that the charge of bribery, whether by a candidate or by his agent, is one which should be established by clear and satisfactory evidence. The consequences resulting from such a charge being established are very serious. In the first place, it avoids the election; and in the recent trial of the *Warrington Election Petition*, 19 L. T. Rep. N. S. 812, where the petitioner sought to avoid the election, not certainly on the ground of bribery, but on the ground of some illegality or irregularity in the proceedings, Martin, B. is reported to have stated that he agreed with what had been said by Willes, J. at Lichfield (20 L. T. Rep. N. S. 11), that before a judge upset an election he ought to be satisfied beyond all doubt that the election was altogether void. In the next place the 43rd and 45th sections of the Parliamentary Elections Act 1868, imposes further and severe penalties for the offence, whether committed by the candidate or by his agent. Mere suspicion, therefore, will not be sufficient to establish a charge of bribery, and a judge, in discharging the onerous and unpleasant duty imposed upon him by this statute, acting in the double capacity of judge and juror, should not hold that charge established upon evidence which, in his opinion, would not be sufficient to warrant a jury in finding the charge proved. In the present case the original bill of particulars contains fifty-one cases of alleged bribery and undue influence, and with respect to these, no evidence whatever was offered to sustain more than twenty-five of them. Three more were added by notice served shortly before the trial, and another by an order made by me during the trial, making in all about fifty-five cases. Mr. Palles opposed the making of that order, but I thought it my duty, under the Act, to afford every facility for investigating the validity of this election. With

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that view I made orders, whenever they were required by the petitioner's counsel, to compel the attendance of witnesses and the production of documents. Upwards of sixty witnesses have been examined for the petitioners, and the trial has extended to a greater length than I believe that of any other trial which has been had under the recent statute. I may here observe that no evidence was offered to support any of those four further cases which were added by the notice or under the order for amending the bill of particulars. [His Lordship discussed numerous cases of alleged bribery, which he found had not been sustained and proceeded.] The next charge to which I shall refer is that of the alleged bribery of Felix McCloskey, the circumstances of which are certainly very singular in their character. It appears that McCloskey had been arrested the evening before the polling-day under a civil bill decree for about 12*s.*, at the suit of Mr. Ramsay, a supporter of Lord Claude Hamilton, and that about half-past two or three o'clock on the polling-day Philip McIntyre, sen., and Mr. Hanna went to the gaol, and, after some conversation with McClosky, paid the amount of the decree, got McClosky discharged, brought him to the court house, where he voted for Mr. Dowse. This, therefore, was done openly, and at a period when, according to the evidence, the election was virtually decided in Mr. Dowse's favour, as he had then a majority which could not be got over. It was not only done openly, but it was done in the presence and through the instrumentality of Mr. Wilson and Mr. Mooney, the authorities of the gaol, by whom McClosky was discharged, and one of whom, at all events, was avowedly opposed to Mr. Dowse. I do not of course, use the word instrumentality to impute to those two persons any participation in the alleged bribery, but of course they must have known for what purpose all this was done; and, indeed, Mr. Mooney states that soon after McIntyre, Hanna, and McClosky had left the gaol, he followed them to the court-house, where the polling was going on, and which was not far from the gaol, and saw them returning from it, and that Hanna said, "they had made it all right." I need not go further into the facts of this cause, because I have no doubt that upon the evidence before me, unexplained, this should be deemed an act of bribery on the part of McIntyre and Hanna. The facts of this case are essentially different from those of the *Ashburton case* (reported in Wolf, and B. 2, p. 1), and which is referred to in Rogers "On Elections," p. 348. And I would not regard that case as establishing the rule, that money paid to get a voter out of prison, in order to "enable" him to vote, should not under the circumstances of this case, be considered as money paid to "induce" him to vote, and as therefore being an act of bribery. Every case must, of course, be governed by its own peculiar circumstances; but if any such general principle was laid down it would go far to afford a cloak for bribery, and the means of evading its penalties. The next question, however, is whether either Philip McIntyre, sen., or Hanna was the agent of Mr. Dowse, so as to render him responsible for this act of theirs. With respect to Hanna, there is no evidence at all to show who he was, or to show any connection between him and Mr. Dowse. With respect to Philip McIntyre, sen., however, evidence has been given that he attended some meetings and spoke at them (I shall presently refer to one meeting in particular); and with respect to his having canvassed for Mr. Dowse, the only evidence to establish his evidence on that ground was that of James Lowrie, who voted for Lord Claud Hamilton. He states in his evidence that on the second occasion of Mr. Dowse canvassing him, which appears to have been about the 5th Sept. he (Mr. Dowse) was accompanied by Mr. Dunne and Philip McIntyre, sen., that they were going to pass Lowrie's house, when McIntyre said to Mr. Dowse, "You will have to see Lowrie;" that they then went in at Lowrie's gate, and that after some conversation between Lowrie and Mr. Dowse (which implied that Lowrie did not intend to vote for him), Philip McIntyre said he thought it would be all right. There is not any other evidence in the case of any canvass by this Philip McIntyre in the presence of Mr. Dowse; and with respect to this transaction, Mr. Dowse stated on his examination that on the occasion of his second visit to the waterside (viz., about the 5th Sept.), he had gone there with Mr. Dunne and Mr. Thomas White for the purpose of canvassing, that about one hundred people joined him there, that Philip McIntyre, sen., whom Mr. Dowse had not previously known even by name, came up and asked him how he was; that Mr. White said, "Mr. Dowse, this is one of your supporters;" that Mr. Dowse replied, "Very well, I am glad to see you;" that Mr. Dowse then proceeded through the street, followed by about one hundred men, women, and children, and went into a house, which it appears was Lowrie's, that he asked Lowrie for his vote, and that while they were speaking on the subject, Mr. Dowse heard a voice say behind him, "Oh, he is sure to support you" (which is much the same as what Lowrie stated). Mr. Dowse further swore that on turning round he found the voice which he heard was that of Phillip McIntyre, senior, and that until then he did not even know that McIntyre was with him, or accompanied him to the house. He further states that he never authorised McIntyre to go with him or to canvass, and that after leaving Lowrie's house he saw a crowd still following him, with McIntyre among them; that he then had some conversation with Messrs. White and Dunne, and immediately afterwards asked McIntyre to leave some document for him in Foyle-street rooms, and that accordingly McIntyre went away to do so. It is true that Mr. Dowse made him his messenger on that occasion, but it is clear (as held by Willes, J. in the *Windsor case*, 19 L. T. Rep. N. S. 613) that the employment of a man as messenger is not sufficient to constitute him an agent. Mr. Dowse further states that, in about an hour afterwards, he returned to the same place, and found Phillip McIntyre there, who told him he had left that document in Foyle-street; that Mr. Dowse again spoke with Messrs. White and Dunne, and that in consequence of what he was told by those two gentlemen, he immediately went down to another house, and drove away on a car with Messrs. White and Dunne, leaving McIntyre behind him. Mr. Dowse was asked by his counsel, on examination, to state the purport of his conversation with Messrs. White and Dunne, but the petitioner's counsel objected to the question, and I ruled that the evidence of this conversation was not admissible. But whatever was the conversatian between them, it is manifest that in consequence of it Mr. Dowse was desirous to get rid of McIntyre; and he states that he did everything in his power to get him away, as he did not (to use Mr. Dowse's own expression) "want anyone to be foisted on him." He further states, that the occasion of this visit to Lowrie was the only one on which McIntyre was even with him on his canvass; that he never authorised McIntyre to canvass for him, and that he did not believe that he did canvass. Mr. Dowse also explained what passed at the public meeting on the 25th Oct. at Mr. White's stores, at which McIntyre spoke, and seconded one of a set of resolutions that were passed. He states that when the resolution was moved some one in the crowd addressed McIntyre by the name of "Phil," and called out to him to speak; that McIntyre then got up to speak, and

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second the resolution, but that there was no previous arrangement as to his doing so. It was proved by other witnesses that McIntyre spoke at other meetings in support of Mr. Dowse: but it appears to me that on the entire evidence there is no ground for holding that McIntyre was the agent of Mr. Dowse, so as to render Mr. Dowse responsible for his conduct in this transaction as to McCloskey. With respect to this question of agency, petitioner's counsel referred to the *Norwich Petition case*, 19 L. T. Rep. N. S. 618, in which Martin, B. made use of the expression, that "Hardiment's agency is proved to the hilt." But the circumstances of that case are essentially different from those of the present. Hardiment had been seen distributing money on the polling-day to a considerable amount, and it appeared that previous to that day, he and Mr. Stracey, and the sitting member's son had been, with others, appointed as canvassers; and that he and Mr. Stracey canvassed together on one day, having gone out together from the committee-room, and that Hardiment, with others, canvassed on another day, and there was upon the evidence no doubt but that Hardiment had been appointed one of the regular canvassers with the knowledge and consent of Sir H. Stracey, the sitting member. The decision in that case does not therefore apply to the present. The *Windsor case*, 19 L. T. Rep. N. S. 613, has also been referred to. Willes, J. does in that case lay down the general proposition that every person who canvassed for a candidate is to be considered as an agent; but he expresses his opinion on the subject in those accurate terms for which he is remarkable, and says, "I have already stated that authority to canvass (and I purposely used the word 'authority' and not 'employment,' because I meant the observation to apply to persons authorised to canvass, whether paid or not for their services) would, in my opinion, constitute an agent, and that authority for the general management of an election would involve an authority to canvass." There is no evidence of any such authority here from Mr. Dowse. He swears he never did give such authority, and what took place on the day of his canvassing, Lowrie would so far negative the existence of any such authority, express or implied. With regard to implied authority, it is to be observed that McIntyre was not even a member of the Liberal Registration Society, by whom Mr. Dowse had been adopted as candidate; I cannot concur in the opinion that any supporter of a candidate who chooses to ask others for their votes, and to make speeches in his favour, can force himself upon the candidate as an agent, or that a candidate should be held responsible for the acts of one from whom, as in this case, he actually endeavoured to disassociate himself. No candidate would be safe, if agency was to be established by the facts of the present case. On these grounds, therefore, I am clearly of opinion, that the agency of McIntyre for Mr. Dowse has not been established, and that accordingly the charge as to M'Closkey's case also fails. The next class of objections to which I shall refer is that relating to the employment of cars. It is not contended that Mr. Dowse, or his agents, violated the provisions of the 12th section of the Irish Representation Act of last session (31 & 32 Vict. c. 49), by paying money on account of cars for the conveyance of voters to the poll, which payment, though illegal, would not, of itself, vitiate the election; and it does not indeed appear in the evidence that any such money was paid by Mr. Dowse or his agents for the conveyance of voters. But the allegation is, that various sums were paid by Peacock, or some other person on behalf of Mr. Dowse, to several voters, who were car owners; that such sums were paid nominally on account of the hire of their cars, but really with the intention of inducing such voters to vote for Mr. Dowse; that such sums exceeded the reasonable charge for the cars, and that such payments were accordingly acts of bribery. The three cases relied on under this head are those of John M'Ivor, Henry Perry, and William Carlin, all of whom voted for Mr. Dowse. [His Lordship considered those cases, and found that they did not support the allegation.] The remaining cases of alleged bribery are those in which various sums of money were paid to voters for loss of time at the revision in September, and also to voters who were employed either for purposes connected with the election, or with the revision, for which they were employed for the registration society, and all which sums, it is alleged, exceeds in amount what was a fair, reasonable remuneration for their services, and were in fact paid for the purpose of inducing those voters to support Mr. Dowse. All those payments appear to have been made by Peacock, or by other persons by his directions, and it was admitted by counsel on both sides that the revision commenced on the 25th Sept., and lasted for five or six days, till early in October. The payments for loss of time at the revision were 10*s.* to George Paris, which I have already mentioned, 1*l.* to Patrick Conmen, and 10*s.* to John Devine, making altogether 2*l.*; and the payments for employments which were made to the voters as to whom bribery is charged were 4*l.* 15*s.* to Mr. Bernadotte Little, 4*l.* to John Quirk, 12*l.* 5*s.* to John Devlin, 2*l.* 7*s.* to Richard Griffiths, of which 7*s.* were for loss of time, 1*l.* 13*s.* 6*d.* to John Brown, 3*l.* 12*s.* 6*d.* to Andrew McLoghlen, and 5*l.*, already mentioned, to Deery; all said sums, together with the 2*l.* for loss of time, make together 35*l.* 13*s.* Mr. Hamilton has charged these payments to be the result of an organised and extensive system of corruption on the part of Peacock; well, and I refer to the amount of these sums not merely as showing that so far as the amount is concerned it affords no foundation for the charge of any extensive corruption, but also for the purpose of observing that although in Peacock's book, which has been so much relied on, and which I have carefully examined, there are about 250 entries of payments by Peacock, and although petitioners had access to all Peacock's books and papers which would show any further payments, yet the payments I have mentioned are the only payments relied on as the foundation of the charge of bribery or of any corrupt practice. I have to observe, with respect to the payments made to voters employed for Mr. Dowse for election purposes, as clerks, messengers, &c., and who voted for Mr. Dowse, that, under the 8th section of the Representation Act of last session (31 & 32 Vict. c. 49), such voters were guilty of a misdemeanor, and that upon a scrutiny their votes would have been struck off. That section, however, is not, and could not be, relied on in this case as of itself rendering the election void; but it is contended that those payments, and also the payments for loss of time at the revision court, were corruptly made: that they were excessive in amount, having regard to the services performed; and that they were made with the corrupt intention of inducing these men to vote for Mr. Dowse. With respect to payments for loss of time at the revision, the first I shall refer to is that of 10*s.* to George Paris. He swore that he lost four days at the revision, for which he only got that sum, which he complained of as too little, and it appears, both by his evidence and that of Mr. Dowse, that he had before the revision promised Mr. Dowse to vote for him. The next case is that of Patrick Cannen, who got 1*l.* for loss of time for four days at the revision; he swore that he voted for Mr. Dowse on principle, that he would have given him fifty votes if he had them, and that he would

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have voted for him without any compensation; that he was a carter and often got more than 5*s.* a day with his horse and car; Mr. Dowse stated also that Patrick Cannen had promised him his vote long before the revision. The next case is that of John Devine, who got 10*s.* for loss of time at the revision; he swore that his principles were those of Mr. Dowse; that he promised to vote for him on that account alone; that his promise had nothing to do with the payment of that money, and that he would have voted for Mr. Dowse if he had got nothing for his loss of time; and Mr. Dowse states that Devine had promised him upon the occasion of his second visit to the Waterside, which was on the 5th Sept., some weeks before the revision. As regards the payments of 5*l.* to Mr. Deery, I do not think that sum exceeded a fair remuneration for his services, or that he was employed in order to influence his vote. Mr. Dowse states that after July last, and some months before the employment, Deery had positively promised to vote for him. The next case is that of Bernadotte Little, who acted as a clerk at a salary of 30*s.* a week at the Liberal registration rooms from the 1st Nov. till after the election. For that he got a sum of 4*l.* 15*s.*, which, considering his position and the nature of his employment, cannot be regarded as excessive. Mr. Dowse states that Little promised him his vote in July, and Little swore that he never changed his intention of voting for him, and that his employment had nothing to do with his vote. The next case is that of John Quirk, who was paid 4*l.* for being in charge of the registration society's rooms in Foyle-street for one week, and at their rooms at the Waterside for three weeks. He was employed in the end of October and in November, and it appeared from Mr. Dowse's evidence that Quirk had promised to vote for him so far back as the 5th Sept. Quirk stated on his examination that he was formerly on the staff of the Derry Militia, and was discharged from it last August, and that in November, when he was in charge of the registration rooms, he was asked by Capt. Butler, the adjutant of the militia, whom he would vote for, and that he replied that he did not know yet, and that he was not then decided whom he would vote for. He also stated that he did not tell Capt. Butler he would vote for whoever gave him employment. He further stated that long previously to that interview and to his employment, he had made up his mind to vote for Mr. Dowse, and that his voting was altogether irrespective of his employment. Capt. Butler was then examined, and he stated that about a week before the election he asked Quirk whom he would vote for, and that Quirk replied he would vote for whoever gave him employment. There is, therefore, a contradiction between Capt. Butler and Quirk as to what passed at that conversation; but it is clear that whatever Quirk may have then told Capt. Butler, who had been his adjutant, he had previously promised to vote for Mr. Dowse. The next case is that of John Devlin, who was employed by Peacock as a clerk, as Mr. Little was, and at the same salary of 30*s.* a week, at the Liberal Association rooms, from before the revision till after the election. He was paid altogether the sum of 12*l.* 5*s.*; but it appears that for some weeks he was paid for each week only broken sums, viz., 25*s.* in one, 10*s.* in another, and 20*s.* for another week, showing he was only paid as he worked. These payments were certainly not excessive, and Devlin swore that he voted according to his principles; and that his employment had nothing to do with his vote; that he had promised Mr. Dowse long before he thought of being employed. Mr. Dowse also states that Devlin first promised him his vote in July, and afterwards again in September. Devlin also stated that, shortly before he was so employed as clerk, he had been in the employment of Messrs. Chrystal, who paid him 1*l.* per week, and a percentage on his collections, which together exceeded what he got from Peacock. The next case is that of Richard Griffith, who promised Mr. Dowse about the 6th Sept. to vote for him; he got 7*s.* from Peacock soon after the revision for his loss of time there for some days, and he afterwards got two payments of 1*l.* each for having been employed for two weeks before the election in watching and looking after voters. He swore that his employment or payment had nothing to do with his vote, that he voted according to his principles, and was determined to vote for Mr. Dowse long previous to his employment; and Mr. Dowse states that in July Griffith told him he would not be against him; and that afterwards, about the 6th Sept., Griffith told him he would vote for him. The next case is that of John Brown, who was employed by Peacock as a messenger for several days immediately preceding the election, at the rate of 3*s.* 6*d.* a day (which I do not think excessive), and got 1*l.* 13*s.* 6*d.* He states that he was determined, long previously thereto, to vote for Mr. Dowse; that money had nothing to do with his vote, and that he would not on any account have voted for Lord Claud Hamilton. Mr. Dowse states that Brown promised his vote first in July, and afterwards early in September, on the occasion of his second visit to Waterside. The last case I have to consider is, that of Andrew M'Laughlin, who was paid altogether 3*l.* 12*s.* 6*d.*, being at the rate of 1*l.* per week. He had been employed to watch voters for about three weeks before the election, and had lost some time at the revision court. It appears that in July, when he was first canvassed by Mr. Dowse, he only promised uot to vote against him, but that about six weeks before the election, when Mr. Dowse canvassed him again, he positively promised to vote for him; and McLaughlin also swore that he had intended from the very first to vote for Mr. Dowse, and that his principles agreed with those of Mr. Dowse. This is the last case of these payments which are alleged to have been made corruptly, as being only nominally for work, but as exceeding in amount the value of the work, and as made with a corrupt purpose. In considering these several cases, I cannot lose sight of the fact, that all of these men had originally in positive terms, and long previous to their respective employments, expressed their intention to vote for Mr. Dowse; that their political opinions agreed with his, and that there can be no doubt but that their natural feelings and inclinations, without any influence whatever, would have induced them to give him their support. In the course of the last week, upon the trial, before Martin, B., of the second *Bradford* petition (as reported in the *Times* newspaper of the 3rd inst.), some cases of giving refreshments to voters were proved and relied on as acts of treating under the 4th section of the Corrupt Practices Act of 1854. It appeared that some of the refreshments given were partaken of by electors who voted for Mr. Forster, the sitting member, and for Mr. Miall, and who had previously promised them their votes; and Martin, B., in stating why he did not think that the giving of refreshments to those voters came within the 4th section, is reported to have said, "They were not given in this case in order to be elected, because it was already known which way the men who had votes would vote; they were voters who had declared their intention to support Messrs. Forster and Miall." I think that these observations of Martin, B. bear upon the cases I am now considering. In order that a gift or promise of any money or employment to a voter should

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be held to be bribery within the meaning of the 2nd section of the Corrupt Practices Act 1854, the statute requires that such gift or promise should be given in order to induce such voter to "vote," or "refrain from voting," or "on account of any voter having voted, or refrained from voting." The men alleged to be bribed by the foregoing employments and payments had long previously promised to vote for Mr. Dowse; their political opinions and feelings agreed with his; and (as I have already stated) I see no reason to doubt that they would have voted for him whether or not they had been so employed or paid; considering, then, that the charge of bribery is one which requires to be satisfactorily proved, I cannot, sitting here as a juror, come to the conclusion that any of those promises, or employments, or payments to which I have referred, were made or given for any of the objects or purposes which are prohibited by that 2nd section, or which would render them acts of bribery. There is, however, a matter to which I have to refer, not connected with the report that I shall make to the Speaker as to the election being valid, but with what I shall have to decide on the question of costs. As a general rule, except there are special circumstances in the case, the costs of these petition proceedings would follow the result of the petition; but in this case, though the election was not avoided or vitiated by the fact that several electors, who were employed for Mr. Dowse's election, and were paid for such employment, voted for him, it is clear that their doing so was a violation of the provision of the statute to which I have already referred. And it may be that the fact of those payments appearing in Peacock's book might so far have called for inquiry, and induced to some extent the presenting of this petition. That consideration, however, would not, according to my present opinion, affect the entire of the costs of these proceedings. I have for these several reasons (which I have given at some length) come to the conclusion that none of these charges of bribery have been sustained, and I shall accordingly certify and report to the speaker, that the sitting member, Richard Dowse, Esq., whose return is complained of by the petition in this matter, was duly elected and returned to serve in Parliament for the borough of Londonderry; that no corrupt practice has been proved to be committed by or with the knowledge or consent of any candidate at said election; that upon the evidence before me it does not appear that corrupt practices have extensively prevailed at said election, and that there is in such evidence no reason to believe that corrupt practices have extensively prevailed at said election.

Feb. 16.—O'Brien, J.—When giving judgment in this case at the close of the trial, I reserved the question of costs. According to the general rule, the costs of these election petition proceedings should follow the result, but the 41st section of the statute shows that, under certain circumstances, such rule may properly be departed from, and it appeared to me that the fact of some of the persons who voted for Mr. Dowse having been employed on his behalf in various services for the election, and having been paid for such services, was a circumstance which might be considered as affecting, to some extent, the question of his right to costs. Under the 8th section of the Irish Representation Act of last session (31 & 32 Vict. c. 49), such persons were not entitled to vote, and were guilty of a misdemeanour for having done so, and it is clear that, on a scrutiny, their votes would have been struck off. In this case, however, it was not, and could not be, contended that the election should be declared void on the mere ground that the votes of those persons were illegal under the said 8th section; but petitioners contended at the trial, that having regard to the amount of such payments, the circumstances under which they were made, and to the nature and value of the services rendered by those voters, the payments to them should be considered as having been colourably and corruptly made for the purpose of securing their support, and as being acts of bribery. I was unable to concur in that conclusion, and (for the reasons I mentioned in my judgment at the trial) I did not think that the payments in any of those cases constituted an act of bribery; but I thought it requisite to consider how far the fact of such illegal votes having been given by persons paid for their services should affect my decision as to the costs of any portion of them. I have, since the close of the trial, carefully considered this question. The entries showing the payments to those voters are contained in Peacock's books; Peacock died on the 10th Dec.: the petition was presented on the 15th, and it appears from Mr. Neilson's evidence as to his letter to Mr. Dowse of the 12th Dec., and his interview with him on that day, that the petition had previously to that day been in actual course of preparation; and it further appears from Neilson's evidence that those acting for petitioners had not any access to Peacock's books till some time after the petition was presented. Under these circumstances, and considering the various other charges of bribery relied on by the bill of particulars, several of which were sought at the trial to be sustained by evidence that lasted a considerable time, it does not appear to me that, with respect to the general costs of the petition and proceedings, there is ground for holding that the respondent's right to them should be affected by any supposition that the petitioners, in presenting their petition, were influenced by the fact of these payments having been made, or for holding that the employment and payment of the voters in question should affect more than a portion of the costs of the trial, but, in my opinion, it does affect a portion of such costs. The voting of such persons was, as I have already said, an illegal act, which is expressly and for obvious purposes of public policy forbidden by the Legislature. At the trial some time was consumed, and the length of the trial was to some extent protracted by the evidence given as to the employment and payment of the voters in question; and I think that the petitioners should not pay to the respondent the additional costs which were caused by the time necessarily occupied in such evidence, and which would not have been incurred but for the fact of those persons having illegally voted. I have referred to the evidence for the purpose of ascertaining the portion of the costs of the trial which, in my opinion, should not (on the ground I have stated) be allowed to the respondent. The evidence relating to the employment and payment of the voters in question was given on different days, but occupied only a portion of each day; and the far greater part of each of those days was occupied in evidence as to other charges which were not sustained. I may observe that Deery was one of those persons, but the great portion of the time occupied by his examination related to the charge of Peacock having promised him 20*l.* for his vote, a charge which I considered to be altogether unfounded. The conclusion, then, at which I have arrived upon a review of the evidence is, that the time occupied by the evidence as to the employment and payment of those voters may properly be estimated at two days, but certainly did not exceed that period. Having thus, from what took place at the trial, the means of determining myself the length of time by which the trial was protracted by such evidence, I think it better that I should regulate the abatement of the respondent's costs by

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reference to that time than by a reference to the master on the subject. Such reference would necessarily, from the nature of the case, involve questions difficult for the master to determine, and would probably be attended with considerable delay and expense to the parties. I shall therefore declare that the respondent is not entitled to the costs of the day for either of two days of the trial, viz., the fifth and sixth days, on which the principal part of such evidence as to the employment and payment of those voters was given; and I shall declare that, with that exception, the petitioner shall pay to the respondent the costs of the petition, the trial, and the other proceedings therein.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs; Barristers-at-Law.

Monday, Jan. 14.

REG. THE MAYOR, &c. OF WIGAN.

Gaol—A borough having a quarter sessions sending its prisoners to a county gaol—Liability for its proportion of costs of enlarging the gaol.

Where a borough having a quarter sessions sends its prisoners to the county gaol, but not under any special contract, the council of the borough is liable to pay to the treasurer of such prison a proportion of the costs of any necessary enlargement of, or addition, to such gaol.

This was a rule calling upon the Town Council of Wigan to show cause why a writ of *mandamus* should not issue commanding them to pay the governor of the gaol at Kirkdale the sum of 1242*l.* 19*s.* 9*d.* for the conveyance, transport, maintenance, safe custody, and care of Wigan prisoners in the said gaol from the 1st Dec. 1867, to the 30th Nov. 1868, and if necessary, to make and levy a rate for that purpose.

By sect. 18 of the 5 & 6 Vict. c. 98 (An Act to amend the Laws concerning Prisons), it is enacted—

That in every borough to which a separate court of sessions of the peace hath been, or shall hereafter, be granted, or purported to be granted, and where the persons committed for offences arising within such borough, have been or shall hereafter be sent to any prison of the county in which such borough is situated, and that no special contract shall be subsisting between such borough and county relative to the said prisoners, the council of such borough shall pay or cause to be paid to the treasurer of such prison, or any other person appointed by the justices of the peace in general or quarter sessions assembled, for the county in which such prison is situated, the actual expense heretofore incurred, or hereafter to be incurred, in the conveyance, transport, maintenance, safe custody, and care of every such prisoner, according to the time for which each such prisoner shall have been or shall remain in custody there, at the average daily cost of each prisoner, according to the whole number of prisoners confined in the said prison, such average to be taken yearly, half-yearly, quarterly, or at such other intervals as the visiting justices of the prison shall from time to time determine, including in such expenses all salaries of officers, all expenses of repairs, alterations, additions, and improvements in or to the said prison, all sums paid to prisoners under any Act of Parliament, on their discharge or otherwise, and any other charge whatsoever on account of the prisoners confined in such prison; subject, nevertheless, to a proportional share of all deductions on account of the earnings of prisoners in the said prison, and of all sums of money received in aid of the rates levied for the maintenance of the said prison. Provided always that the payment by the council of any such borough of any such expenses incurred before the passing of this Act may be made by five yearly instalments, the first of such instalments to be payable within three calendar months after the passing of this Act, with interest at the yearly rate of four pounds in the hundred, to be calculated from the passing of this Act, upon so much of the said expenses incurred before the passing of this Act as shall remain unpaid until the whole shall be discharged.

It appeared that the borough of Wigan having a court of quarter sessions committed its prisoners to the Kirkdale gaol, which was the county prison for Lancashire, but not under any special contract. In consequence of the increase of prisoners the justices resolved upon making some additions to the gaol, which they did, providing thereby 132 new cells, a cook-house, bakery, wash-house, &c., and they charged the borough of Wigan with a proportion of the cost, which amounted to a certain sum, included in the amount mentioned in the rule.

Giffard, Q. C. and *Baylis* showed cause. The cost of enlarging the gaol ought not to be thrown upon Wigan, which has no control over it; the words of sect. 18 of the 5 & 6 Vict. c. 98, "expenses of repairs, alterations, additions, and improvements" should have a limited construction put upon them. [BLACKBURN, J.—It is naturally to be expected that when a gaol is altered for the general convenience of the boroughs that send their prisoners there, they should all contribute. COCKBURN, C. J.—It may be that the necessity for enlargement arises wholly in consequence of the increase of borough prisoners, and it would in such a case be exceedingly hard to make the county bear the entire cost.] There is no permanent expense incurred by the Wigan prisoners; the meaning of the section must be such expenses as are incurred by the maintenance of the prisoners. [LUSH, J.—You are entitled to share in the earnings of all the prisoners.] The section must be taken to mean only current expenses. The word "additions" may be fairly assumed to mean things such as new doors or windows, and could hardly have been intended to extend to a large and permanent addition to the gaol.

COCKBURN, C. J.—It would be indeed a strange thing that if, owing to a number of borough prisoners being sent to the county gaol, the prison is not large enough, the various boroughs which supply the prisoners should not contribute to the expense of the enlargement. The section of the Act of Parliament is certainly wide enough to include this liability, and I think the rule must be made absolute.

BLACKBURN, J.—I am of the same opinion, and quite agree that it would be exceedingly hard that if it becomes necessary, in consequence of an increase of borough prisoners, to enlarge the gaol, the borough should not bear a portion of the expense, and that the rural population should be compelled to sustain the whole. It is certainly for the justices to consider how they will raise the money, but it is clear that this borough is bound to contribute.

MELLOR and LUSH, JJ. concurred.

Attorneys for the Crown, *Sharpe* and *Co.*, 41, Bedford-row.

Attorneys for the defendants, *M. W. Peace*, Wigan.

Wednesday, Jan. 19.

THOMAS (app.), *v.* ALSOP (resp.).

Poor law—Order upon a husband to contribute to the support of his wife who had become chargeable— 31 *&* 32 *Vict. c.* 122, *s.* 33.

The jurisdiction of justices to make an order under sect. 33 *of the* 31 *&* 32 *Vict. c.* 122, *upon a man for the relief of his wife, who is living apart from him, is not ousted by his offer to receive her back and provide for her, it being for the justices to consider, under all the circumstances, whether or not the refusal of the wife to return to her husband's home is reasonable.*

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Where, therefore, the wife of the appellant some years ago left him in consequence of his ill-usage of her, and became chargeable to the union, and an application was made under sect. 33 *of the* 31 *&* 32 *Vict. c.* 122, *for an order upon the appellant to maintain her, and upon the hearing he offered to receive her back and provide for her, but the wife declined to go back on account of the ill-usage she had previously received, and the justices thereupon made an order upon him:*

Held, that they had jurisdiction to make it.

This was a case stated under the 20 & 21 Vict. c. 43, upon an order of justices made upon the appellant to pay a weekly sum for the maintenance of his wife pursuant to the provisions of the 31 & 32 Vict. c. 122, s. 33. The order itself directed the appellant James Thomas to pay to the relieving officer of Newton Abbott weekly 3*s.* for and towards the maintenance of the said Thirza Thomas for and during so long a time as the said Thirza Thomas required relief, or until the said order should be revoked.

The case stated that it was proved that the said Thirza Thomas lived with the said appellant from the date of their marriage—the 7th Aug. 1835—until the 17th March 1853, when, in consequence of the ill-usage she received from the appellant, she left his home and lived separate from him, and that she was then suffering from the said injury; that the said appellant had not contributed to the support of his said wife during the separation, but he applied to her to return to cohabitation; that she was then wholly unable to support herself, and required relief; that the said appellant, at the hearing of the case, through his attorney, offered to receive back the said Thirza Thomas at his house, and to provide for her; that the said Thirza Thomas declined to return to the said appellant from the brutality she had previously received from him, and medical evidence was called, and it was proved to our satisfaction that it would be injurious to the health of the said Thirza Thomas to return to cohabitation with the said appellant; that it was contended that as she refused to return, the justices had no jurisdiction to make an order. The question of law arising on the above statements for the opinion of the court is whether we had jurisdiction to make such order after the appellant had offered to receive and provide for his said wife in manner aforesaid.

By sect. 33 of the 31 & 32 Vict. c. 122, it is enacted that

When a married woman requires relief without her husband, the guardians of the union or parish, or the overseers of the parish, as the case may be, to which she becomes chargeable, may apply to the justices having jurisdiction in such union or parish, in petty sessions assembled, and thereupon such justices may summon such husband to appear before them, to show cause why an order should not be made upon him to maintain his wife; and upon his appearance, or in the event of his not appearing upon proof of due service of such summons upon him, such justices may, after hearing such wife upon oath, or receiving such other evidence as they may deem sufficient, make an order upon him to pay such sum weekly, or otherwise towards the cost of the relief of the wife, as after consideration of all the circumstances of the case shall appear to them to be proper, and shall determine how and to whom the payments shall from time to time be made, which order shall, if the payments required by it to be made be in arrears be enforced in the manner prescribed by the Act of the 11 & 12 Vict. c. 43, for the enforcing of orders of justices requiring the payment of a sum of money. Provided that such order may be at any future time revoked by the justices in petty sessions assembled, if they see sufficient cause for so doing.

McKellar appeared for the appellant.—The justices had no jurisdiction to make the order, as the appellant offered to take home and provide for his wife. She cannot be said to be deserted when he offers to take her back, nor can she require relief so long as the husband is willing to maintain her. To uphold this order would be in effect to give justices a power to decree a divorce. The words of the 33rd section are, "when a married woman requires relief." She can only require relief when she is deserted. [MELLOR, J.—The words are very general, and are not restricted to a case of abandonment by the husband. COCKBURN, C. J.—Is she not justified in such a case as this in staying away from her husband?] There must be desertion to render a wife justified in staying away from her husband: (*Cargill* v. *Cavill*, 27 L. J. 69, Prob.) The cases under the Vagrant Act are applicable. [LUSH, J.—The words of that Act are much more restricted, and there it has been held that the desertion must be wilful. MELLOR, J.—There is nothing in the present Act which speaks of the desertion being wilful.] The case says she required relief, not that she required it without her husband. The alleged cruelty, moreover, took place sixteen years ago. She cannot be said to be *chargeable* so long as she has a husband willing to support her. In *Rex* v. *Flintan*, 1 B. & Ad. 227, it was held that a husband was not guilty of desertion under the Vagrant Act (5 Geo. 4, c. 83), s. 3, where the wife left him. [LUSH, J.—There the wife had forfeited all right to support by her conduct.] In *Sweeny* v. *Spooner*, 32 L. J. 82, M. C.; 7 L. T. Rep. N. S. 623, it was held that to make a party liable as a rogue and vagabond for running away and leaving his wife chargeable to the parish, he must leave her wilfully, and reasonably believe at the time that she would become chargeable. Here he has not left her, but she has left him; and it is no excuse for her not returning that many years ago he ill-used her. It is not to be presumed he will again ill-use her, and should he do so she will have her remedy. [COCKBURN, C. J.—Can it be said that if a woman has been under a course of ill treatment all her life, and is in fear of being murdered, she is bound to go back because merely he offers to take her in?] It is the duty of the wife to live with her husband; and, if a divorce be desirable, the Legislature has provided for that.

Bere, Q. C. for the respondent, was not called upon.

COCKBURN, C. J. — Our judgment must be in favour of the justices. This Act of Parliament which we are called upon to construe, differs most essentially from the Vagrant Act under which the case of *Rex* v. *Flintan* was decided. By the 33rd section of the 31 & 32 Vict. c. 122, it is enacted that when a married woman requires relief without her husband, the parish authorities where she becomes chargeable may summon the husband to appear before justices to show cause why an order should not be made upon him to support his wife; and the justices after hearing the wife, or receiving such other evidence as they may deem sufficient, may make an order upon him to pay such sum weekly or otherwise towards the cost of the relief of the wife as, after the consideration of all the circumstances of the case, shall appear to them to be proper. Now the only difficulty which can arise in the application of the Act is, with reference to the particular facts. It appears that some years ago the wife left her husband's house in consequence of his violence. Now, no one doubts that a wife is justified in leaving her husband for such a cause, and moreover that she is justified in not returning so long as she has a reasonable belief of its continuance. Here, being in such a condition, she requires relief, and the parish officers come forward and seek for an order against the husband. Upon his appearing he gives as a reason against making the order, that he is willing to take back his wife, and that he is able to maintain her. Now the justices do not ask us to decide whether or not she was justified in leaving her husband, but whether or not the offer of the husband

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to take her back ousts them of jurisdiction? I think that it does not. It is for them to decide whether or not the wife is bound to return. If it is shown that she left his home under circumstances which justified her, they would have come to a right conclusion. All that the husband says is, if she will return, he will maintain her, but if she was warranted in believing a continuance of ill-usage, she would not be bound to return, and she would be justified in pledging his credit for her own support. Under these circumstances the justices were warranted in considering whether she could properly go back. I do not say how I should have decided upon the facts, but it is enough to say that the justices had jurisdiction to consider them. The words of the section are, in my opinion, sufficiently large to justify the justices in exercising their powers as they have done.

MELLOR, J.—I am also of opinion that the justices had jurisdiction to make the order in this case. They seem to have thought that the woman whose case they were considering was reasonably living apart from her husband, and that he was liable under the statute in question. Under the Vagrant Act, it is the wilfulness of the husband which constitutes the offence. That is a different state of things from that under the present Act which contemplates a case where a woman is chargeable by reason simply of not being supported by her husband; and upon the consideration of such a case it is a question of whether or not she is justified in living apart from him. The justices have decided this, and we ought not to interfere.

LUSH, J.—I entirely agree with the rest of the court in holding that the justices had jurisdiction notwithstanding the husband made an offer to take back his wife. I understand the justices to have found as a fact that the woman having been some years ago driven from his house, refused to return upon a well-grounded apprehension of further violence. Then, not having the means of living, she went to the parish. That being so, I think the justices were quite right in supposing that that was a state of facts which came within the operation of the statute.

Judgment for the respondent.

Attorneys for the appellant, *Vizard, Crowder,* and *Co.*, agents for *Square*, Plymouth.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Friday, Jan. 28.

LEVY v. RICE.

Change of venue—Preponderance of convenience—Forum rei of defendant.

In the exercise of a judge's discretion upon an application to change the venue in an action of contract, the advantage of holding the trial at the forum rei of the defendant, as well as the preponderance of convenience, should be considered.

F. M. White moved to set aside an order of Willes, J., rescinding a decision of Master Kaye, who, upon the defendant's summons, had refused to change the venue in this action from London to Liverpool.

It appeared from the defendant's affidavit in support of the summons that the action was brought to recover damages for an alleged breach of contract for the sale and delivery by him to the plaintiffs of 200,000 Calcutta sound seed bags at 6*d.* each, cash for delivery in 160 days, from the 8th July last, and for money alleged to be payable by him to the plaintiffs, and for interest and for money alleged to be due to the plaintiffs on accounts stated.

The plaintiffs declared on the 1st Jan. of this year, laying the venue in London, and claiming 5000*l.* as damages.

The defendant pleaded general issue and traverses of allegations, and before this application was made issue was joined.

The defendant stated that the cause of action, if any, arose at Liverpool, where the contract was entered into and was to be performed, and where the alleged breaches, and all the circumstances connected therewith, took place, and not in London. That he himself was a sack dealer at Liverpool, and that his thirteen witnesses, all of whom it would be necessary for him to call at the trial, lived at or near Liverpool.

The bags in question had been resold by public auction in Liverpool, and the defendant in this action was plaintiff against the present plaintiff in a cross action for not accepting the said bags, damages laid 6000*l.*, and venue Liverpool, to which the present plaintiffs had not yet pleaded.

The defendant's affidavit concluded with allegations that it would be more convenient and less expensive to have this action as well as the cross action tried at Liverpool; that the application was not made for the purpose of delay; that this was a pure Liverpool cause, and there was no reason whatever why it should be tried in London instead of Liverpool.

In answer, one of the plaintiffs who were a firm of bag and sack manufacturers in the City of London, made an affidavit, from which it appeared that the action was brought upon a written contract containing words, "at 6*d.* each, cash for delivery in 160 days from this date;" the contract being dated 8th July 1869. Since this date numerous letters were written and sent by the plaintiffs from their place of business in London to the defendant on the subject of the said sale. The plaintiffs and twenty-eight witnesses all being in London would have to be present at the trial; they alleged it would be more convenient and less expensive if this action were tried in London, and they believed it could be tried there earlier than at Liverpool.

White.—Upon the application at chambers, the learned judge said that although the preponderance of convenience might be in favour of the *venue* fixed by the plaintiff, and although there was a *prima facie* right on the plaintiff's part to choose the place of trial, yet he thought the defendant's place of business, according to sound jurisprudence, was that in which every action should be tried, if either party desired it, although contrary to the rule laid down in books of practice. He had not referred this summons to the court, but he said he wished some one would bring the matter before one of the Superior Courts. It has been frequently held that a plaintiff has a right to make his election where to lay the venue:

Lush's Practice, p. 414;
Jenkins v. *Hutton*, 7 Moo. 520;
Durie v. *Hopwood*, 7 C. B., N. S. 835.

BOVILL, C. J.—There is clearly a discretion in the judge to order a change of venue; and if in this case he entertained any doubt about the principles upon which he should exercise it, he might have referred the matter directly to us; as however he has not done so, we do not consider it right to interfere. If my brother Willes wished the course of practice to be discussed, we should grant a rule, but it seems he considered the matter carefully upon the affidavits, and acted contrary to the judgment of the master.

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White.—Will your Lordship allow this motion to stand over in order that I may apply to Willes, J. to refer this case to the court?

BOVILL, C. J.—We will not do that; for it appears that the question of comparative convenience was entered upon at chambers: and we cannot say that the learned judge exercised his discretion wrongly. Of course he can now, if he chooses, vary his order, but at present we refuse a rule *nisi.*

M. SMITH, J.—I also think the rule should be refused. Some discretion was in this case exercised by the judge, and I am by no means clear that there was a preponderance of convenience in favour of the trial being held in London; but even if there were, it would be a matter of discretion with the judge whether or not the advantage of trying the case at the defendant's place of business be greater than the inconvenience of bringing witnesses a long distance. The rule that actions should, if possible, be tried at the *forum rei* is one well worth consideration, and ought not to be forgotten when a question is raised as to where an action can be most properly tried. In the case referred to, *Duris* v. *Hopwood*, Erle, C. J. merely remarked that it was not a case in which he felt justified in interfering to prevent the plaintiff from trying his cause in the county in which he had elected to lay the venue; and Willes, J., in referring to a previous case, in which it was held that the court would not deprive the plaintiff of his right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue, is reported to have said, "When the question arises again, perhaps that case may require some consideration."

BRETT, J. concurred.

Rule refused.

Attorney for plaintiff, *W. A. Crump*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Friday, Jan. 21.

STUCLEY *v.* THE COMMISSIONERS OF INLAND REVENUE.

*Stamp duty—Marriage settlement—*13 *&* 14 *Vict. c.* 97, *Sched., title "Settlement."—"Definite and certain principal sum or sums of money"—Land purchased with trust funds and subject to a trust for conversion into personalty—Consols subject to a trust for conversion into land.*

In assessing the stamp duty payable upon a marriage settlement under 13 *&* 14 *Vict. c.* 97, *land purchased with trust moneys under a previous settlement, though subject under such settlement to a trust for conversion into money, cannot be made the subject of assessment, not being a "definite and certain principal sum" within the meaning of the Act.*

Secus, with respect to certain Consols and New Threes included in the settlement, though subject under a previous settlement to a trust for conversion into land.

This was a case stated by the Commissioners of Inland Revenue pursuant to the 13 & 14 Vict. c. 97, at the request of William Lewis Stucley, in order that he might appeal to the Exchequer against the determination of the commissioners as to the stamp duty chargeable upon the indenture hereinafter mentioned. The following is an abstract of such indenture which bore date 13th April 1869. By proposals agreed to on this date between Sir George Stucley Stucley, Bart., and William Lewis Stucley, Esq., his son, of the one part, and Head Pottinger Best, Esq., and Rosamond Head Best, spinster, his daughter, of the other part. After stating that the fortune of the said Rosamond Head Best to be put in settlement consisted of the particulars and was circumstanced as follows, viz.:

1. Under settlement dated the 6th June 1839, made previous to the marriage of her parents, the said Head Pottinger Best and Maria, his wife, of the fortune of the said Maria and a deed-poll endorsed thereon, all the property subject to the trusts of such settlement was then vested in the trustees thereof upon trust, to pay the income to the said Head Pottinger Best so long during his life as he shall not charge or alienate the same, and afterwards as to the capital as well as the income, upon trust for the said Rosamond Head Best absolutely, but so as to remain her separate property and at her disposal, for the purpose of settlement on marriage, either before or after marriage; and such trust funds and premises then consisted of certain freehold hereditaments and estates in the counties of Wilts and Berks, purchased under a power in the settlement out of the trust moneys to the amount of 52,000*l.* sterling and upwards, and which was held by the said trustees, in trust to be resold, and in the mean time to be considered in equity as money, and to be subject, as well as the proceeds of the sale thereof, to the same trusts as the moneys laid out therein. The sum of 16,000*l.* sterling secured, with interest at 4*l.* per cent., by mortgage of estates of the said Head Pottinger Best, made by indenture dated the 30th March 1860, and the sum of 4876*l.* 10*s.* 4*d.* Consols, and 11,196*l.* 4*s.* New Threes.

2. Under another indenture of settlement, also dated the 6th June 1839, made upon the same marriage by the said Head Pottinger Best, certain freehold hereditaments in the county of Berks then stood limited to the use of the said Head Pottinger Best for his life, with remainder to the use of the said Rosamond Head Best, as the only child of his said marriage, in tail general, with remainder to the use of the said Head Pottinger Best in fee simple, and the sums of 15,073*l.* 8*s.* 4*d.* New Threes, and 769*l.* 6*s.* 8*d.* Consols were then standing in the names of the trustees of the last-mentioned settlement, upon trust to invest the same in the purchase of hereditaments to be settled to the like uses, and in the mean time to pay the annual income thereof to the several persons who would be entitled to the rents of such hereditaments if purchased.

It was agreed, first, that the estate or interest to which the said Rosamond Head Best was entitled in reversion expectant on such less or other interest of her father therein as aforesaid of and in all the trust moneys, stocks, and property subject to the first above-mentioned settlement of the 6th June 1839, should, within three calendar months after the solemnisation of the marriage, be effectually assigned by all necessary parties to trustees. Upon the trusts, &c. thereinafter specified, which should attach upon and bind the same in equity upon the solemnisation of the marriage, such settlement to take effect without prejudice to such prior interest of the said Head Pottinger Best as aforesaid, and also in respect to the hereditaments purchased as aforesaid, without prejudice to the said trust for the resale thereof, and also to the powers of exchange and leasing contained in the said settlement. Then followed a declaration of the trusts upon which the property in the last preceding clauses was to be held, and various provisions relative thereto, including a proviso that if at the time when the funds and premises comprised in that settlement should become subject in possession to the trusts thereof, the said hereditaments, purchased or otherwise acquired under the powers of the said settlement of the 6th June 1839 first above mentioned

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should not have been resold, the trustees or trustee of the present settlement might, with the consent in writing of the said William Lewis Stucley and Rosamond Head Best or the survivor of them, and afterwards of their own discretion, accept in lieu of the sale moneys a conveyance of such hereditaments to them or him, and their or his heirs or assigns, upon the like trusts for sale, and with the like powers of exchanging and demising in the mean time (*mutatis mutandis*) as were expressed in the said settlement of the 6th June 1839. Also a declaration that the moneys to arise by sale or exchange under the present settlement, and also the hereditaments subject to sale, and the rents and profits thereof in the mean time, should respectively be held upon the same trusts as were above agreed to be declared by the present settlement in regard to proceeds of sale of the hereditaments originally purchased, and the annual proceeds thereof respectively.

Secondly, provision for the execution by the said Head Pottinger Best, and Rosamond Head Best of a disentailing deed of all the freehold property, subject to the subsisting terms of the settlement of the 6th June 1839, and the sums of 15,073*l.* 8*s.* 4*d.* New Threes, and 769*l.* 6*s.* 8*d.* Consols, so as to enable these said hereditaments to be conveyed to certain uses, and the said sums to be transferred upon certain trusts therein specified.

The said indenture concluded with a covenant by all the parties that settlements, conformable to the proposals therein contained, should be prepared and executed.

The commissioners charged and assessed the said indenture (under 13 & 14 Vict. c. 97, Sched., title "Settlement") with an *ad valorem* settlement duty, at the rate of 5*s.* for every 100*l.* on an aggregate sum of 97,345*l.*, in which was included a sum of 52,000*l.*, and 15,072*l.* 8*s.* 4*d.* New Threes, and 769*l.* 6*s.* 8*d.* Consols. The former sum being, in respect of the freehold hereditaments in Berks and Wilts, which were above mentioned as having been purchased at the price of 52,000*l.*, and which were held on trust to be resold, and the latter, being the sums above mentioned as held in trust to be invested in the purchase of real estate.

Against this assessment the said William Lewis Stucley appealed.

By the schedule to 13 & 14 Vict. c. 97, certain stamp duties are imposed under the head "Settlement." And it is defined to be:

Any deed or instrument, whether voluntary or gratuitous, or upon any good or valuable consideration, other than a *bona fide* pecuniary consideration, whereby any definite and certain principal sum or sums of money (whether charged or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain share or shares in any of the Government or Parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or of the Bank of Ireland, or of the East India Company, or of the South Sea Company, or of any other company or corporation, shall be settled or agreed to be settled upon or for the benefit of any person or persons, either in possession or reversion, either absolutely or for life, or other partial interest, or in any other manner whatsoever.

Digby, for the appellant, argued that the assessment in respect of 52,000*l.* could not be maintained, inasmuch as the property upon which it was made could not be considered as a "definite and certain principal sum of money" within the Act.

The *Attorney-General* (with him *Crompton Hutton*) argued that this property, being subject to a trust for conversion into money, would be regarded in equity as already converted. It was the case of a mere temporary investment of a trust-fund amounting to 52,000*l.* in land. That sum it was that really formed the subject of the present settlement, and was, therefore, subject to the settlement duty.

KELLY, C. B.—It appears to me impossible to support the claim of the Crown in this case. By the language of the statute the duty is imposed on the deed in respect of any definite and certain principal sum or sums of money settled or agreed to be settled. No doubt here the subject-matter alleged to be taxable is agreed to be settled, but is it a definite and certain sum of money? We are here met by the insuperable difficulty that there is no definite and certain sum of money until the land in question is sold. There is no definite principle upon which it may be estimated for the purpose of the duty; the amount upon which the tax is to be imposed is quite uncertain. The land might sell for double the sum laid out in it; it might sell for only half, so the amount of the original purchase-money is no sufficient criterion. If the Act had intended that the duty should be imposed upon property the subject matter of a settlement of this description, it would have provided some machinery for estimating its value. It was argued by the Attorney-General that there was a time when this property was represented by a sum of 52,000*l.*, and that it must still, under the provisions of the settlement, be looked upon as such sum of money. No doubt there was a time when the sum so invested was a specific sum of 52,000*l.*, and if that were the subject of the settlement it might be liable to the duty claimed. But that is not so. When the land was purchased the money was gone. Although a distinction was sought to be made between investing money in land and converting it into land, it is impossible to say that, for this purpose, the sum of money remains. There is no longer any certain definite sum; there is not for this purpose any longer any sum of money at all, for we cannot extend the terms of this Stamp Act or any other act of taxation. The result might be most mischievous and unjust if we were to say that this land is money because the land was purchased with a certain sum of trust money an indefinite period before, and still remained personalty in equity. For certain purposes it is to be considered as money no doubt. In case of an intestacy the next of kin would be entitled, and not the heir-at-law, and so for other purposes, as a disposition by will. But, for the purposes of the Stamp Act, there must be more than that; there must be a definite and certain principal sum of money. Here the sum is utterly indefinite and uncertain. For these reasons I think the case is not within the statute.

MARTIN, B.—I am of the same opinion. When we once have come to see what the question really is, I confess it seems to me scarcely arguable. The commissioners have assessed stamp duty upon a sum of 52,000*l.* under a provision which only entitles them to tax a deed settling, or agreeing to settle, a definite and certain sum of money. Now let us look at the deed in question; it recites the fact that, under a former settlement, certain property was subject to the trusts of that settlement, and that a sum of 52,000*l.* constituting such property, had been invested in land. And it then proceeds to specify certain articles of agreement for a settlement. What the property in question consisted of is nowhere stated; the only approach to a statement of a definite sum of money, is the statement that certain estates, subject to the trusts of the former settlement, were purchased for 52,000*l.* Then the deed goes on to state that these estates are to be treated in equity as personalty. But that is not all; to make the matter still clearer it should be observed that there is a subsequent provision by which, by the consent of the parties interested, it shall be lawful for the trustees to treat the property in question as land, and not money. It is as clear as can be, that what was the subject of this settle-

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ment was these estates, and not any definite or certain sum of money.

PIGOTT, B.—I am of the same opinion. It seems to me a perfect fallacy to say that there was here a settlement of a definite or certain sum of money. The commissioners would not have known anything about the value of the property unless the amount of the purchase-money had been mentioned as 52,000*l.* But the mere fact of the property having originally cost that sum, does not make this a settlement of that particular sum.

Digby requested the judgment of the court as to the Consols and New Threes, subject to the trust for investment in land. He argued that this must be considered as land, being subject to a trust for conversion into land. He cited

Crabtree v. *Bramble*, 3 Atk. 679;
Guidot v. *Guidot*, 3 Atk. 254.

KELLY, C.B.—You have defeated the claim of the Crown with respect to the property already invested in the land, on the ground that, with reference to the assessment of duty under the Stamp Act, the actual existing fact alone can be looked at, and that therefore such property cannot, though regarded in equity as personalty, be looked at for this purpose as a definite sum of money. The same reasoning appears fatal to your present claim. The only way in which it might be argued is that the words "to be laid out in the purchase of land or other hereditaments, or not," are not inserted in the schedule to the Act after the words, "definite and certain share or shares, &c.," as they are after the words "definite and certain principal sum or sums of money." Still I think this property comes within the plain words of the Act, and is, therefore, subject to the duty.

Judgment for the appellants that the duty be reduced by the amount charged in respect of the sum of 52,000l.

Attorneys for appellants, *Law*, *Hussey*, and *Hulbert*.

Attorney for Commissioners, *Solicitor of Inland Revenue.*

BOULTON *v.* THE COMMISSIONERS OF INLAND REVENUE.

Stamp duty—Building lease—17 & 18 Vict. c. 83, s. 16—"Further or other consideration"—Lease not otherwise charged.

The 16th section of the 17 & 18 Vict. c. 83 enacts that "in any case where any deed or instrument which shall be chargeable with any ad valorem stamp duty in respect of any sum of money yearly or in gross, or any stock or security therein mentioned, shall be made also for any further or other valuable consideration, such deed or instrument shall be chargeable (except where express provision to the contrary is or shall be made in any Act of Parliament), with such further stamp duty as any separate deed or instrument made for such last-mentioned consideration alone would be chargeable with, except progressive duty:

Held, that a lease for ninety-nine years, granted in consideration of a certain rent, and of certain covenants, among which was a covenant by the lessee to complete certain houses which had been commenced to be built upon the demised premises, was within the above enactment, and was therefore chargeable in addition to the ad valorem duty assessed upon the amount of the rent with a duty as a lease not otherwise charged.

This was a case stated by the Commissioners of Inland Revenue, pursuant to the 13 & 14 Vict. c. 97, at the request of the appellant, in order that he might appeal to the Court of Exchequer against the determination of the commissioners as to the stamp duty chargeable on a certain indenture of lease. The indenture in question was dated 1869, and made between George Boulton, the "lessor," and Edward Boulton, the "lessee," and witnessed that in consideration of the yearly rent, covenants, and agreements thereinafter reserved and contained, and in the exercise of a power given him by an indenture, dated the 20th Feb. 1868, the said lessor did appoint, demise, and lease unto the lessee all those four several pieces or parcels of ground, situate, &c., together with the four several messuages or tenements thereon erected and built, numbered, &c. and all ways, easements, and appurtenances to the said premises belonging. To hold the same with the appurtenances unto the lessee, his executors, administrators, and assigns, from the 25th March 1868, for the term of ninety-nine years, yielding and paying, therefor, yearly, during the said term, the clear rent of 8*l.* 8*s.* for each of the said pieces of ground, and the messuages erected thereon, by equal quarterly payments, on the 25th March, the 24th June, the 29th Sept., and the 25th Dec. in every year, without deduction.

The lease, amongst other covenants, contained a covenant by the lessee, that he should, within six calendar months from the date thereof, complete and make fit for use, in every respect, each of the said messuages on the land thereby demised, with all necessary fixtures and fastenings to the same, and do all such works to the satisfaction of the surveyor for the time being, of the person or persons who for the time being should be in the receipt of the said sums thereinbefore reserved by way of rent, and also should, when required, make, form, and complete the footpath fronting and abutting on the said premises, and provide and lay down proper kerbing thereto, and pave the footpaths to the satisfaction of the same person or persons, and keep the sewers, drains, roads, and footpaths in repair, or, upon demand, pay a fair proportion of the expenses already incurred, and from time to time to be incurred in forming, making, completing, and keeping the same sewers, drains, roads, and footpaths in proper repair and condition until taken by the parish; and also that the lessee, his executors, administrators, and assigns, should at all times during the said term hereby granted, at his and their own expense, keep the said messuages and all other buildings which might be thereinafter erected on the premises thereby demised in good and substantial repair and condition.

The commissioners assessed and charged this lease, under the 13 & 14 Vict. c. 97, Sched. title "Lease," and 17 & 18 Vict. c. 83, Sched. title "Lease," with stamp duty as follows:—

Ad valorem lease duty, in respect of the yearly rent of 33*l.* 12*s.*, for a term of ninety-nine years, such sum being the aggregate yearly rent reserved by the said lease	£1	10	0
As for a separate lease made for a further or other valuable consideration, that is to say, a lease not otherwise charged	1	15	0
Progressive duty		10	0

Against this assessment the lessee appealed.

The 17 & 18 Vict. c. 83, s. 16, enacts as follows:—

And where any conveyance, charter, disposition, or contract, described in the schedule to this Act, shall be made partly in consideration of such annual sum as in the said schedule is mentioned, and partly in consideration of a sum of money or stock as mentioned under the head or title of "Conveyance" in the schedule to the said Act of the 13 & 14 Vict., such conveyance, charter, disposition, or contract, shall be chargeable with the *ad valorem* stamp duties granted by the said Acts respectively in respect of each of the said considerations; and in any case where any deed or instrument which shall be chargeable with any ad valorem stamp duty in respect of any sum of money, yearly or in gross, or any stock or security therein mentioned, shall be made also for any further or other valuable consideration, such deed or instrument shall be chargeable (except where

express provision to the contrary is or shall be made in any Act of Parliament) with such further stamp duty as any separate deed or instrument made for such last-mentioned consideration alone would be chargeable with, except progressive duty.

Manisty, Q. C., for the appellant. It is contended that the covenant to complete the houses erected upon the demised land is a further or other valuable consideration within the 17 & 18 Vict. c. 83, s. 16. I submit that it was never intended to apply to such a case as the present. If a building lease such as the present be within the Act, every lease which contains a covenant by the lessee to repair is likewise within it, for the money to be laid out in repairs certainly goes in reduction of the rent that would otherwise be paid. The Legislature can never have intended to produce such a sweeping effect by such ambiguous words as "further or other consideration." The Act of 55 Geo. 3, c. 184, provided for the case of a lease granted in consideration of a fine or premium only without yearly rent, for a lease at a yearly rent without fine or premium, for a lease granted in consideration of a fine or premium and also of a yearly rent, and also for a lease not otherwise charged; but a case which frequently occurs in practice was not sufficiently provided for. It often happened that a lessor agreed to grant a lease at a certain rent, and then the intended lessee assigned his interest for a certain sum, and procured the making of a lease direct to his assignee for the rent originally agreed upon. To prevent this kind of transaction escaping taxation, the provision was introduced to make the one instrument taxable as amounting to two, *i.e.*, a lease and an assignment. The 13 & 14 Vict. c. 97 Sched., title "Lease," provides expressly for the case, and also for fines or rents, payable wholly or in part of corn, grain, or other victual. All that was meant by the expression "further or other consideration" was to sum up compendiously the various provisions of this sort contained in 13 & 14 Vict. c. 97. It was intended to refer to every species of consideration not incident to the management, completion, or mode of dealing with the property demised. But there is seldom a lease in which there is not a provision that something shall be done to the property by the lessee, and it never could be intended that all those leases, in addition to the *ad valorem* duty on the rent, be also charged as a lease not otherwise charged.

The *Attorney-General* (with him *C. Hutton*), for the respondent, was not called upon.

KELLY, C. B.—When we look to the words of the Act in question it seems that there can be no reasonable doubt on this matter, and that this case is clearly subject to the two duties which have been imposed first to the *ad valorem* duty charged on the amount of rent, and secondly as a lease not otherwise charged. The Act imposes the latter duty when the lease is granted for some "further or other consideration" besides the rent. The only question, therefore, is whether there is in the case of this lease any such "further or other consideration." When we look at the deed, we find that the leases contain a covenant on the part of the lessee to complete the four messuages on the demised premises. Be the expense of this great or small, it amounts to a consideration, and clearly brings the case within the language of the Act. It is plain, therefore, that this lease in addition to the stamp duty assessed in relation to the rent is liable to the duty with which it would have been chargeable if made in consideration of the completion of the houses alone, that is to say, the duty upon a lease not otherwise charged.

MARTIN, B.—I am of the same opinion. I think as a matter of surmise that it is probable that the language of the Act was framed with a view to meeting this very case, which was omitted from previous Acts probably from its not having been present to the minds of the framers of such Acts. Whether this be so or not, it is quite obvious that where money is contracted to be expended by a tenant in erecting a house on the landlord's freehold, it is just as much a valuable consideration, as when it is contracted to be paid to the landlord.

PIGOTT, B. concurred.

Judgment for the Crown.

Attorney for appellant, *Boulton* and *Son*.

Attorney for Commissioners, *Solicitor af Inland Revenue.*

THE TRUSTEES OF THE ROYAL LIVER FRIENDLY SOCIETY v. THE COMMISSIONERS OF INLAND REVENUE.

Stamp duty—Friendly society—Exemption—Transfer of mortgage.

The rules of a society registered as a friendly society, under 18 & 19 Vict. c. 63, authorised the investment of surplus funds upon real security. The trustees of the society invested certain funds on a transfer of a mortgage, which was carried out by an indenture of transfer, in which the mortgagors joined. The 18 & 19 Vict. c. 63, s. 37, enacts "That no copy of rules . . . nor any bond to be given to or on account of any such society, or by the treasurer or any other officer thereof . . . nor any other document whatever required or authorised by or in pursuance of this Act or the rules of any society, shall be liable to stamp duty:"

Held, that the deed of transfer of the mortgage was not exempt from stamp duty.

Walker *v.* Giles *commented upon.*

This was a case stated by the Commissioners of Inland Revenue, pursuant to the Act 13 & 14 Vict. c. 97, at the request of the trustees of the Royal Liver Friendly Society, in order that they might appeal against the determination of the commissioners as to the liability of a certain indenture to stamp duty. The society is registered as a friendly society under 18 & 19 Vict. c. 63. The indenture in question was a transfer of a mortgage, and was made between John Walker and William Walker, of Birkenhead, thereinafter called the mortgagors, of the first part, Timothy Ryan and Lawrence Daniel Kirby, of the second part, and the said trustees, thereinafter called the mortgagees, of the third part. It recited an indenture of mortgage from the said mortgagors to J. B. Aspinall and Timothy Ryan, a transfer of the said mortgage from Aspinall and Ryan to Ryan and Kirby, and witnessed that, in consideration of 1100*l.* to the said Ryan and Kirby, paid by the said mortgagees at the request of the said mortgagors, they, the said T. Ryan and L. D. Kirby, did assign unto the said mortgagees, their executors, administrators, and assigns, the mortgage-debt, and did grant and release, and the said mortgagors did also grant and confirm to the said mortgagees, their heirs and assigns, the hereditaments described in the schedules, to hold the same unto and to the use of the said mortgagees, their heirs and assigns. The said indenture likewise contained a proviso for redemption, power of sale, the usual mortgage covenants, and a declaration that the said sum so lent as aforesaid, was lent by the said mortgagees out of the funds of the Royal Liver Friendly Society, and as trustees thereof. The rules of the society em-

powered the trustees to invest the surplus funds (*inter alia*) upon real securities.

The commissioners charged this indenture with duty as follows:—*Ad valorem* transfer of mortgage duty on 1100*l.*, 5*s.* 6*d.* (under 28 & 29 Vict. c. 96, s. 17); progressive duty, 5*s.* 6*d.*

Against this decision the trustees of the society appealed on the ground that by the 37th section of 18 & 19 Vict. c. 63 the indenture in question was exempt from stamp duty.

By that section it is enacted that

No copy of rules, nor power, warrant, or letter of attorney granted by any person as trustee of any society established under this Act, or any of the Acts hereby repealed, for the transfer of any share in the public funds standing in the name of such trustee, nor any order or receipts for money contributed to or received from the funds of any such society by any person liable or entitled to pay or receive the same by virtue of the rules thereof or of this Act, nor any bond to be given to or on account of any such society, or by the treasurer or any officer thereof, nor any draft or order, nor any form of policy, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment, nor any other document whatever required or authorised by or in pursuance of this Act, or the rules of any society, shall be liable to stamp duty, provided that no exemption from any of the duties granted by any Act or Acts relating to stamp duties, shall be deemed to extend to any society, which shall assure the payment of money exceeding 200*l.*, or which shall assure the payment of any money on the death of a member to any person except executor, administrator, or assigns of such member, or the husband, wife, father, mother, child, brother, sister, nephew, or niece of such member.

By the 37th section of the old Friendly Societies Act (10 Geo. 4, c. 56), since repealed, it was enacted,

That no copy of rules, power, warrant, or letter of attorney, granted or to be granted by any person as trustee of any established under this Act for the transfer of any share in the public funds standing in the name of such trustee, nor any receipts given for any dividend in the public stock or fund, or interest of Exchequer Bills, nor any receipt nor any entry in any book of receipts for money deposited in the funds of any such society, nor for any money received by any member, his or her executors, administrators, assigns, or attorneys from the funds of such society, nor *any bond or other security* to be given to or on account of any such society, or by the treasurer, or trustee, or any officer thereof, nor any draft or order, nor any form of assurance, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment, nor any other instrument or document whatever required or authorised to be given, issued, signed, made, or produced in pursuance of this Act shall be subject or liable to, or charged with any stamp duty or duties whatsoever.

C. Russell, for the appellants.—The question is whether this deed, being a transfer of a mortgage to the trustees of the society, is not exempt from stamp duty under the 18 & 19 Vict. c. 63, s. 37. It was decided that mortgages and other securities given to trustees of building societies established under 6 & 7 Will. 4, c. 32, which incorporates the exemption given to friendly societies by the former Act, 10 Geo. 4, c 56, s. 37, were exempt from stamp duty, by *Walker* v. *Giles*, 6 C. B. 662. That case really concludes the present, for the language of the two sections is substantially identical. The omission of the words "or other security" really makes no difference. The words were probably omitted as useless and tautological, the concluding expression "any document" being sufficient. It is impossible, on looking at the two sections, to come to any other conclusion than that the intention of the framers of the present Act was simply to repeat the exemption contained in the former Act. It is quite clear that this instrument comes within the description of "a document authorised by this Act or the rules of any society," for the rules of this society expressly authorise investments on real security. [PIGOTT, B.—According to your argument any document arising out of the rules would be exempt. KELLY, C.B.—In the case of a mortgage, the mortgagor honestly pays for the stamp. Your argument must extend to original mortgages as well as transfers; and the practical result would be to exempt the borrowers from payment of duty on borrowing sums of money on mortgage of, it may be, very large amounts.] I contend that it is impossible to give any signification to the words of the section if this case is excluded. He also cited

Barnard v. *Pillworth*;
See notes to *Walker* v. *Giles*, 6 C. B. 698.

KELLY, C.B.—I am of opinion that the Crown is entitled to judgment in this case. It appears by the rules that this society is empowered to invest its funds on real securities, and therefore on a mortgage, as in the present case. Now the question is whether, looking to the 37th section of the 18 & 19 Vict. c. 63, the meaning is that not merely are certain acts done by the society itself directly in pursuance of authority conferred by the Act or by their rules exempted from becoming the subject of the duty, but that every instrument which has come into existence in the course of carrying out any act or transaction indirectly authorised is to be exempt. I cannot help thinking that if an exemption of so very extensive a character as the latter had been intended, the Legislature would have employed more explicit language. When we look at the terms of the section, and remember that the concluding words, on which stress was laid, "any document whatsoever, &c.," must be construed according to the well settled rule with respect to general words, as only referring to matters *ejusdem generis* with what has been specifically mentioned before, the case seems perfectly clear. The subjects of exemption which come first in order, copies of rules, powers of attorney for transfer of stock, orders, or receipts, are all very small matters which it is very reasonable that the Legislature should exempt. Then we come to the exemption of bonds given to or on account of any such society, or by the treasurer or any officer thereof, and a matter for consideration arises with reference to the difference between the wording of this Act and the former Act, 10 Geo. 4, c. 56. The words in that Act were, "any bond or other security to be given to or on account of any such society, or by the treasurer or trustee, or any officer thereof." The question is what the effect is of this alteration. The case of *Giles* v. *Walker*, which has been cited, was decided on the words of the former Act, and it was there held that the words used were not confined to bonds or other securities given by officers or others as security for the funds passing through their hands, or other such instruments relating to the internal dealings of the society, but were intended to have a general effect. Now it is very possible, as a matter of conjecture, that the alteration of the expressions used in the present Act may have been the result of this decision. The persons drawing the later Act may have seen that if the words used included any bond or other security for a loan of money or other investment, these exemptions might amount to a very large sum of money, and though it may have been intended to exempt a number of comparatively small matters, constantly occurring in the usual course of such a society's business it may not have been contemplated that these instruments should be exempted by which the society might carry into effect the investments of large sums of money. For this very reason it may have been that the words "or other security" have been left out in the present Act. Be that as it may, the question arises on the words of this Act, whether it was intended to exempt instruments by which investments such as that now in question of the property of these societies are carried into effect. Now by the general usage under contracts for the transfer of mortgages, the stamp duty is paid for by the

mortgagor; and if the transfer of a mortgage is exempt under the words of the Act, it is impossible to say that an original mortgage will not also be exempt. If merely because the rules authorise the investment of money in real securities the instruments carrying out such investments are exempted, then this exemption will apply both to cases in which by usage the duty is payable by the mortgagor, as well as those in which the duty is payable by the society investing. It is quite impossible that the Legislature can have intended this. The exemption must have been intended to apply to cases only in which the society would have to pay the duty. The specific expressions used before the general concluding words show clearly that this was so. This is not the case of a document authorised by the rules within the meaning of the Act, for although the investment is authorised by the rules, it does not follow that every instrument which comes into existence as connected with such investment is exempted. There are no words to that effect. If the words had been "no document rendered necessary for any purpose by the rules," the effect might have been different. Under these circumstances I think our judgment must clearly be against the claim for exemption.

MARTIN, B.—I am of the same opinion. It is obvious upon a comparison of the Act of Geo. 4, and the present Act that the intention of the latter was to exempt only instruments immediately connected with the business of the society. It was never intended to relieve persons borrowing money from these societies. And the effect of such an exemption as contended for would be for the relief, not of the society, but really and in effect for the relief of the borrowers, for they are the persons who substantially have to pay the stamp duty. So far as regards the society itself, it was reasonable enough that the Legislature wishing to encourage such societies should exempt them from the payment of duty in respect of documents directly authorised by the Act or their rules, but I agree with my Lord that a mortgage or transfer of mortgage is not such a document. I am strongly disposed to think, though this is after all mere surmise, that the words "or other security" which occur in the former Act were omitted from the 18 & 19 Vict. c. 63 probably on purpose by the framers of the Act to prevent this very question arising. The words of the former Act were certainly ambiguous, and might be construed to include a mortgage, and that was probably deemed by the framers of this Act not to be the intention of the Legislature. All the words of the old Act, as of the new, seem to point to direct transactions between the members of the society and the society, except the expressions "Any bond or other security, &c." It is quite clear that the Court of Common Pleas gave judgment with respect to the effect of those words, as my Lord stated, but my impression is that in reality the bond or security thereby meant was not a bond or security for repayment of a loan, but a bond or security given by the treasurers, clerks, or agents of a society for duly accounting; and that, in order to confine the meaning to this, the framers of the present Act omitted the words "or other security," which tended to make the meaning ambiguous. It is said that the present instrument is included by the words at the latter part of the clause, but those words must clearly be read as including only matters *ejusdem generis* with what has gone before.

PIGOTT, B.—I am of the same opinion. I think, with reference to the construction of the words, "bond or other security," in the old Act, I should have agreed with the Court of Common Pleas; but it seems to me impossible to give the same meaning to the words of the present Act, after the omission of the words "other security." Then there is only one other expression which seems to make the case doubtful; that is, the expression, "any document whatever," &c. These words, however, I think must be read as confined to things *ejusdem generis* with what has been previously specified.

Judgment for the Crown.

Attorneys for appellant, *Makinson* and *Carpenter*.

Attorney for Commissioners, *Solicitor of Inland Revenue*.

BAIL COURT.

Reported by G. F. R. JERVIS, Esq., Barrister-at-Law.

Saturday, Jan. 29.

(Before HANNEN, J.)

FRAZER v. DANIEL.

County Courts Commitment—Debtors' Act 1869.

An order of commitment by a County Court judge previous to 1st Jan. 1870, *if not executed before that date, is abrogated by the effect of the Debtors' Act* 1869, *and the County Court judge is justified in suspending it:*

Semble, that the judgment-creditor may apply to the County Court judge for a new order, and if the facts warrant a commitment in the form prescribed by the Debtors' Act, the County Court judge may make the same.

The defendant had been committed on a judgment-summons by Sir Eardley Wilmot, the judge of the County Court of Marylebone, in the month of December last, but no arrest had taken place up to 1st Jan. 1870, when the Act for the Abolition of Imprisonment for Debt came into force. Sir Eardley Wilmot subsequently in open court ordered the high bailiff not to make the arrest, expressing a doubt whether the order of commitment made prior to the commencement of the Act for Abolishing Imprisonment for Debt could be efficacious to arrest upon afterwards, and accordingly suspended his order of commitment. Upon these facts,

Torr moved for a prohibition to issue to the County Court judge of Marylebone, to prevent him from suspending the order. The County Court Act (9 & 10 Vict. c. 95) gives judges of County Courts power to commit on default of payment of money recovered in the County Courts. The Debtors' Act 1869 (32 & 33 Vict. c. 62), abolishes imprisonment for debt except in certain cases. It does not take away the power of the County Court judge to commit, but renders it necessary for him to state on the face of the order the very grounds of the commitment. Here this was not set forth, but the order was made previous to the commencement of the Debtors' Act, but was not executed through inability to find the defendant. This order must be in force now, or justice will miscarry, for a commitment being out against the defendant, another commitment cannot be made. [HANNEN, J.—If the facts warrant it, the County Court judge has still the power.] He has already made the order. He cannot make another order whilst this is unsatisfied. The 20th section of 32 & 33 Vict. c. 83, the Act for winding-up the Bankruptcy Court, which must be read with the Debtors' Act, expressly saves the operation of that Act as regarded past cases. The words are, "This repeal shall not interfere with the prosecution or affect the course of any legal proceeding pending in bankruptcy or otherwise." "Otherwise" alludes to such cases as the present. The words of sect. 5 of the Debtors' Act, "subject

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to the provisions of the Debtors' Act," only apply to cases in progress, and there is a distinction between pending matters and those like the present, where the commitment took place before the end of last year. The commitment here is complete, and cannot be affected by a subsequent Act.

Macrae Moir showed cause in the first instance on behalf of the County Court judge. By the Debtors' Act, imprisonment for debt was abolished, and any imprisonment now must be made in conformity with the provisions of that Act. Sect. 5 of the Debtors' Act, paragraph 2, is express to the effect that this Act shall be substituted for those previously in force. The new Act contains provisions as to the form of the order, and an order to be enforced now must be in conformity with those provisions.

Hannen, J.—I am of opinion that the application must be refused. The 32 & 33 Vict. c. 62 is an Act for abolishing imprisonment for debt; not merely for abolishing imprisonment for debt following upon judgments of the Superior Courts, but for the abolition of imprisonment for debt under those circumstances in which it could take place in the County Courts; and it provides a series of other safeguards for that which is deemed to be a right that should be safely hedged round—viz., the power of incarcerating a debtor for the non-payment of his debt. There are now, under this Act more stringent conditions to be fulfilled before a person can be sent to prison. I have to consider what is the meaning of the words of sect. 4 of this Act. Those words are, "With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in the payment of money." The exceptions are set forth, under none of which does the present case fall. This is an application to imprison the defendant for default in the payment of a sum of money, and I do not think the circumstances of the case bring it under the conditions under which only imprisonment for debt can be had according to this Act. Previously the judge of a County Court had only to make inquiries, and, if he thought the defendant was evading payment, to commit him; now a number of other conditions are required. The intention of the Legislature was to make a clean sweep of it, and that no one should be arrested unless those conditions were fulfilled. I think it follows that the judgment-creditor is entitled to proceed, but it must be by substantive application before the County Court Judge, who will then see if the new conditions are complied with, and he can then make an order.

Application refused.

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Saturday, Jan. 22.

(Before Cockburn, C. J., Byles, and Keating, JJ., Pigott, and Cleasby, BB.)

Reg. v. Wm. Parker.

Depositions—Magistrate's signature—Pleading—Surplusage.

It is sufficient if the signature of a committing magistrate be attached at the conclusion of the depositions of the several witnesses in the form in schedule M of 11 & 12 Vict. c. 42, and his signature need not be subscribed to the deposition of each witness respectively.

An indictment for making a false declaration before a justice of the peace as to the loss of a pawnbroker's ticket concluded, "Whereas, in truth, the defendant had not lost the said ticket, but had sold, lent, or deposited it as a security to one J. C.:"

Held, that the allegation, "that the defendant had sold, lent, or deposited it as a security to J. C." might be rejected as mere surplusage, and did not vitiate for uncertainty.

Case reserved by Lush, J., for the opinion of this court.

The indictment was in the following form:

Northumberland to wit—The jurors for our lady the Queen on their oath, present that William Parker did, on the 6th April 1869, at the parish of Tynemouth, in the borough of Tynemouth, in the county of Northumberland, wilfully and corruptly make a false declaration before John Byrom Bramwell, Esq., one of Her Majesty's justices of the peace for the said borough of Tynemouth, that he, the said William Parker, had lost a certain note or memorandum, being a pawnbroker's ticket. (*a*) Whereas in truth and in

Witnesses, James Carter, James Mitchell, Sarah Frame, and John Hewitt, P.C.

Misdemeanor in making a false declaration (Mr. Steavenson).

The deposition of a deceased witness was tendered and objected to on the ground that it did not purport to be signed by the justices before whom it purported to have been taken as required by the 11 & 12 Vict. c. 42, s. 17. (*b*)

The deposition in question was the second of four depositions made at the same hearing, all of which were pinned together. Each occupied more than one sheet of paper.

The justices did not sign either of the sheets on

(*a*) 39 & 40 Geo. 3, c. 99, s. 16; 5 & 6 Will. 4, c. 62, s. 12.

(*b*) The 11 & 12 Vict. c. 42, s. 17, enacts, that in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily after summons, or have been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness, produced against him, take the statement (M) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and the justice or justices before whom any such witnesses shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if, upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justices purporting to sign the same.

Schedule M.

—— *to wit.*—The examination of C. D., of , farmer, and E. F., of , labourer, taken on [*oath*] this day of , in the year of our Lord , at , in the county aforesaid, before the undersigned [*one*] of Her Majesty's justices of the peace for the said [*county*], in the presence and hearing of A. B., who is charged this day before [*me*], for that he, the said A. B., on , at [*&c., describing the offence as in a warrant of commitment*].

This deponent, C. D., on his [*oath*] saith as follows, &c. [*stating the deposition of the witness as nearly as possible in his own words. When his deposition is complete, let him sign it.*]

And this deponent E. F. upon his oath saith as follows [*&c.*]

The above depositions of C. D. and E. F. were taken [*sworn*] before me, at , on the day and year first above mentioned. J. S.

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which the depositions were written except the last (that sheet not containing any part of the depositions in question), and the signature was appended at the end of the last deposition to a statement in the following form copied from schedule M of the 11 & 12 Vict. c. 42. "The above depositions of" (naming the several witnesses, and amongst them the deceased) "was taken and sworn before us at, &c., according to the form in the schedule."

I allowed the deposition to be read subject to the opinion of this court on its admissibility.

It was objected, after the jury were sworn and charged that the indictment was bad for uncertainty, as it alleged in the alternative that the prisoner "had sold, lent, or deposited it."

I overruled the objection, but as I meant to reserve the other point, I also reserved this for the opinion of the court: (see 1 C. & K. 243.)

The prisoner was convicted, but not sentenced. I admitted him to bail, but I am not aware whether he has been able to find it or not.

If the deposition ought not to have been received, or if the indictment is bad, the conviction is to be quashed. Robt. Lush.

Greenhow for the prisoner.—The conviction was wrong on two grounds. The deposition was not admissible in evidence because it was not signed by the magistrate before whom it was taken, as required by the 11 & 12 Vict. c. 42 s. 17. It is contended that under that enactment the several depositions of the witnesses should be respectively signed by the committing magistrate, and that the magistrate's signature once only at the end of the examination is not sufficient. This point has not been decided in this court as yet. In *Reg.* v. *Osborne*, 8 Car. & P. 118, where three witnesses were examined before the magistrate, and the examinations of all three were on the same sheet of paper, the prosecutor being first, and the only signature of the magistrate was at the end of the last examination, after the words "Sworn before me," it was held that the depostion of the prosecutor, who had died before the trial, was admissible. Coleridge, J., said, "There may be a doubt whether each deposition should not be signed by the justice." His lordship then conferred with Lord Abinger, C. B., and afterwards said, "My own impression was that this was sufficient; if this had been the case of an affidavit it would have been bad; but that is on account of an arbitrary rule. In this case, however, there is no such rule, and Lord Abinger agrees with me in thinking, after the proof given by the justice's clerk (that the deposition was regularly taken and read over in the presence of the prisoner, and that he had an opportunity of cross-examining the prosecutor), that the deposition is admissible." That case was upon the statute of 7 Geo. 4. In *Reg.* v. *Lee*, 4 Fos. & Fin. 63, where the depositions of several witnesses were taken before the magistrate on separate sheets of paper, and signed by the magistrate once at the end, and then the sheets of paper were attached together, Pollock, C. B., held that the depositions were properly signed, so as to render the deposition of one who died before the trial admissible in evidence. There is, however, the case of *Reg.* v. *Richards*, 4 Fos. & Fin. 860, which is opposed to the above cases. There Cockburn, C. J., said that each deposition must be signed by the witness and the magistrate, and that it was not in compliance with the statute for the magistrate merely to sign at the end. [Cockburn, C.J.—At the time I so expressed myself my attention had not been called to schedule M; when I saw that I thought my previous view was erroneous.] It is submitted that the form in schedule M will not control the positive language of sect. 17, "and shall be signed also by the magistrate taking the same." In *Reg.* v. *France*, 2 M. & Rob. 207, where a witness W., who had been examined and cross-examined before the magistrates, died before the trial, and his deposition was duly signed by the magistrates, but the cross-examination which had taken place on a subsequent day was not signed by the magistrates, but the depositions of two other witnesses on the prisoner's behalf, which had been taken at the same time with the cross-examination of W., were pinned up along with it, and the last sheet of the whole was signed by the magistrates, Alderson, B., after consulting Parke, B., said if the magistrates' clerk could state that the sheets were all pinned together at the time the magistrates signed the last sheet, he thought he must receive the whole in evidence; but neither the magistrates' clerk nor one of the magistrates being able so to state, the deposition as well as the cross-examination was rejected, although the magistrate stated that all the sheets were lying on the table when he signed them. The following cases were also cited:

Reg. v. *Johnson*, 2 Car. & Kir. 354;
Reg. v. *Young*, 3 Car. & Kir. 106.

As to the second point, the indictment is bad for uncertainty in averring that the defendant "sold, lent, or deposited it as a security." The rule is that averments must be certain and not in the alternative:

Reg. v. *Jones*, 1 Car. & Kir. 243;
1 East, P. C. 245;
1 Rus. on Crimes, 466.

Although this averment need not have been inserted, yet having been so it should have been alleged with certainty.

No counsel appeared for the prosecution.

Cockburn, C. J.—I am of opinion that the conviction must stand, and that both objections fail. Upon the first point as to the admissibility of the deposition, we have the authority of two cases for their reception, the case of *Reg.* v. *Young*, a case before Mr. Greaves, sitting as a commissioner, and in which he took the opinion of Williams, J. as to the admissility of the evidence, and the case of *Reg.* v. *Lee*, where Pollock, C. B., held that depositions signed in the same way as those now in question were admissible in evidence. In the case at the Central Criminal Court before me, the same point arose, but my attention was called to the 17th section of the Act without any reference to the schedule. On reading the 17th section I was of opinion that that section strictly construed required that the deposition of each witness should be signed by the committing magistrate. After my decision the clerk to the magistrates called my attention to the decided cases and the schedule. On looking at the two together, and seeing that the language of sect. 17 is not conclusive, and that the section says that such depositions shall be read over to and signed *respectively* by the witnesses, and the word "respectively" is omitted when it speaks of the signature by the magistrate, and reading the section by the light of the schedule—which, after giving the form of the caption and the introductory part of the deposition of each witness, concludes, "The above depositions of C. D. and E. F. were taken before me," and the magistrate is then to affix his signature, I thought that the section did not exact from the magistrate that he should affix his signature to the deposition of each witness, but that it was enough if he attached it to the entire set of depositions as a body. Accordingly I informed Mr. Oke, the magistrates' clerk, that I had too hastily decided the point, and authorised him to state that I did not intend on any future occasion to abide by it. I think, therefore, looking at the section and schedule together, it is enough if the depositions are signed according to

the form given in the schedule. These depositions were signed in that way, and I think that was sufficient to make them admissible. As to the second point, I have no wish to infringe on any general rule of criminal law, and think that where the indictment sets forth anything which it alleges as constituting the subject matter of the offence we are bound by it; but where what is unnecessarily put in the indictment is plainly suplusage, it may be rejected. In the present case the offence consists in the having made a false declaration as to the loss of the pawn-ticket; but the indictment goes on to say, whereas in truth he had not lost the said ticket. If the indictment had stopped there it would have been sufficient, but it goes on further to state that the defendant had sold, lent, or deposited it as a security to one J. C. Now what is this but only stating the evidence by which the falsity of the declaration was to be proved? If that had been the essence of the offence, and necessary to be stated, there would have been ground for the argument of the prisoner's counsel, but, as it is not, it may be treated as mere surplusage, and not vitiating the indictment.

Byles, J.—I am of the same opinion. The statute intended plainly that the committing magistrate's signature should be affixed to the whole depositions when attached together. If all the depositions had been written on one sheet of paper, the signature of the magistrate at the end would clearly have been sufficient, and it does not, in my opinion, make any difference that the several depositions have been sewn or attached together by some other means. As to the second objection, if the indictment had stopped at the averment, "Whereas, in truth he had not lost the said ticket," it would have been sufficient; but it goes on to exhaust all suppositions for the defendant's believing that he had lost it. This is clearly surplusage, and may be rejected.

The other judges were of the same opinion.

Conviction affirmed.

Reg. v. French.

Forgery—Acquittance—Receipt—24 & 25 Vict. c. 98, s. 23.

A document issued to members of the Ancient Order of Foresters Friendly Society, called a "clearance," certified that the member had paid all his dues and demands, and authorised any court of the order to accept the bearer as a clearance member:

Held, that this was not the subject of forgery within the 24 & 25 Vict. c, 98, s. 23 (a) as an acquittance or receipt.

Case reserved for the opinion of this court by Lush, J. at the last summer assizes for the West Riding of Yorkshire, held at Leeds.

Indictment on the 24 & 25 Vict. c. 98, s. 23 for forging an acquittance or receipt for money.

The prisoner was secretary of a friendly society called the Ancient Order of Foresters, which had branches in various towns. A member removing from one place to another, who had paid all dues, was entitled to a document in the form hereafter set out, called a "clearance," which admitted him to all the privileges of membership at any place where a branch of the society existed.

The qualifications for membership were the payment of an entrance fee, a certain time of probation, and certain general payments made at meetings of the society called "courts." At these courts, constituted by the presence of the chief ranger, the sub-chief ranger, the treasurer, the secretary, and two members at the least, the payments were made to the secretary, and by him handed over there and then to the treasurer. Neither the chief ranger, nor the sub-chief ranger received or was responsible for any of these payments, nor were their signatures to a "clearance" understood as importing that any money had been received by them or either of them; but a "clearance" without their signatures would not have been accepted.

Edward Cragg, a member of the society, was entitled to a "clearance," but the money he had paid had not been accounted for by the prisoner to the treasurer.

The prisoner sent to Cragg a "clearance," of which the following is a copy, and to which he forged the names of the chief and the sub-chief rangers.

Ancient Order of Foresters Friendly Society.
Members' Clearance.
Authorised form pursuant to General Law.

Samuel Shawcross, Permt. Sec.

Court "Painters," No. 4076 of the Leeds District, held at the Harewood Arms, Harewood-street, in Leeds, in the county of York.

To all whom it may concern. These are to certify that the bearer hereof, brother Edward Cragg, a [*state whether single or married*] married man, now aged twenty-six years, by trade a painter, was admitted a member of the above court on the 25th day of June 1864, and has paid all dues and demands up to the 29th day of August 1868.

We therefore hereby authorise any court of the order to accept the said brother as a clearance member, subject to the conditions expressed in the general laws, to which, so far as they may apply to the above court, we undertake to conform.

In witness whereof we have, by order of the court and on its behalf, subscribed our hands, and affixed the seal of the court.

Thomas Maw, Chief Ranger.
(Seal.) John Doyle, Sub-Chief Ranger.
George French, Secretary.

Caution.—The member to whom this clearance is granted, must throw it into some legal court within two calendar months from the time of drawing the same, and should it be refused by any court, it must be returned to the court which granted it, within one calendar month, or the member will become suspended: (See General Laws, 92, 93, 94, 95.)

We, the undersigned, declare that this is the document presented to this court, No. 1567, by brother Cragg, on Oct. 26, 1868.

William Tranter, C.R.
(Seal.) Nathaniel Powell, S.C.R.
Thomas Bates, Secretary, Court 1567.

May 24, 1864.

The question for the opinion of the court is, whether the above document is an acquittance or receipt for money within the meaning of the statute? The prisoner was convicted, but admitted to bail.

Robert Lush.

No counsel were instructed on either side.

Cockburn, C. J.—In this case it appears that there was a doubt whether the document the prisoner was indicted for forging was an acquittance or receipt for money within the statute 24 & 25 Vict. c. 98, s. 23, upon which the indictment was framed. We are of opinion that it was not an acquittance or receipt for money within that enactment, and that it is nothing more than what it purports to be, viz., a certificate certifying that the bearer was admitted a member of the court which issued it, and had paid up all dues, and authorising any other court of the Ancient Order of Foresters to accept the bearer as a clearance member. We think that it is simply a certificate, and not in any sense of the term an acquittance or receipt for money, and therefore that the conviction cannot be upheld.

Conviction quashed.

(a) The 24 & 25 Vict. c. 98, s. 23, enacts "Whosoever shall forge or alter, offer, &c., any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement or assignment of any such accountable receipt, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, &c.

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COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister-at-Law.

Wednesday, Nov. 17, 1869.

THE BENGAL.

County Court Admiralty Jurisdiction Act (31 & 32 Vict. c. 71)—Order to institute proceedings in the High Court of Admiralty.

This court, in pursuance of the provisions of sect. 9, will, should it think fit, grant an order for instituting proceedings before it, which might have been taken without agreement in the County Court.

Clarkson moved in this case for an order to institute a suit under the above section, on the part of the owners of two steam tugs, who claimed to have rendered salvage service to the *Bengal* (1300 tons burthen). An agreement had been made between the masters of the tugs and the master of the *Bengal*, to tow her into port for a specified sum, but it was alleged that subsequently the difficulty of the enterprise had increased, and a question of law was likely to arise, whether the services rendered did not amount to salvage.

The COURT granted the application.

Proctors for plaintiff, *Lowless* and *Nelson*.

Tuesday, Nov. 23, 1869.

THE MEMPHIS.

Costs—Practice—Inspection of documents—Unnecessary motion.

This court, in all cases where a motion is made for leave to inspect documents without a previous application to the person in possession, will condemn the party moving in costs of the motion.

This was a cause of salvage, in which

Phillimore, on the part of defendants, moved for leave to inspect certain policies of insurance and bills of lading.

Clarkson for the plaintiffs, offered no opposition to the order, so far as documents in possession of the plaintiff were concerned, but asked that the defendants be condemned in the costs of the motion which was unnecessary, they having made no previous application to the plaintiffs for leave to inspect.

Sir R. PHILLIMORE.—The defendants must have their order; but I shall condemn them in the cost of the motion. The court will follow this rule in all cases where a motion for inspection is made without previous application to the other side.

Proctors for plaintiff, *Clarkson, Son*, and *Greenwell*.

Proctors for defendants, *Pritchard* and *Sons*.

THE HEART OF OAK.

Mortgage—Fraudulent Preference.

The Admiralty Court, being a court of law and equity, will follow the decisions of the courts of law and equity in deciding questions under the bankruptcy law.

Where a debtor mortgaged to one creditor all his effects, with a colourable exception in view of bankruptcy, and without any present equivalent:

Held, that the mortgages were not valid,

Semble, a debtor must not assign all or nearly all his effects to one creditor, so as to put it out of his power to carry on his trade; but such an assignment is not necessarily fraudulent where it does not include his trade effects, or where he gets a present equivalent, and The assignment of a security to a particular creditor, even when bankrupty is inevitable, if the assignment be not made voluntarily, but at the demand of a creditor, is not necessarily a fraudulent preference.

This was a cause of mortgage instituted under the Admiralty Court Act (24 Vict. c. 10), s. 11, by W. F. Watts, the mortgagee of the sloop *Heart of Oak*, her tackle, &c., against W. P. V. Wallis, the assignee in bankruptcy of Julius Vandenbergh, her registered owner intervening.

The material facts of the case were these: There was a shipping firm at Portsmouth, of Vandenbergh and Son, and to this firm Watts, the plaintiff, before the year 1866 (the exact date did not appear) became a clerk for a twelvemonth without any salary, and afterwards at a salary of 10*s.* a week, but with no obligation to a fixed or a regular attendance, and with liberty to carry on a sort of business of his own with masters of ships, for the sale, exchange, and transfer of their private adventures. His chief duty to the firm was to enter ships at the Custom House and clear them out. In June 1866, he entered into an engagement with Mr Julius Vandenbergh, the mortgagor, who appears not to have been a member of the firm, but who carried on business in another room of the same house in which the firm carried on their business. Julius Vandenbergh was a shipowner and a commission agent, and Watts was engaged, according to his own statement, "to do his work generally," for which he was to receive 30*l.* per annum, but of that he never did receive a farthing. Almost his first act appears to have been to assist his new master in endeavouring to obtain the assent of creditors to a deed of composition at 5*s.* in the pound. This attempt failed, and Julius Vandenbergh was obliged in the year 1866 to do what is technically called "keep his house," which it is admitted constituted an act of bankruptcy, but no creditor chose to make him a bankrupt; and he appears to have remained unmolested until the year 1869, and was therefore, under the 88th sect. of 12 & 13 Vict. c. 106, not liable at that time for an act of bankruptcy committed more than twelve months before. The *Heart of Oak*, which belonged to Julius Vandenbergh, sailed upon what is called the principle of thirds. The master paid the crew their wages and food, deducted two-thirds for himself from the earnings of the ship, and paid the other third to the owners. Watts received this one-third, and paid it over to Julius Vandenbergh. Watts kept a sort of diary with an account of moneys which he had paid for Julius Vandenbergh from June 1866, but he never kept any account of moneys received from Julius Vandenbergh, and took no receipt and made no entry of moneys which he paid over to him; he received from 90*l.* to 100*l.*; he kept no account, but tied the vouchers together. He kept no books at all for himself, and Julius Vandenbergh had no banking account.

It appeared that receiving no salary or repayments of any kind for his disbursements, Watts pressed Vandenbergh for a security and obtained the equity of redemption of some houses; but in January 1869, there being some considerable sum (about 100*l.*) due to him he pressed for further security, and Vandenbergh being satisfied with his accounts, which he says he went through with him, gave to Watts the security of the first mortgage dated the 4th Jan. 1869 (which was registered on the 26th March 1869), for 110*l.*; Watts prepared this mortgage, as he did the subsequent one, himself. In the early part of the same month—between the 5th and 10th—the *Heart of Oak* got upon the rocks at Lyme Cobb and suffered severe damage. Watts called upon Vandenbergh to repair this damage, but Vandenbergh declined on the ground that he had no money. Watts undertook to

make the repairs and asked for a further mortgage as a security, and he gave some evidence that he expended upwards of 60*l.* for this purpose.

The second mortgage was pleaded, and sworn to have been executed on the 8th Jan. 1869; it purported to secure the repayment of the sum of 60*l.* It was admitted, however, upon the evidence, that it certainly was not executed until after the 29th March. This admission was inevitable, because, purporting to be executed on the 8th Jan., it recited the registration of the former mortgage on the 29th March following. This was sought to be explained by reference to an agreement which bore date the 8th Jan. 1869, and it was said that the second mortgage was merely an amplification of the agreement which it was urged was contemporaneous with the repair of the vessel. This agreement was not put in evidence till after the cross examination of Watts. The bankruptcy took place on the 10th May, and the second mortgage was not registered till the August following. It further appeared that in Dec. 1868, or thereabouts, another attempt at composition with his creditors was made by Vandenbergh, in which Watts took an active part, and which it was said failed on account of the refusal of a single creditor. In Jan. 1869, the debts were between 1400*l.* and 1500*l.*, and it was admitted by Vandenbergh, that there remained no available assets for creditors.

Giffard, Q. C. and *Cohen* for defendant.—The second mortgage is inoperative, as an act of bankruptcy had been committed within twelve months of the actual bankruptcy, and the ship at the time of the execution was within the order and disposition of the bankrupt:

12 & 13 Vict. c. 106, s. 125;
17 & 18 Vict. c. 104, ss. 37, 43, 55, 66, 70.

There is no proof that the second mortgage was executed before the bankruptcy, it was antedated, it was not registered, and there can be no doubt on consideration of the evidence that it was executed after the bankruptcy. In reference to the first mortgage, apart from any other consideration, it is a fraudulent preference; the facts disclose a secret trust in favour of the bankrupt, therefore the mortgage is *per se* fraudulent:

13 Eliz. c. 5;
Twine's Case, 1 Sm. L. C. 1.

There is a fraudulent preference, for by the mortgage the mortgagor conveyed all his available assets:

Ex parte Foxley, re Nurse, L. Rep. 3 Ch. App. 515; 18 L. T. Rep. N. S. 862;
Woodhouse v. *Murray*, L. Rep. 2 Q. B. 633; 19 L. T. Rep. N. S. 570;
Graham v. *Chapman*, 12 C. B. 85.

Butt, Q.C., and *Pritchard*, for the mortgagor.—The ship was out of the control of the bankrupt once the first mortgage was made, and at the time of the second mortgage he was not the owner:

Griffith's Bankruptcy, p. 450;
Joy v. *Campbell*, 1 Sch. & Lef., 328.

Moreover the objection that the ship was in the bankrupt's order and disposition at the time of the bankruptcy should have been specifically pleaded. The mortgage was registered in the usual way, and, not pending any proceedings in bankruptcy, the mortgagor did not remain in possession, and the gift was only of part of the mortgagor's property, and not general; therefore *Twine's* case does not hold good in the present case:

Van Castel v. *Booker*, 2 Ex. 691;
Brown v. *Kempton*, 19 L. J., N. S. 169, C. P.

The mortgagor was not really bankrupt till after execution of the second mortgage. Even if the upt assigned all his property this would not arily constitute a fraudulent preference, the court must decide this question on an examination of all the facts of the case.

Smith v. *Timms*, 4 L. T. Rep. N. S. 827; 1 H. & C. 849;
Johnson v. *Feseymeyer*, 3 De G. & J. 13;
Balme v. *Hutton*, 2 C. & J. 19.

It is clear that the first mortgage did not convey all the mortgagor's interest, for after that had been given it was still worth plaintiff's while to advance money on a second mortgage, and the mortgagor's good faith is shown by his spending the money raised by the second mortgage in repairs.

Sir R. J. PHILLIMORE—This court is required, and I believe for the first time, to administer the law of bankruptcy as between an assignee and a creditor mortgagee. The present Lord Chancellor observed in the case of *Ex parte Roseley*, speaking of the assignment of property by a bankrupt, "there cannot be any difference in the mode of judging of such an assignment in the courts of common law and equity," neither can there be, I may add, any difference in the mode of judging of such a case in the High Court of Admiralty, which is both a court of law and equity, and I must endeavour to decide the matter now before me upon the same principles as those which have governed the decisions in those courts. The industry of counsel has furnished me with reference to all the principal cases, and to some of them I will presently refer. [His Lordship then proceeded to summarise the facts as above, and having done so continued.] I think it unnecessary to go into further detail. I am satisfied upon the whole evidence as to two material points: First, that after the assignment of the equity of redemption in the houses and the mortgage of the *Heart of Oak*, there remains scarcely any, and if any, the most inconsiderable, assets in the hands of Vandenbergh; secondly, that at the time when these assignments were made, both Vandenbergh and Watts were aware that the former was practically bankrupt. It was said that I had no evidence that the ship was not of greater value than both the mortgages, and that perhaps the property not assigned was therefore considerable; but Watts, in answer to this question put to him by the counsel for the assignee, "How was the composition" (that is the proposed composition of 5s. in the pound) "with the creditors to be paid? you had the equity of redemption of the houses and the mortgage of the *Heart of Oak*," answered, after a considerable pause, "I don't know." Nor did he or Vandenbergh, in his examination before me, ever pretend or suggest that there was any margin of property to be derived from the ship after the mortgages had been satisfied. And here I may observe that some furniture said to have been possessed by Vandenbergh, but apparently of the most trifling value, was the only property which could be suggested as not being covered by the assignment. Having arrived at these conclusions of fact, I forbear to dwell upon the various circumstances of suspicion which surround the case of the plaintiff; but I will add, that with respect to the demeanour of the witnesses, while there was obviously much in the broken health and spirits of the bankrupt (who was most humanely cross-examined) to excite compassion, there was apparently no want of candour in his evidence, or in the manner in which he gave it—a remark I regret to say is in my judgment inapplicable to the testimony of the plaintiff. It remains for me to state briefly the law which is applicable to this state of facts. Before I consider the general law, I will deal with an argument founded upon the Merchant Shipping and Bankruptcy Acts. The 125th section of the 12 & 13 Vict. c. 106, enacts "that if any bankrupt at the time he becomes bankrupt, shall by the consent and

permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner," &c., such goods or chattels shall be deemed to be the property of the bankrupt, and it was contended that the effect of the sects. 37, 43, 55, 66, and 70 of the Merchant and Shipping Act 1854 (17 & 18 Vict. c. 104), showed that this vessel, the second mortgage of which was not registered till after the bankruptcy, was still in the "order and disposition" of the bankrupt, and therefore passed to his assignees. To this, I incline to think, though a decision upon this point is not necessary to the view which I take of the case, that it was effectually replied that the words in the 125th section of the first statute "true owner," applied to third persons, and that the fact of the registration of the first mortgage before the date of the bankruptcy was sufficient to show that the vessel could not have been sold by the bankrupt, a position which was further supported by a reference to the 70th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). It was also contended that, apart from the bankruptcy laws, these mortgages were, under the authority of *Twine's case*, Sm. L. C. vol. 1, p. 1, fraudulent and invalid, inasmuch as the circumstances showed that there was a secret trust between the parties, and only a colourable disposition of the property. While I am not prepared to say that this argument is not sound, I shall not decide the case upon this ground, but upon the bankruptcy laws and the judgments which expound them. I was referred, during the course of the argument, to a great many cases. Those which I have principally consulted are—I state them in the chronological order—*Graham* v. *Chapman*, 12 C. B. 85; *Smith* v. *Carman*, E. & B. 35; *Smith* v. *Timms*, 1 H. & C. 849; *Johnson* v. *Fesenmeyer*, 3 De G. & J. 13; *Woodhouse* v. *Murray* (*sup.*); and *Ex parte Foxley, re Morse* (*sup.*) From these and other cases, I extract the following principles as applicable to the present case, that fraud in the bankruptcy law is not necessarily an intentional fraud; that the cardinal principle of the bankrupt law is that there shall be equal distribution of the bankrupt's effects among his creditors; that among the corollary principles are these: that a debtor may not assign all or nearly all his effects to one creditor, so as to put it out of his power to carry on his trade. Such an assignment is not necessarily fraudulent where it does not include his trade effects; for the test is whether the necessary effect of the deed is to defeat and delay the creditors of the trader, and not whether it stops his trade. An assignment of the whole and such an assignment, with a colourable exception of a part only, is in effect an assignment of the whole, and such an assignment is fraudulent in the eye of the law. The sale of the whole of a trader's effects to a *bonâ fide* purchaser is not necessarily fraudulent if the trader gets a present equivalent for his goods; but where the payment of an old debt is taken as part of the price, the trader gets no such equivalent, but his transfer has the effect of defeating and delaying his creditors. The assignment of a security to a particular creditor, even when bankruptcy is inevitable, if the assignment be not made voluntarily, but at the demand of the creditor, is not necessarily a fraudulent preference. Applying these principles to the circumstances of the case before me, I am of opinion that these mortgages fall under the category of a fraudulent preference to a particular creditor, inasmuch as by means of these an assignment was made by the trader of all his effects with only a colourable exception, in contemplation of bankruptcy; and because such an assignment was made without any present equivalent, and the effect of the assignment was to delay and defeat the equal distribution of his effects among all his creditors, I must pronounce against the validity of these mortgages, and dismiss the petition of the mortgagee with costs.

Proctors for the plaintiff, *Pritchard* and *Sons*.

Solicitors for the defendant, *Whites*, *Renard*, and *Floyd*.

Jan. 11th and 18th.

THE ELIZABETH.

County Court Admiralty Jurisdiction Act 1870 (31 & 32 *Vict.* 71)—*General Order* 37—*Cross causes—Appeal—Consolidation.*

Where in cross causes of damage the amount of damage sustained by the innocent vessel was under 50l., and the wrongdoer sought to appeal in both causes, and prayed that they might be consolidated:

Held, that the court will not order the consolidation of cross causes tried together under General Order 37, for the purposes of appeal, and that on proper evidence being afforded that the amount of damage had been ascertained to be under 50l., the appeal should be dismissed in the cause in which the appellant had been defendant.

This was a motion to dismiss an appeal from a decision of the Judge of the City of London Court on the ground that the decision being for a sum of less than 50*l.* no appeal lay under the 31st section of the County Courts Admiralty Jurisdiction Act.

The suit arose out of a collision in the river Thames between the schooner *Elizabeth* and the steam ship *Adalia*, in which both vessels sustained damage. The schooner brought a suit against the *Adalia* placing her damage at 100*l.*, and the *Adalia* brought a cross suit in the above cause, the *Elizabeth* placing her damage also at 100*l.* At the hearing it was agreed that both suits should be heard and decided upon the same evidence, and that the question of damages should be referred to the nautical assessors who sat with the County Court judge. The judge decided that the *Elizabeth* was solely to blame and dismissed the suit against the *Adalia*, and in the cross suit gave judgment for the *Adalia*. The damages have not yet been assessed. The owners of the schooner appealed against both decisions.

Webster, for the appellants, contended that no appeal lay in the case of the Elizabeth, as the cause came within the 31st section of the County Court Admiralty Jurisdiction Act. Affidavits were read to prove that the damage sustained by the Adalia did not amount to 50*l.*, and that the award of the assessors when made would be for a sum under that amount. It was contended that the words of the section applied, and that the circumstances of the case having been heard on the same evidence, did not disentitle the plaintiff to the benefit of the section.

Edwyn Jones, contra.—The section does not apply, the decree not being for any specific sum. In case it be considered as applying to cross causes, as in this case, if the plaintiff should succeed in this motion, and the defendant (the plaintiff in the other suit) should succeed on the appeal, there would be this absurdity: On the same evidence and between the same parties the judgment would be diametrically opposite. He also contended that the plaintiff, having entered his suit for 100*l.*, could not amend his claim by putting his damages at a smaller sum, for the purpose of taking away the defendant's right of appeal. He cited *North* v. *Holroyd*, L. Rep. 3 Ex. 69; 17 L. T. Rep., N. S. 575.

Sir R. J. PHILLIMORE.—This is a cause of appeal from the City of London Court, instituted by the

owners of the *Elizabeth* against the owners of the *Adalia* in the sum of 300*l.* There were cross suits in the court below which, under the 37th order of the General Orders issued under the County Courts Admiralty Jurisdiction Act 1868, were heard "at the same time and upon the same evidence." Under the 31st section of the Act referred to (31 & 32 Vict. c. 71), "no appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.*" In the suit in which the *Elizabeth* was plaintiff the cause was dismissed, and in the suit in which the *Elizabeth* was defendant, she was pronounced solely to blame; and the amount was referred, by consent, to the nautical assessors. The report of the assessors I have not before me; but I have two affidavits, one from the proctor for the *Adalia*, stating that he verily believes the damage sustained by the *Adalia* to be the sum of 29*l.* 10*s.* 1*d.*, and no more; and another affidavit, by the managing clerk of the owners of the *Adalia*, to the effect that the damage sustained by her does not exceed 50*l.* It appears from the affidavit of the solicitor for the *Elizabeth*, that both the suits were instituted for the sum of 100*l.* in the court below. The *Elizabeth* has appealed in both causes. The *Adalia* prays that the appeal in the case in which she was the plaintiff in the court below may be dismissed, with costs, on account of the damage received by her being under the sum of 50*l.* The *Elizabeth*, on the other hand, prays that the two suits may be consolidated, and that an order may be made as to the amount of security for costs, and all further proceedings in the court below stayed. Upon this statement of facts two questions have been mooted before me—first, whether the two suits, having been heard together in the court below, should not be considered as one suit, in which case, as the *Elizabeth* claims upwards of 50*l.*, and has received nothing, the section of the statute would not apply, according to my ruling in a former case? Secondly, whether I have proper evidence before me that in the case in which the *Elizabeth* is defendant the amount decreed or ordered to be due does not exceed 50*l.*? As to the first question, I am of opinion that the two suits cannot be considered as one, any more than if they had been respectively instituted in different county courts. This position is further confirmed by the practice on appeals from the High Court of Admiralty, in which cross-suits which have been heard together are treated as separate with respect to the institution of the appeal. I must therefore dismiss this appeal when I have proper evidence before me that the amount decreed or ordered to be due does not exceed 50*l.* The second question is, whether I have or not the requisite evidence on this point, and I am of opinion that I have not. I have considered the case cited of *Worth* v. *Holroyd* (*sup.*) The finding of the assessors as to the amount will, I presume, be made part of the decree *nunc pro tunc*, and on an affidavit being filed that that finding places the amount under 50*l.*, I shall direct that the appeal in the suit in which the *Adalia* is plaintiff be dismissed. The motion will stand over for the filing of the affidavit.

Attorneys for appellant, *Lowless* and *Nelson*.

Attorney for respondent, *Stokes*.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Jan. 11.

In the Goods of J. JAMES.

Administration — Estate not wholly administered — Sureties allowed to justify for unadministered portion only.

A wife took out administration to her husband's estate, and became insane before completely administering it. The court in granting administration to the son allowed the sureties to justify for the present instead of the original value of the estate.

The estate of John James was administered to by his wife. It was of the value of 3000*l.*, and after administering it all, except about 160*l.*, she became insane.

M'Connel now moved that administration be granted to her son—both her and her husband's sole next of kin; and that the securities should be required to justify only for the unadministered residue of the estate, and not for its full original value.

Lord PENZANCE.—The thing has been done before I believe, and is not unreasonable. You may take the grant with permission to the sureties to justify for the smallest amount.

In the Goods of G. PEABODY.

Will of domiciled American—Two sets of executors—Trust-deed to be discharged in America—Incorporation dispensed with.

A domiciled American subject made a will in the United States, by which he directed his property in this country to be paid over, after the discharge of certain specified legacies, to his executors in America, and to be by them distributed according to the provisions of a trust-deed also executed in the United States. The deed did not affect the devolution of property in this country, and the court therefore allowed probate to go without incorporating, an affidavit being filed in the registry identifying it by date and name of trustees.

George Peabody, late of Danvers, Massachussets, U.S., a domiciled American, died in London, Nov. 4, 1869, leaving a will duly executed in the United States bearing date Sept. 9, 1869. By this will he appointed two sets of executors, one set whom he described in the will as his London executors, the other as his American executors. His London executors were directed by the will to realise his estate in this country, and after the payment of certain legacies to transmit the residue to the American executors. The American executors, to whom were committed the control and management of the testator's American property, were directed at the end of a certain term to distribute the whole realised, &c., estate, English and American, according to the provision of a family deed executed in the United States, and appointing an entirely different set of trustees. A question arose in the registry whether this deed ought to be incorporated with the probate, and

Dr. *Deane*, Q.C., on behalf of the English executors, now moved that the grant of probate might go without setting out the deed. There are no trusts in it to be discharged in this country, and the English executors have no knowledge of it whatever. All that they have to do is to pay certain specific legacies, and then hand the residue over to the American executors. He cited

Sheldon v. *Sheldon*, 1 Rob. 221; and
In the Goods of Lord Lansdowne, 3 S. & T. 195; 9 L. T. Rep. N. S. 22.

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Lord PENZANCE.—The reason for the rule which gave rise to the objection in the registry is that it is desirable to have on record there the names of the residuary legatees, so that if, in the course of time, it becomes necessary to have another grant, the court may have the power of ascertaining the persons entitled to it. But in this case it appears to me unnecessary to take that precaution, as nothing will happen in this country under the deed, and no devolution of property in this country will be affected by it. I think you ought to be allowed to take probate without incorporating the deed; but you must file affidavits identifying the deed by its date, and the names of the trustees for the purposes of reference. You must also file an affidavit that the will is valid according to the law of the United States.

Solicitors: *Freshfields.*

Tuesday, Jan. 18.

In the Goods of GRINSTEAD.

Administration—Simultaneous death of husband and wife—Survivorship uncertainty—Form of oath.

T. G., with his wife and three children, perished in a shipwreck. There being no evidence as to survivorship, and no will,

The court granted administration of the estate of T. G., as having died a widower, to the maternal grandfather of the surviving children, and directed that the administrator's oath, instead of being in the usual form, should state that there was no reason for believing that the wife had survived her husband.

T. S. Grinstead, late of New Shoreham, Sussex, a master mariner, sailed in the brig *Diamond*, of Sunderland, from the port of Shields, with a cargo of coals, bound to Portsmouth. His wife, Emma Susannah Grinstead, and three of his children, Thomas, aged thirteen, Harry Bertram, aged eleven, and Ellen, aged two, were on board with him. The ship never reached Porsmouth, and the last time she was seen was by the captain of a foreign vessel, when she was off Beachy Head, labouring heavily under the heavy gales of the 11th, 12th, and 13th Sept. 1869, and in such a position that it was impossible she could escape. Shortly afterwards, the long boat and different portions of a wreck, identified as being part of the brig *Diamond*, came ashore near Newhaven, but nothing more was seen of her. The underwriters at Lloyds paid the insurance effected on her as for a total loss. Mr. Grinstead left three children surviving, Albert, aged eight, Emma, aged six, and Alice, four. He owned one half of the brig *Diamond*. Diligent search had been made for a will, but none had been found. Albert Grinstead, the eldest of the three surviving children, had, by a proxy dated Jan. 12, 1870 elected Daniel Young, his maternal grandfather, his guardian, for the purpose of applying for letters of administration.

Inderwick, on behalf of Daniel Young, the maternal grandfather, now moved the court to decree letters of administration of the estate of Thomas Grinstead to him as the lawful maternal grandfather and sole next of kin of the said minor and infants, duly elected their guardian for that purpose, for their use and benefit until one of them shall attain the age of twenty-one. In the form of oath, instead of stating that the deceased had died a widower, it would be necessary to state that there was no reason to believe that the wife had survived her husband. In all probability they either perished together, or, the husband being the more robust, might have struggled the longest. He cited

In the Goods of Wainwright; and
In the Goods of Ewart, 1 S. & T. 257, 258.

Lord PENZANCE.—The administration may go, and the form of oath may be as suggested.

Solicitors, *Longden* and *Procter.*

LIMB v. HOLDEN AND WHITE.

Testamentary suit—Separate defences—Consolidation

Two executors had commenced separate defences, and two records had been made up. The court, on motion, ordered the records to be consolidated, but gave the defendants leave to be represented by counsel separately.

Ann White died May 11,1864, leaving a will duly executed, bearing date March 15 in the same year, of which the defendants were the executors. The plaintiff as the next of kin of deceased, pleaded that the will was not duly executed; that the deceased did not know and approve of the contents; that the deceased was not of sound mind, memory, and understanding at the time of execution, and that the execution of the will was procured by the undue influence of the defendants. The defendants had pleaded separately, and there were two separate records. On the cause being ordered to be tried by a common jury.

G. Browne, for the defendant White, who had been subpœnased to bring in the will, moved that the records be consolidated.

Lord PENZANCE.—By all means let the proceedings be consolidated; but the parties must have leave to appear by separate counsel, if they think fit.

Solicitors for the plaintiff, *White*, *Rickards* and *Walker.*

In the Goods OF BENSON.

Probate—Attestation clause defective—Affidavit dispensed with.

The attestation clause to a seaman's will was defective, in that it did not state that the witnesses had signed in each other's presence. One of the witnesses was in India, the whereabouts of the other was unknown. The court, under the circumstances, on the consent of the widow being filed, dispensed with the usual affidavit from an attesting witness.

G. Benson, late of Liverpool, in the county of Lancaster, a seaman in the employ of the British Indian Steam Company, died Jan. 6, 1869, at Manilla. He left a will bearing date Aug. 27, 1864, executed on board the ship *Cashmere*, at Greenock. It was witnessed by two fellow seamen, but the attestation clause was deficient, in that it did not state that the witnesses signed in each other's presence.

Searle now moved for probate, and applied that the court would dispense with the usual affidavit from one of the attesting witnesses. One of them was in India, and the other had gone nobody knew where. The widow had consented.

Lord PENZANCE.—I think you have done all that is reasonable, and you may take the grant.

Solicitors: *Fawcett*, *Horne*, and *Hunter.*

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COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Wednesday, Nov. 17, 1869.

(Before Lord PENZANCE, J. O.)

PARKINSON *v.* PARKINSON.

Desertion—Separation-deed.

A husband deserted his wife, but before the two years expired a deed of separation was executed between the parties, by which the husband covenanted to pay her a certain sum yearly. No part of it had ever been paid.

The court held that the deed disentitled the wife to petition for divorce on the ground of desertion without cause for two years.

Nott *v.* Nott *distinguished.*

This was a wife's petition for a divorce on the ground of adultery coupled with desertion. The parties were married in 1861 and cohabited until 1865, when the husband deserted his wife and went to live with another woman. In April 1866 a deed of separation was executed between the husband and a trustee on behalf of the wife, by which she covenanted to live apart from him on consideration of his paying her an annuity which he charged on a sum of 5000*l.* in which he had a reversionary interest. He had never paid any of the allowance, nor had he contributed in any way to her maintenance. At the trial the adultery was proved, and

Dr. *Swabey*, for the petitioner, submitted that the object of the deed was simply to secure a maintenance for the wife, and not a consent to live apart. She had never received any benefit from it. He cited

Nott v. *Nott*, L. Rep. 1 P. & M. 251; 15 L. T. Rep. N. S. 299.

Lord PENZANCE, J. O.—The court is satisfied as to the adultery, but the question is whether it is justified in holding that there has been desertion without cause for two years. No doubt the husband left the wife in 1865 under such circumstances that if he had never seen her again, and no communication had passed between them for two years the desertion would have been complete. But in 1866 Mr. Paine, a trustee under certain family deeds, and a friend both of the husband and of the wife went to the husband and remonstrated with him for having left his wife, and discussed with him the question of making some provision for her. The result of his negotiations was that the husband and wife entered into a deed by which he covenanted to pay her 150*l.* a year. That deed was fully and completely executed, and was signed by the husband and wife and the trustee. The husband had not the means of paying the money, but he had a reversionary interest in 5000*l.*, and it was covenanted that the allowance should be made a charge on that reversion. The wife, therefore, obtained a distinct benefit under the deed, having a charge upon the reversion for the allowance upon which she might raise money. She on her part agreed that she would live separate from her husband. It is now suggested that the court should inquire into what was intended by her when she executed the deed. It is clear that such evidence cannot be admissible. The question then is whether the woman who voluntarily enters into an agreement that her husband should live apart from her, can be said to have been deserted without just cause. I repeat the opinion I formed in *Crabb* v. *Crabb*, L. Rep. 1 P. & M. 601, that she cannot. There is a material difference between such a case as this and *Nott* v. *Nott* (*sup.*) The *ratio decidendi* in *Nott* v. *Nott* was that the wife never agreed to live separate and apart from the husband. The making of a deed was contemplated, and some of the parties executed it, but the party whose execution was to make it an efficient and binding act, was the trustee who covenanted for the wife, and he never signed it, so that the deed was never completed. In this case the court is reluctantly compelled to hold that the wife has bargained away her right to relief on the ground of desertion, and that the charge of desertion without cause for two years is not established. She is entitled to a judicial separation on the ground of adultery, if she applies for it.

The case was adjourned in order that the plaintiff might be consulted.

Saturday, Dec. 18, 1869.

HEBBLETHWAITE *v.* HEBBLETHWAITE (Queen's Proctor intervening).

Evidence of adultery—Witness not bound to answer, nor liable to be asked questions—Evidence Act—Further amendment Act of 1869 (32 *&* 33 *Vict. c.* 68), *s.* 3.

A witness who is called to prove adultery with one of the parties to a suit may claim the protection of the proviso in the 3rd section of the Evidence Amendment Act; but if he or she do not claim it, the evidence is admissible. The judge may refuse to allow the question to be put if the witness claims the protection of the proviso, but the counsel cannot exclude it.

This was originally a petition by a wife for a dissolution of her marriage, on the ground of her husband's adultery. The husband denied the adultery, and charged his wife with adultery, and prayed for a dissolution of his marriage. At the trial no evidence was given on behalf of the petitioner, and the respondent having proved his wife's adultery, a decree *nisi* was pronounced. Subsequently the Queen's Proctor intervened, and among other things charged the husband with adultery with one Clara Phillips.

The case was tried on Dec 18th before the court and a special jury.

The *Attorney-General* (*J. F. Collier* with him), for the Queen's Proctor, called Clara Phillips.

Dr. *Spinks* (*Inderwick* with him), on behalf of the husband, objected to any question being put to the witness tending to show that she had committed adultery with Mr. Hebblethwaite. The words of the statute are clear; she is not only not bound to answer the question, but she is not liable to be asked it. (*a*)

The *Attorney-General.*—It is for the witness to take the objection, not the other side. The witness may, if she pleases, claim the protection of the proviso; but the intention of the statute is that a witness, not being a party to the suit, may give evidence as to the adultery if he or she pleases, but that the witness shall not be bound to answer any question as to the adultery if unwilling to do so.

Dr. *Spinks* in reply.—The words of the statute admit of no doubt. If the proviso were only in-

(*a*) The words of the section (3) are: "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties shall be competent to give evidence in such proceedings, provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked, or bound to answer, any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

tended to protect the witness from the inference of guilt which would be drawn from a refusal to answer, the words, "no witness shall be liable to be asked," would be mere surplusage.

Lord PENZANCE, J. O.—I am very clear as to the intentions of the Legislature, though I cannot say that the words they have used are not capable of the interpretation Dr. Spinks has put on them. The general intention was to protect witnesses whose evidence was rendered admissible by the statute. The proviso was not intended to apply to evidence by which a case on either side was supported independently of the evidence of the parties. It was not intended to narrow the sources of evidence for or against a petitioner or respondent, but to protect the witnesses, and I doubt whether it is competent for counsel in any case to take advantage of it. It is the duty of the judge to see that the witnesses have the protection given to them by the statute. What is the meaning of the words, no witness "shall be bound to answer or liable to be asked?" The meaning is this, that when any person is called into the witness box and it is proposed to question him or her for the purpose of extorting a statement that he or she has been guilty of adultery, the witness may claim the protection of the statute, if he or she is not desirous of answering. I think the words "no witness shall be liable to be asked," are not surplusage, because without those words a string of questions might be put one after the other to a witness, who would have to refuse to answer them one by one; whereas with those words in, it becomes the duty of the judge to refuse to allow any of those question to be put if the witness claims the protection of the statute.

Lord PENZANCE, J. O. then told the witness that she was not bound to answer any question relating to her alleged adultery with Mr. Hebblethwaite, unless she pleased.

The witness, however, said she had no objection to answer the question, and denied that any such adultery had taken place.

The jury found that Mr. Hebblethwaite was not guilty of the adultery charged; and on a subsequent day the decree *nisi* for the dissolution of his marriage was made absolute.

Tuesday, Jan. 11.

ROWLAND *v.* ROWLAND AND MILES.

Dissolution suit—Co-respondent allowed to come in and traverse the petition two years after it was filed.

A petition for dissolution had been filed so far back as 1867, *and the co-respondent had not answered. He had been living abroad, and was entirely without means.*

In order that he might be heard as to costs, the court now allowed him to come in and file an answer, on the condition that it should simply traverse the petition.

The petition in this suit, which prayed for a dissolution of the petitioner's marriage on the ground of his wife's adultery with the co-respondent, was filed in 1867. The respondent and co-respondent had not appeared. Damages were prayed, and the cause had been set down for hearing before a common jury. The co-respondent had been living abroad, and was entirely dependent on his friends.

Inderwick now moved that the co-respondent have leave to appear and file an answer, in order that he might be heard on the question of costs.

Dr. *Spinks*, contra.

Lord PENZANCE, J. O.—You may have leave to come in on paying the costs of this motion, but on the understanding that the petition is only to be traversed.

Dr. *Spinks* asked that the co-respondent might be put under the condition of giving security for the costs of the cause.

Lord PENZANCE, J.O.—I cannot cast that additional burden on the co-respondent.

Solicitor for the petitioner, *Withall.*

Solicitor for the respondent, *Harrison.*

Solicitor for the co-respondent, *Gregory.*

Tuesday, Jan. 18.

YEATMAN *v.* YEATMAN AND RUMMELL.

Dissolution—Prior decree of judicial separation pleaded.

A wife, in answer to the husband's petition for dissolution on the ground of adultery, pleaded that in a former suit she had been judicially separated from him. The court refused to hold the prior decree as a bar to the husband's suit.

This was a husband's suit for dissolution on the ground of the wife's adultery. The wife, in her answer, alleged (*inter alia*) that in a former suit at her instance a decree had been pronounced judicially separating her from her husband on the ground of her husband's cruelty.

Searle, on behalf of the repondent, asked that before going into the inquiry into the wife's adultery, it should be argued and decided whether the decree of judicial separation did not operate as an estoppel against any further proceedings on the part of the husband. [Lord PENZANCE, J. O.—The cruelty would only be a discretionary bar.] Here there was something more than cruelty; there was a judicial separation standing against the husband.

Lord PENZANCE, J. O.—The section which gives the court discretion to refuse or grant a divorce under such circumstances says nothing about a decree. A decree cannot go further than this, that the court was satisfied that the petitioner had been guilty of adultery. It is a mere discretionary bar. The case must take the usual course.

Petitioner in person.

Solicitor for respondent, *Edwards.*

Tuesday, Jan. 18.

EATON *v.* EATON AND CAMPBELL.

Dissolution suit—Alimony pendente lite—Allowance to the wife from her father.

A husband, in answer to his wife's petition for alimony pendente lite, pleaded that her father at the time of marriage promised to allow her an annuity of 100*l. It being shown that this annuity had been regularly paid, and that the father had not expressed any intention of withdrawing it; and the husband's means being small, the court refused to make any order on him for alimony.*

This was a husband's suit for dissolution on the ground of his wife's adultery. The wife now petitioned for alimony *pendente lite*, and the husband, in his answer, alleged that the wife's father had promised at the time of the marriage to make her an allowance of 100*l.* a year, and that he had in fact paid her that sum annually in advance.

Dr. *Tristram*, for the petitioner, now submitted that no order should be made. The father had never repudiated the equitable contract which he had

made at the time of marriage, and there was no reason to believe that he would not go on paying the wife her separate allowance.

M'Intyre.—The wife could not enforce this contract; she was dependent entirely on her husband, and if no order were made she might be left destitute.

Lord PENZANCE, J.O.—The wife's father has never yet omitted to pay the allowance which he promised to pay, and there is no reason suggested for believing that when the proper time comes he will repudiate it. I look upon the wife, therefore, practically, as a person in the receipt of a separate income of 100*l.* a year, and as the petitioner's means are very small, I do not feel disposed to make an order. If anything occurs to show that the father intends to hold his hand, the respondent may apply again.

SILVER *v.* SILVER.

Dissolution—Wife's suit—Bigamy pleaded by husband—Answer on oath—Pleading.

A husband, in answer to his wife's petition for divorce, pleaded that she was not his lawful wife as he had contracted a previous marriage. On motion for particulars of the previous marriage the court ordered them to be set out in the pleas, and not by way of particulars, but dispensed with their averment on oath on the ground that it might form the basis of a prosecution for bigamy.

This was the wife's suit for dissolution of her marriage on the ground of her husband's adultery, cruelty, and desertion. The husband traversed the charges, and pleaded that the petitioner was not his lawful wife, inasmuch as at the time of the ceremony he was married to another person then living.

Searle, on behalf the petitioner, applied that the circumstances of the alleged previous marriage should be more fully set out in the respondent's pleas. It is quite unusual to plead a marriage in so vague a form.

Bayford, for the petitioner, urged that the circumstances should be set out in particulars, and not in the pleas, on the ground that if the respondent swore to the fact of his previous marriage it might be the foundation of a prosecution for bigamy.

Lord PENZANCE, J. O.—I think the circumstances of the previous marriage must be set out in the pleas, and not by way of particulars; but the court will relieve the respondent from the necessity of affirming them on oath.

Solicitor for the petitioner, *Vyner*.

Solicitors for the respondent, *Phelps* and *Bennett*.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Saturday, Dec. 11, 1869.

(Before Lord Justice GIFFARD.)

Re THE HOLLYFORD COPPER MINING COMPANY (LIMITED).

Winding-up—Order of an Irish court—Making that order an order of the Court of Chancery in England—The Companies Act 1862, *ss.* 81, 122—*The Bankruptcy Act* 1861, *s.* 219.

The Court of Bankruptcy in England has no jurisdic- to make an order of the Court of Bankruptcy in Ireland, made in the winding-up of a company under the Companies Act 1862, *an order of the Court of Bankruptcy in England.*

But, under sect. 122 *of the Companies Act* 1862, *such an order of the Court of Bankruptcy in Ireland can be made an order of the High Court of Chancery in England:*

A company formed under the Companies Act 1862, *and having its registered office in Ireland, was ordered to be wound-up by the Court of Chancery in Ireland. The proceedings in the winding-up were afterwards, under sect.* 81 *of the Companies Act* 1862, *transferred to the Court of Bankruptcy in Ireland. An order was made by that court for a call upon the contributories mentioned in a schedule to the order. Some of those contributories were resident in England, and, as they did not pay the call, it was desired to enforce the order against them through the medium of an English court.*

The official liquidators applied to Mr. Commissioner Bacon to make an order of the Irish court an order of the Court of Bankruptcy in England. His Honour was of opinion that he had no jurisdiction to do this, and consequently refused the application. Upon appeal by the official liquidators:

Held, that the commissioner was right in deciding that he had no jurisdiction. But, held, that the order of the Irish court could, under sect. 122 *of the Companies Act* 1862, *be made an order of the Court of Chancery in England, and this was directed to be done accordingly.*

The Hollyford Copper Mining Company (Limited) was incorporated by registration under the Companies Act 1862. It was an Irish company and its registered office was in that country. In 1867, an order for the winding-up of the company was made by the Court of Chancery in Ireland. It is provided by sect. 81 of the Companies Act 1862, that where the Court of Chancery in Ireland makes an order for the winding-up of a company under the Act, it may, if it thinks fit, direct all subsequent proceedings for winding-up the same to be had in the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate; and thereupon such last-mentioned Court of Bankrtptcy shall, for the purpose of winding-up the company, be deemed to be "the court" within the meaning of the Act, and shall have for the purposes of the winding-up all the powers of the Court of Chancery in Ireland. Under this section, the winding-up of this company was transferred to the Court of Bankruptcy in Ireland. On the 13th July 1869, an order was made by the court for a call of 4s. 6d. per share upon the contributories of the company. whose names were inserted in a schedule to the order. Some of these persons resided in England, and they failed to pay the call. The official liquidators desired to enforce the call order against these persons by means of the order of an English court, and they therefore applied to Mr Commissioner Bacon to have the order of the Court of Bankruptcy in Ireland made an order of the Court of Bankruptcy in England. It was alleged that there was jurisdiction to do this under sect. 219 of the Bankruptcy Act 1861. That section provides that any order made by the court in the course of the prosecution of any matter under the court, shall be enforced in Scotland and Ireland in the courts that would respectively have jurisdiction in respect of such matter if the residence or place of business of the debtor had been situated in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the courts that are thereby required to enforce the same; and in like manner, orders made by the Court in Ireland for or in the

course of any such proceedings, shall be enforced in England and Scotland by the courts of bankruptcy which would really have had jurisdiction in any such matter, and in the same manner in all respects as if such order had been made by the court required to enforce the same in the case of a matter within its own jurisdiction.

His Honour held that he had no jurisdiction, and refused the application, which was now renewed by the liquidators by way of appeal.

Lindley, on behalf of the appellants, contended that the Court of Bankruptcy had jurisdiction to make the order. But, if not, he then asked that an order might be made in Chancery, making the order of the Irish Court of Bankruptcy an order of the Court of Chancery in England. This, he submitted, could be done under sect. 122 of the Companies Act 1862, which provides that orders made by the court in Ireland for or in the course of winding-up a company shall be enforced in England and Scotland by the courts which would respectively have had jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced; and in the same manner in all respects as if such order had been made by the court required to enforce the same in the case of a company within its own jurisdiction.

No one appeared for the contributories.

Lord Justice GIFFARD said that he thought the commissioner was right, and that there was no jurisdiction given to the Court of Bankruptcy under sect. 219 of the Bankruptcy Act 1861, and for this simple reason that if the company had had its registered office in England, the Court of Bankruptcy would have had no jurisdiction in the winding-up unless the Court of Chancery here had remitted the proceedings to it. The Court of Chancery would certainly never remit the proceedings to the Court of Bankruptcy simply for the purpose of enabling it to make the order of the Irish Court an order of its own. But under sect. 122 of the Act of 1862, his Lordship thought that there was no difficulty. This court would have been the proper court to wind-up the company if its registered office had been in England, and therefore the call order might be made an order of this court. The same form should be followed which had been already adopted under this Act, in making orders of the Irish Court of Chancery orders of this court. The liquidators must apply to the court in Ireland as to the costs.

Solicitors for the official liquidators *Tatham* and *Son*.

July 14, 15, *and Aug.* 6.

(Before the LORD CHANCELLOR (Hatherley) and Lord Justice GIFFARD.)

Re THE CORK AND YOUGHAL RAILWAY COMPANY; *Ex parte* OVEREND, GURNEY, AND CO. (LIMITED); *Ex parte* THE LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK (LIMITED) AND OTHERS.

Company—Limited borrowing powers—Bonds for sums in excess of—Lloyds' bonds—Equities of actual holders.

The railway company had exhausted their capital and borrowing powers; but their undertaking was yet incomplete. At a general meeting of the company, a balance-sheet showing the then amount of excess, was laid before the company, and a resolution mas adopted authorising the board to issue to L., their financial agent, bonds to be settled by counsel. Lloyds' bonds to a large amount were accordingly given to L., upon which he raised money, some part of which, it was not disputed, was applied in payment of the company's debts, and completing their works, and the bonds passed from L. into the hands of the present respondents, who carried in claims against the proceeds of sale of the railway under a special Act of Parliament for its dissolution, ond claimed to be entitled to a surplus of such proceeds in priority to the shareholders. On appeal by the shareholders, it was

Held that, although it was not law that no creditor who trusted the company after its capital and borrowing powers were exhausted could recover what was due to him, yet any debenture, loan notes, or the like, for the mere borrowing of money in excess of the company's powers, were void; but as the moneys raised in this case had been applied in paying debts of the company, and otherwise for the purposes of its undertaking, with the sanction and acquiescence of the shareholders, these latter could not be entitled to the surplus of the company's property without repaying all moneys so raised and expended.

Inquiries were accordingly directed to ascertain whether the company had had the benefit of any, and what, expenditure in payment of any sums recoverable from the company, or of any and what advances on the bonds, and whether any of the moneys so expended still remained unpaid by the company.

Per Giffard, L.J.: There is no ground whatever for asserting that a contract or instrument which fails at law for illegality, can be enforced in equity, even although money has been paid and received in respect of it. Where a plaintiff seeks to set aside an illegal contract, equitable terms are imposed on him by this court, as the price of the relief; but as to any claim sought to be actively enforced, the defence of illegality is as available in equity as at law.

This was an appeal by Mr. H. G. Pick, as representing the preference shareholders of the Cork and Youghal Railway Company, against a decision of Malins, V.C. that certain large sums of money supplied by a Mr. David Leopold Lewis, and expended for the benefit of the company, although in excess of the share capital, and the sums raisable under the borrowing powers of the company, constituted a debt due to the company, and that the bonds issued by the company to secure those moneys, which had passed from the hands of Mr Lewis to various other persons who were respondents on this occasion, must be satisfied out of a fund in court, arising from the sale of the railway, after satisfaction thereout of certain charges to which, by the Act for the dissolution and winding-up of the company, the proceeds of sale were made liable.

The circumstances were briefly these:

The company had in the year 1862 expended upon its undertaking a sum considerably in excess of its subscribed capital and the sums it was authorised to raise by loans, and had been assisted in raising money by Mr Lewis, their financial agent. On the 28th August 1862 the general meeting of the company was held, at which a balance-sheet was submitted, and a resolution was adopted that, inasmuch as the directors on behalf of the company had from time to time obtained moneys to pay for the purposes of the undertaking, which moneys had been so applied, the board be authorised to issue bonds according to forms to be settled by counsel to be given to Lewis as a security for the debt due from the company to him.

The material passages of these bonds, which were issued under the common seal of the company, were as follows:

Whereas, the above bounden company is well and truly indebted to the above-named David Leopold Lewis in the sum of , for work done and goods and materials supplied to the company for the purpose of their undertaking, by the

means and procurement and at the cost of the said D. L. Lewis, and at the request of the company, as they do hereby acknowledge; and whereas the said D. L. Lewis hath applied to the said company for payment of the said sum of money, but hath, at the request of the said company, agreed to forbear payment of the same until the day of on the said company being bound by this application for securing payment of the said principal sum on the day last aforesaid and interest thereon. Now, the condition of the above-written bond is such that if the said company, their successors or assigns, pay to the said D. L. Lewis, his executors, administrators, or assigns pounds, on or before the said day of , with interest in the mean time for the same at the rate of 5*l.* per cent. per annum, then the above-written bond shall be void; but otherwise the same shall remain in full force and effect."

Of such bonds 165,000*l.* worth were issued to Mr Lewis, who from time to time, as occasion required, parted with them, or some of them, to the present respondents for valuable consideration, whilst some of the debts of the company were paid with parts of the proceeds.

By the 29 & 30 Vict. c. 124, "An Act for the winding-up of the affairs, and the dissolution of the Cork and Youghal Railway Company, and for other purposes," after reciting that the company had not acquired some of the lands necessary for their railway, and that they might have incurred debts considerably beyond their mortgage debt, which they had not the means of paying; and that it would be of advantage to the public that the railway should be sold to the Great Southern and Western Railway Company, who were willing to purchase it for 310,000*l.* of their ordinary stock, which should be appropriated as a fund for satisfying the liabilities of the Cork and Youghal Company, and that claims had been made by alleged creditors which were denied by the company, and that it was expedient that provision should be made for ascertaining whether and how far the claims against the company were valid or not, it was, amongst other things, enacted that the railway should be vested in the purchasing company free from the debts of the Cork and Youghal Company except for land; that the stock to be created by the purchasing company should be registered in the name of the official liquidator to be appointed by the Cork and Youghal Company, who should sell the same as he should think fit, and that the net proceeds of such sale should (under sect. 12) be applied with the sanction of the Court of Chancery, first, in payment of the costs of the Act; secondly, in payment of compensation and expenses of completing the purchases of lands; thirdly, in payment of principal and interest due on mortgages; fourthly, in payment of the costs, charges, and expenses of legal proceedings subsequently to a certain day, and of office expenses, salaries, and wages; and fifthly, the surplus shall be subject to all the rights, equities, priorities, claims, and demands, whether of preference or ordinary shareholders, bondholders, or others, to which the vested property would, in case this Act had not been passed, have been subject, and shall be applied accordingly.

Under this Act the sale of the property of the company was completed, and after satisfaction o the objects mentioned in the first four clauses, there remained the surplus contemplated by the fifth of these clauses, which was in court. The present respondents carried in against this surplus their claims in respect of the bonds they held, and the learned Vice-Chancellor, as already stated, decided that they were entitled to be paid in priority to the share or stock holders of the company, from which decision these latter now appealed.

Jessel Q.C. and *Higgins* supported the appeal.

Roxburgh Q.C. and *Lindley*, *Cotton* Q.C. and *Hastings*, *Pearson* Q.C., and *Waller* and *H. M. Jackson*, supported his Honour's order.

The arguments fully appear in the judgments, and the authorities cited were:

White v. *The Carmarthen, &c., Railway Company*, 1 H. & M. 786; 9 L. T. Rep. N. S. 439;
Chambers v. *The Manchester and Milford Railway Company*, 5 B. & S. 588, 10 L. T. Rep. N. S. 715;
Re The German Mining Company, 4 De G. M. & G. 19;
Re The Worcester Corn Exchange Company, 3 De G. M. & G. 180;
Bateman v. *The Mid-Wales Railway Company*, L. Rep. 1 C. P. 499;
Bryan v. *The Metropolitan Saloon Omnibus Company (Limited)*, 3 De G. & J. 123.

Jessel Q.C. having replied,

The LORD CHANCELLOR said: It appears to the Lord Justice and myself that the order in the precise form in which it now stands is not exactly the order which the exigencies of the case require; but that, on the other hand, it is quite clear that it would be most improper to hold, that under and by virtue of the 12th section of the Act by which this company has been put an end to, and has been in effect bought by another company, the money should be distributed to the shareholders without making any provision whatever in respect of the payments that have been made by moneys procured by Mr Lewis in the manner described in the affidavits. Now the transaction was no doubt one of an irregular character in its substance, because the company, having expended the whole of its capital apparently, and reached the extent also of its borrowing powers, found itself heavily embarrassed with debt, and many of these debts appear to have been debts which certainly in themselves would be legally payable. Certainly many of these debts were debts to contractors, as stated in the affidavit, and debts to other persons; some of them were debts for rolling stock, which would undoubtedly be payable by the company, as it appears to me the debts to the contractors were also, which the company had not the means in the ordinary course of procedure of paying. The contention raised by Mr. Jessel it may not be necessary distinctly to decide on the present occasion; but it is still one which I conceive would not be sustainable, viz., that when a railway company is formed with a certain amount of capital, and is authorised to execute certain works, unless the works are executed within exactly the prescribed amount of capital, no further work can be done at all; in other words, that no contractor who has entered into an engagement to make the two or three miles of line required for the purpose of completing the work, would be able to recover in respect of the money, labour, and work expended on the company's behalf. That, I apprehend, would not be law. The very point did arise in the case of *White* v. *The Carmarthenshire Railway Company*, which, as far as I recollect, was not appealed, where a contractor was willing to give his services and to take his chance of being paid, with such remedy as he could insist upon by bringing an action against the company, and recovering judgment. In that case I held that the contractor having neglected so to act, and having proceeded to take some steps towards so acting, the company were authorised in giving him a debenture acknowledging the amount of the debt. On the other hand it was equally clear, or it has been made clear if it was not clear before by the case of *Chambers* v. *The Manchester and Milford Railway*

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Company, and the very able and lucid judgment there given, especially that of Mr. Justice Blackburn, that any scheme by which a company is authorised only to raise a given amount of capital by shares, and then a certain other quantity, usually one-third, of the share capital is prescribed by the Act of Parliament under which it acts, in the shape of debentures or mortgages, they cannot issue any debenture, or loan note, or any security of that description, for the mere purpose of borrowing money; and I apprehend any such instrument so issued would be just as void in equity as at law, being contrary altogether to statute, and being absolutely forbidden by statute: for I entirely adopt the view which was taken by the learned judges, that that thing, in respect of which a penalty is inflicted by statute, must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever.

Accordingly they held that these bonds, called Lloyds' bonds, were not in effect, for any purpose whatsoever, a payment of debts actually due; but were simply instruments issued for the purpose of raising and borrowing money; instruments to which no legal validity could be attributed, and I apprehend, for the reasons there assigned, no validity could be given to them in this court, any more than in a court of law. They proceeded upon this ground: that the Act of 7 & 8 Vict. contained an enactment by which it recited that many railway companies had borrowed money in a manner unauthorised by their Act of incorporation, or other Acts of Parliament relating to the companies, upon the security of loan notes or other instruments, purporting to give a security for the repayment of the principal sums borrowed at certain dates, and for the payment of interest thereon in the mean time; that they were issued contrary to Act of Parliament; that they had been issued in many respects in good faith, as between the borrower and the lender, for the lawful purposes of the undertaking, and in ignorance on the part of those who had taken them of their legal invalidity. So that it preserved the rights of those who at that time were placed in those circumstances, but proceeded to enact that, from and after the passing of the Act, any railway company issuing any loan note or other negotiable or assignable instrument purporting to bind the company, as a legal security for money advanced to the railway company, otherwise than under the provisions of some Act or Acts of Parliament authorising the Railway Company to raise such money, and to issue such security, should, for the offence, forfeit a given sum. The judges held that that penalty indicated plainly that the course of procedure in respect of which the penalty was inflicted was a course forbidden by law, and that, therefore, no recovery could be had upon any such instrument in a court of law. Of course, I need hardly say that, if the reasoning be just (and I think the reasoning is just), if it be forbidden expressly by Act of Parliament, this court can no more contravene that Act of Parliament than any other court of judicature in the kingdom.

That being so, this distinction is drawn by Mr Justice Blackburn, which appears to me to be very plain and clear; he says, in p. 611 of 5th Best and Smith's Reports: "They" (that means these instruments) "are on their face the acknowledgment of a debt to some particular person, with a covenant to pay it. Such instrument may be useful in this way: when a company are indebted it may be convenient to make a bond pointing to a particular portion of the debt actually due; it would facilitate the assignment in equity of the debt thus acknowledged to be due, and possibly throw upon the company the onus of showing the non-existence of the debt. But if there be no debt existing, such an instrument cannot create one, nor put any assignee in a better position than the original obligee or covenantee; and the person holding it could not recover upon it, if it was shown that it was given gratuitously, or was not authorised by statute."

That being so, one has to consider then the circumstances of this particular case, and they appear to be these: it is shown, I think, that, as regards some of the moneys which have been raised through the medium of Mr. Lewis, some small portions were paid direct. Mr. Jessel admitted that there were two small items so dealt with. There was a contest upon that; but some portions, larger or smaller as the case may be, seem to have been advanced by Mr. Lewis direct towards payment of persons who were actual creditors of the company, and so far, I apprehend, there could be little or no dispute as to the position of Mr. Lewis, and a person claiming through Mr. Lewis to stand in his place in respect of this debt so paid; or rather, more correctly to word it, to stand in the place of the original debtor, whose debt, being a valid debt, had been so paid.

But, with regard to the other debts, they seem to stand in this position. As far as one can see, there were debts for which the company were liable (for that seems to be beyond dispute), which had to be paid somehow or other. These debts having to be paid, it appears that the company circulated bills which were sent to every shareholder in the company, indicating the amount of debt to be somewhere about 100,000*l.*, or more, beyond the amount which they had power to raise by shares or by borrowing. That being so, and the company in truth having full and distinct notice that there was this debt, and that there was a large sum somehow or other to be provided for, proceedings were taken by the directors, with more or less the sanction of the company. I do not think the direct and special sanction of the company, such as there would be at meetings, would have much to do with the matter; because the question would rather depend upon the acquiescence of the company in the steps taken, and the benefit which they derived from the money raised, than upon any direct sanction which they could give to that which was otherwise beyond the powers of the directors. The directors took upon themselves to issue bonds to Mr. Lewis, which recite that the company is indebted to Lewis (that is the recital contained in the condition of the bond) for work and labour done, and, I think, "materials furnished by, or by the procurement of, Lewis." That is the expression. We are told in the affidavit which narrates all these proceedings—the affidavit of two officers of the company—that in effect, Lewis found the money from time to time for the company, first of all by means of bills; and he afterwards told them that he should find greater facilities in raising moneys by way of bonds; and no doubt with good reason, because there would be no longer any question about the company's bills of exchange at all, to say nothing about the difficulty and expense of renewing them from time to time. He suggested to them their giving him these bonds for the very express reason of their being more available, and for the express purpose of his being able to go into the market, and say, "Here I am with these debts due and owing to me from the company, as they have by these bonds acknowledged, on a perfectly legitimate ground, for work and labour done by me for the company, or by my procurement, and that being so, I can by those means replace in your coffers funds which you may apply for the benefit of the company." He, being furnished with these instruments expressly for this purpose, procures the money. The money, it is said, was applied first of all in paying off bills, and not *per directum* in paying off the particular debts; but the bills which had been given paid off the debts, or some of them. It

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does not appear upon the evidence before us to have paid all of them, but some of them. Then other bonds appear to have been given for those bills in the exact shape those bonds are now in, to pay off first the bills, and afterwards other bonds, to pay off those bonds which have been so applied in paying off the bills, until ultimately we get to a set of bonds which are in the hands of the present holders.

Then the question is, whether the present holders can be said to be entitled under any circumstances to claim upon the present bonds. Now, first it was said by Mr Jessel in reply, and he opened it very much in the same way, that taking these bonds at the best as a *chose in action*, even taking them to be that which they really are, a mere acknowledgment (for they cannot be put beyond that) of a debt due apparently on a legitimate ground, those who took them must be in the same condition exactly as Mr Lewis, the original holder, was; and therefore, if Mr Lewis, the original holder, could not recover in respect of the position in which he was placed with a full knowledge of all the circumstances, and how the company had proceeded for the purpose of raising money, then no more could the holders of this *chose in action* take simply through him, or be entitled to place themselves in a better position. That would be so if, as between Mr Lewis and the directors, there was really no debt at all, or if this was all a mere sham, and the company had been in no way parties to the transaction.

But if the money thus raised on a representation which Mr Lewis is directed by the directors to make for the express purpose of getting the money, is applied, when raised, for the benefit, and the legitimate benefit, of the company, can it be possible that the company can hold that surplus which is directed to be paid to them under the 12th section, and treat this as being no debt whatever by which they are to be in any way affected? That would, I apprehend, be contrary to all principles of justice.

Therefore what strikes me as the proper course to take is this—to say that as far as the company have adopted the proceedings of their directors by allowing these moneys to be raised on the issue of these debentures, and as far as the money so raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off. It is not simply that they stand as assignees of the debt which, no doubt, they are not, in this sense that the contractor has not assigned his debt over to the person who paid him. That has not been done. On the other hand it has been represented by the directors, that the man who lent his money on that I.O.U., or whatever it may be called, was lending his money for the purpose of clearing off that debt. Therefore the directors were representing to him that he was to be put in the position of the assignee of the debt. They say We owe this man who has this I.O.U. this money, in respect of work which is legitimately a debt owing by our company for work done; we owe him that, he will hand it over to you, and, therefore, you will stand in exactly the same position as if you had paid off the debt yourself." That is the effect of the representation.

Therefore, what we propose to do is to make this order. "Let the order of the Vice-Chancellor be varied, and let the order so varied be as follows: Declare that the receipt and the expenditure by the directors of the company in payment of any sums recoverable from the company of moneys advanced on, and procured by means of the deposits of, the alleged bonds, was *pro tanto* an adoption by the company of the transactions referred to in the affidavits of Charles Banks and Henry Green; and, having regard to the representations contained in the alleged bonds, that the money so expended constituted debts owing from the company, inquire whether the company had the benefit of any, and what expenditure in payment of any sums recoverable from the company, of any and what sums advanced on, or procured by means of, any and which of the deposits of the alleged bonds, and whether any, and which, of the sums so expended still remain unpaid by the company. The costs to be as in the original order; no costs of this application, except that the official liquidator will take his costs out of the estate."

Lord Justice GIFFARD said: I think it of importance to state clearly in this case that it is not intended by the court to throw the slightest doubt on the decision come to in the case of *Chambers* v. *The Manchester and Milford Railway Company*, and, from the course which the matter took in the court below. I think it is also important to say that there is no ground whatever for the argument that a contract or instrument which fails in a court of law by reason of its illegality can, nevertheless, be enforced in equity, because money has been paid and received in respect of it. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claim sought to be actively enforced, the defence of illegality is as available in a court of equity as it is in a court of law; and it is for that reason, among others, that the declaration made by the court below has been varied. That, of course, is no answer to the present case.

Now, as regards the present case, I am of opinion that the proof was quite sufficient. There are two affidavits alleging that money was lent on these bonds, which contain the representations which have been referred to; and there was also the affidavit of Mr. Banks and Mr. Green; and if it had been sought to affect either of the parties who prove, with anything like fraud, that was quite enough to throw on the company the onus of proof that there was fraud. However, there has been no evidence of that description.

That being so, what the case amounts to is this: Documents were given under the seal of the company; those documents represented that the company was indebted to Mr. David Leopold Lewis in the amount there stated; they were given for the purpose of being deposited by Lewis as security for advances to be made, and, if the representations in them had been true, those who advanced their money on the deposit would have been assignees of debts actually owing from the company to Lewis, and the transaction would have been perfectly legal.

Now in this case the representations in the alleged bonds are either true or false, or partly true and partly false. In so far as they are true, the transactions are legitimate, for Mr. Lewis could assign his debt or debts. On the other hand, in so far as they are false, there is fraud—fraud on the part of the directors of the company. The representations on the face of the alleged bonds purported to be representations by the company, and induced the loans, and were made in order that the loans might be obtained. In so far, therefore, as the company has had the benefit of those loans for its legitimate purposes, it must be taken to have adopted the transactions. It cannot be heard to say the contrary, and to that extent it must be held liable. For these reasons I concur in the order which the Lord Chancellor has read.

Solicitors for the appellant, *Stevens, Williamson,* and *Harris.*

Solicitors for the respondents, *Young, Jones,* and *Co.; Deane* and *Chubb; Alfred Jones.*

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Saturday, Dec. 11, 1869.

(Before Lord Justice GIFFARD.)

Re CUMING.

Practice—The Trustee Act 1850, *ss.* 3, 20—*Covenant to surrender copyholds—Death of covenantor before surrender—Lunatic heir—Distinction between an executed and an unexecuted contract—Appointment of person to convey—Where a suit to declare the heir a trustee is unnecessary.*

S. contracted to purchase certain copyholds of C., and C. executed a deed by which he covenanted to surrender the copyholds to the use of S., his heirs, and assigns. Before any surrender was made C. died, leaving as his customary heir a person of unsound mind, not so found by inquisition:

Held, that, inasmuch as there was an executed contract, it was not necessary that there should be a suit to have the heir declared a trustee for the purchaser, but that the court could, on a petition in lunacy, and under the Trustee Act 1850, *appoint a person to surrender the copyhold to the purchaser.*

In the year 1867, Frederick Slade entered into a contract with Henry Cuming for the purchase from him of certain copyhold estates which were held of the manor of Millbrook. An indenture, dated the 9th Nov. 1867, was made and executed between, and by Henry Cuming of the first part, Robert Driver of the second part, and Frederick Slade of the third part, which contained a covenant by Henry Cuming for himself, his heirs, executors, and administrators, with Frederick Slade, his heirs and assigns, that Henry Cuming, or his heirs, would forthwith surrender the copyholds to the use of Frederick Slade, his heirs, and assigns, according to the custon of the manor.

Before any surrender was made, Henry Cuming died intestate, leaving Alexander Cuming, his heir according to the custom of the manor. He was of unsound mind, but not so found by inquisition. A petition was then presented by Frederick Slade stating these facts, and praying that a proper person might be appointed by the court to surrender the copyhold to him, his heirs, and assigns, in the place of the lunatic.

The petition was thus entitled: "In the matter of Alexander Cuming, a person of unsound mind, not so found by inquisition; In the matter of the Trustee Acts 1850 and 1852; and In the matter of Frederick Slade's trust."

Ford North, on behalf of the petitioner, argued that there being an executed contract, it was unnecessary that there should be a suit instituted to have the heir declared a trustee for the purchaser, but the court could act at once under the Trustee Acts. He referred to *Re Collingwood's Trusts*, 6 W. R. 536, in which case there being a covenant to stand seised of copyholds until surrender to a purchaser, in trust for the purchaser, a vesting order was made on a petition under the Act without a suit, and argued that the principle of that case would apply to the present, the covenant being an executed one. He referred also to

The Trustee Act 1850, ss. 3, 20.

Lord Justice GIFFARD was of opinion that the distinction between the cases of an executed and an unexecuted contract was a sound one. In the latter case, no doubt, a suit to have the heir declared a trustee for the purchaser would be necessary, before a vesting order or an order appointing a person to convey could be made under the Trustee Act, but in the former case the order could be made without the necessity of a suit. The order asked for by this petition might therefore be made.

Solicitors: *Westall* and *Roberts*.

Thursday, Dec. 2, 1869.

Re TRICK'S TRUSTS; *Ex parte* WILLOBY.

The Trustee Relief Act—Particular legacy paid into court—Residue in hands of trustee—Costs.

A trustee of a will paid into court under the Trustee Relief Act a sum which was given by the testator in certain trusts. The trustee had also in his hands the general residue of the testator's estate in which he was beneficially interested. A petition was presented for payment out of court of the fund which had been paid in:

Held, that the court had jurisdiction to order the trustee to pay the costs of the petition out of the general residue of the estate.

This was an appeal from a decision of Stuart, V.C., with reference to the construction of a will so far as it related to the trusts of a particular fund bequeathed by the testator. This fund had been paid into court by the trustee of the will under the Trustee Relief Act, and the Vice-Chancellor, on a petition being presented to determine the construction, and for payment to the persons entitled, ordered the trustee to pay the respondent's costs of the petition out of the general residue of the estate which was in the hands of the trustee, and in which he was beneficially interested.

Dickinson, Q.C. and *Freeling*, on behalf of the appellants, argued the question of construction, and also contended that under the Act the court could not order costs to be paid out of any fund other than that which was paid into court. It might make an order on a trustee who had acted improperly to pay costs personally, but there was no jurisdiction to deal with a fund not in court.

Karslake, Q.C. and *Charles Hall* for the respondent

Lord Justice GIFFARD was of opinion that there was jurisdiction to order these costs to be paid out of the general residue, which was a fund applicable to the general costs of administration of the estate.

Solicitors: *Hunter*, *Gwatkin*, and *Co.*

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Nov. 15, 16, 17, *and* 18, 1869, *and Jan.* 14, 1870.

SMITH *v.* EARL BROWNLOW.

Rights of common—Freehold and copyhold tenants—Suit by one on behalf of all the tenants of the manor—Approvement—Survey—Evidence—Pleading.

The lord of a manor having attempted to inclose a portion of the waste, a bill was filed against him by one of the tenants (who was both a freeholder and a copyholder of the manor), on behalf of himself and all the other freehold and copyhold tenants of the manor, to obtain a declaration of their rights to common over the waste, and to restrain the lord from inclosing any portion of the common:

Held, that the plaintiff was entitled to sue on behalf of all the freeholders and copyholders of the manor:

Held also, that the burden of proof that after making the proposed inclosure, a sufficiency of the waste would be left to satisfy the commonnable rights of the tenants, lay upon the lord, the tenants having in the first instance established their right to common.

A survey made by the direction of the Crown in 1607, *when the manor belonged to the Duchy of Cornwall, held to be admissible in evidence, though the commission on which it was founded had not been produced, and could not be found.*

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This was a suit instituted by Mr. Augustus Smith, of Tresco Abbey, in the Isles of Scilly, on behalf of himself and all other the freehold and copyhold tenants of the manor of Berkhampstead against the late Earl Brownlow, the lord of the manor, praying for a declaration that the plaintiff, and the other freehold and copyhold tenants of the manor of Berkhampstead. are entitled as to the right of pasture for commonable cattle as appendant, and as to all other rights of pasture and all other commonable rights as appurtenant to their said freehold and copyhold tenements, to the following common rights, viz., a right of common of pasture upon the said common, and so much of four pieces of waste in the bill mentioned as now remains uninclosed, for all sorts of cattle levant and couchant, as well commonable as others, and a right of estovers and haybote and woodbote, and to cut so much furze, gorse, fern, and underwood upon the said common, and so much of the said four pieces of waste as now remains uninclosed, as may be required for the purpose of fodder and litter for cattle, as well commonable as others. levant and couchant, on the said tenements, and for fuel and other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of the said tenements, and a right to use the whole of the said common for walking, driving, and riding on horseback, and for the enjoyment of air and exercise, and for amusement and recreation, and other rights, privileges, and customs.

And the plaintiff prayed in the second paragraph of the prayer of his bill, that the defendant, his servants, agents, and workmen, might be restrained by injunction from inclosing any part of the common or frith, or of so much of the four pieces of waste as now remains uninclosed, and from in any manner disturbing or interfering with any of the said rights of the plaintiff and other freehold and copyhold tenants of the manor over the common, and in particular from erecting or commencing to erect, and from entering into any agreement as to the erection of any houses, buildings, or fences, upon any part of the common, &c., and from digging gravel, &c., or in any manner interfering with any of the ancient roads and paths over the common.

The manor of Berkhampstead, which is situate in the counties of Hertford, Buckingham, and Northampton, formerly belonged to the Duchy of Cornwall, and was purchased by the late Earl Brownlow in 1862. The common in question consists of a large open tract of ground, situate partly in the parish of Berkhampstead St. Peter, and partly in that of Northchurch, and is usually called Berkhampstead Common or Frith.

The plaintiff was both a freeholder and a copyholder of the manor.

In Feb. 1866 the late earl inclosed about 400 acres of the common by the erection of iron fences, which the plaintiff afterwards caused to be removed. Thereupon the late earl commenced an action of trespass against the plaintiff in the present suit; the action never came to a hearing, and the plaintiff in July 1866 filed the present bill for the purpose of establishing his rights over the common, and preventing the earl from inclosing any part of the common and from carrying out an intention which he entertained of building on the portion of the common which he had fenced off.

The late earl died in Feb. 1867, having by his will devised the Berkhampstead manor to the present earl, against whom the suit was revived.

The defence set up by the answer was that the rights of the freeholders and copyholders were distinct, and that even assuming that one copyholder might sue on behalf of all, still every freeholder must sue for himself; that Berkhampstead St. Peter and Northchurch were two distinct manors, and that the tenants of the former manor alone had any rights of common over Berkhampstead-common; and further that after the inclosure of the 400 acres a sufficiency of the waste would be left to satisfy the commonable rights of the tenants, even assuming the tenants of both manors to have rights of common over Berkhampstead common.

The plaintiff contended that the two alleged manors really constituted only one manor, and that the commonable rights of the tenants extended over the whole waste. The plaintiff supported his case by a vast mass of evidence, oral and documentary, which is fully discussed in his Lordship's judgment. A document known as Doddridge's survey, which had been made by the direction of the Crown, was mainly relied upon by the plaintiff, but its admissibility in evidence was contested by the defendant, on the ground that the commission on which it was founded had not been produced, and could not be found.

Sir *Roundell Palmer*, Q.C., *Joshua Williams*, Q.C., and *A. P. Whately* for the plaintiff.—Although the commission cannot be found, Dodderidge's survey is admissible in evidence; similar documents have been constantly received as evidence. They cited,

Rowe v. *Brenton*, 8 B. & C. 747;
Denn d. Goodwin v. *Spray*, 1 T. R. 466;
Chapman v. *Cowlan*, 13 East, 10;
Freeman v. *Read*. 4 Best & Sm. 174.

The *onus probandi* that there is sufficient waste left to satisfy the commonable rights of the tenants lies on the lord:

5 Vin. Abr., tit. "Common," A a;
Filewood v. *Palmer*, Mos. 169;
Arlett v. *Ellis*, 7 B. & C. 346;
Mellor v. *Spateman*, 1 Saund. 346, note g.

The custom to use commons for purposes of recreation is a good one, and has been recognised in many cases, *e.g.*,

Fitch v. *Rawlings*, 1 Hy. Bl. 393;
Abbot v. *Weekly*, 1 Lev. 176.

On the question whether the plaintiff's prescription was injured by his prescribing for less than he was entitled to claim, they cited,

Bushwood v. *Bond*, Cro. Eliz. 722;
Bruges v. *Searle*, Carth. 219;
Bailiffs, &c. of Tewkesbury v. *Bricknell*, 1 Taunt. 142;
Phillips on Evidence, 8th edit., p. 857.

Sir *Richard Baggallay*, Q. C., *Charles Hall*, and *Darby*, for the defendant, contended that the frame of the bill was improper, as one tenant could not sue on behalf of all the freehold and copyhold tenants of the manor, the tenants having distinct rights in respect of the two manors, for they contended that there were two distinct manors. They submitted that there was no evidence of right of estovers and recreation, and that issues ought to be directed as to those rights and as to the sufficiency of common. They cited

Weeks v. *Staker*, 2 Vern. 300;
Lord Dunraven v. *Llewellyn*, 15 Q. B., N. S., 791;
Evans v. *Taylor*, 7 Ad. & Ell. 617.

Sir *Roundell Palmer*, in reply, contended that the frame of the suit was proper. He cited

Powell v. *Lord Powis*, 1 Y. & J. 159;
Evelme Hospital v. *Andover*, 1 Vern. 265;
Mayor of York v. *Pilkington*, 1 Atk. 282.

He also cited:

Fawcett v. *Strickland*, Com. 578;
Hanson v. *Gardiner*, 7 Ves. 305.

The following authorities were also referred to:

Earl of Chichester v. *Hall*, 17 L. T. Rep. 121;
Duke of Beaufort v. *Smith*, 4 Ex. 474;
Daniel v. *Wilkin*, 7 Ex. 434;
Price's Case, 8 Co. Rep. 80;
Wakefield v. *Duke of Buccleugh*, 16 L. T. Rep. N. S. 475; L. Rep. 4 Eq. 613;

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Grant v. *Gunner*, 1 Taunt. 435;
Evans v. *Taylor*, 7 Ad. & Ell. 617;
How v. *Tenants of Bromsgrove*, 1 Vern. 22;
Artlington v. *Fawkes*, 2 Vern. 356;
Statute of Merton, 20 Hen. 3, c. 4; 13 Edw. 1, c. 46.

Jan. 13.—Lord ROMILLY, after stating the object of the suit, continued: In determining this question an important point to be considered is the extent of the manor of Berkhampstead. A map, which purports to be a map of the extent of the manor, as alleged by the plaintiff, is appended to the bill. The defendant contends that this plan comprises the whole or the greater portion of two manors, viz., the manor of the borough of Berkhampstead, and the manor of the hallimote of Northchurch. The property originally and previously to the year 1600 belonged to the Duke of Cornwall, and seems to have originated by a grant by Edward III. to Edward Prince of Wales of the honour of Berkhampstead, which honour included the manor of Swanborne, in Bucks, the manor of Blaxley, in Northamptonshire, and the manor of Aldbury; and it also included, according to the old grant, the borough of Berkhampstead, and also the manor of the hallimote of Northchurch; and the defendant contends that these were separate and distinct manors. The plaintiff contends that these two, viz., the borough of Berkhampstead and the hallimote of Northchurch, together constituted the manor of Berkhampstead, and that the commonable rights of the tenants of both divisions extended indiscriminately over the whole waste, and that the waste was never separated or defined as belonging partly to one and partly to the other district. [His Lordship examined the evidence afforded by the court rolls, and continued:] In 1607, a survey was made, by the direction of the Crown, of the court and manor of Berkhampstead, under the care and presidency of Serjeant Dodderidge, afterwards judge of the Court of King's Bench, and the reputed author of Sheppard's Touchstone. This survey lays down the boundaries of the manor very clearly and distinctly, and they include the whole of what is called the hallimote of Northchurch. It states that 34a. 37p. are held by freehold tenants of the manor, and 650 acres are held by copyhold tenants of the manor. The survey states the whole circumference, which is about eleven miles, and it distinctly points out the exact boundaries, including the four pieces of waste in question in this cause. The accuracy of this survey, and of these boundaries of the manor does not seem ever to have been called in question. The admissibility of it in evidence is contested, and the commission on which it was founded is not produced or proved, still I am of opinion that it is strictly evidence, and also that the character of it is such that the court is bound to attribute great weight to it. In Oct. 1616, another survey was made by the Duke of Cornwall. The court for the borough of Berkhampstead was held in the town itself; the court for the hallimote of Northchurch was held in the castle of Berkhampstead. If the accuracy of the defendant's contention is admitted, it involves this dilemma, that either the court for the manor of the hallimote of Northchurch was held in a place not within the manor, or else that the castle of Berkhampstead did not lie within the manor of Berkhampstead—in either case a strange and anomalous circumstance, which the fact of the five manors belonging to the honour of Berkhampstead does not remove, because they are not all held in the same place. Not only are all the entries made in the same book of rolls, but the tenants of each division are continually cited to both courts; this appears by a series of documents. When I come to consider the rights of the tenants of the manor, whether united or severed, the evidence is strong to show that the commonable rights of the tenants were never severed or considered as capable of being treated apart from each other; on this subject the constant discussions and disputes relating to the inclosing and approving by the lord of parts of the waste afford valuable and unquestionable evidence. The first of them, a transaction of great importance, occurred in the year 1618. This was an arrangement made between the Prince (the Duke of Cornwall) on one side, and the tenants of the manor on the other, to settle what portions of the waste might be enclosed for the benefit of the lord, leaving sufficient for the tenants of the manor, who had rights of common over the waste. In the discussion and settlement of this question no distinction is made between the tenants of the borough of Berkhampstead and the tenants of the hallimote of Northchurch; they are treated alike, as having equal rights and claims as tenants of one manor; and, finally, it is settled between them that 300 acres may be approved by the lord, and that this will leave sufficient for the commonable rights of the tenants over the remainder of the waste, without any separation of the waste, or any other attribution of any part of it to the borough or to the hallimote. I think it unnecessary to go through all the documents relating to this transaction, but throughout the tenants of Northchurch make common cause with the tenants of the borough, and seem alike to be treated as tenants of the manor of Berkhampstead. In the year 1634 an attempt was made on the part of the Duke of Cornwall, which was continued, with more or less assiduity, until April 1642, to approve 400 acres more of the waste, not as the waste belonging to two manors, but as one waste belonging to one manors. This was resisted by the tenants of both, without distinction. The resistance was successful, and the plan was ultimately abandoned, as I shall presently state somewhat more in detail. The same appears in the Parliamentary surveys of 1650 and 1653, in which no distinct manor of the borough and of the hallimote of Northchurch is to be discovered. In 1649 to 1654 the attempt was renewed to obtain 400 additional acres, part of the waste, from the common, and this again was successfully resisted It is impossible too carefully to examine the documents which relate to the circumstances connected with the arrangement by which the 300 acres were approved, and those which portray the successful resistance to the approvement of 400 acres. They are fully and minutely set forth in the documents proved in this case. The various Acts of Council from the 19th May 1618 to the 29th Jan. 1619, the commission and articles of the 14th Aug. 1618, and the warrant of the 20th Feb. 1619, clearly establish how complete and careful was the arrangement and compromise which was entered into when the first 300 acres were inclosed from the waste. Here it might have been supposed that the attempts of the lord on the waste would have ceased; but twenty years afterwards the attempt is renewed which, if successful, would have left little or no waste for the tenants of the manor. The manner in which this attempt was conducted and how it was attempted to be enforced are described in the warrant of the 13th Nov. 1638, to F. Wytherhed, and the summons in the same month to the commons to attend. This is followed by a copy of the minutes of proceedings in Feb. 1637, and May 1639, by the articles of instruction of the 3rd July 1639, and the report of the 22nd Oct. 1639, respecting the 400 acres and the returns of the commissioners concerning them, and is completed by a lease of these 400 acres granted to Jane Murray. This, however, did not prevent or abate the strenuous efforts of the commoners to prevent the 400 more acres being taken from them. How

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the contest continued down to April 1654, how in April 1653 the interest of the duchy was sold to Messrs. Ellis and Thride, and how on the 27th April 1654 this claim was dismissed, and the right of the commoners permanently established, in spite of a series of proceedings in the House of Lords, is very minutely detailed in the documents, and with much interest shows the success of the tenants of the manor. In fact, these identical 400 acres now in question, or very nearly the same, are those the inclosure of which was so strongly and so successfully resisted in the reign of Charles. and during the subsequent protectorate of Cromwell, and these the late earl has attempted to enclose. This was forcibly resisted by the present plaintiffs. Unquestionably, in such a state of things, and seeing how carefully the matter has hitherto been investigated, and having regard to the circumstance that the rights of the lord and of the tenants of the manor have remained unaltered, it is manifest that the burden of proof lies most expressly on the defendant, the present earl, who seeks to support this encroachment, to show that the late earl was entitled to make this approvement, and that he is entitled to support it. Upon the whole, a full consideration of the document convinces me that, though these two manors were for some purposes distinct, that for the purpose of commonable rights, and so far as regards the waste, they together formed one manor of Berkhampstead, and that the rights of the tenants of the manor over the waste were common to the tenants of the borough of Berkhampstead and to the tenants of the hallimote of Northchurch, and that no waste has ever been or can now be properly defined or set out as belonging separately to either manor, but that both enjoyed indiscriminately and in common the whole waste. As to what these commonable rights were, the evidence to be drawn from the documents as to the nature and extent of them shows that they include almost every commonable right except the right to estovers and to recreation or pastime on the waste; as to these no evidence is given in favour of the plaintiffs. The *viva voce* evidence confirmatory of the documentary evidence is also all one way, and is conclusive as to the manner in which these rights have been enjoyed during the memory of anyone now alive. It is unnecessary to advert to it in detail; it is, in my opinion, comprehensive, conclusive, and uncontradicted. Besides the matters above mentioned which are adduced by the defendant, besides disputing the admissibility in evidence of the survey of Mr. Serjeant Dodderidge in 1607, he also brings forward several technical objections to the frame of the plaintiff's bill. He contends that the plaintiff cannot properly sue on behalf of himself and the freeholders and copyholders of the manor, and that this constitutes a misjoinder; but I am of opinion that this objection fails, and that though their rights of common might not be exactly co-extensive, yet, as the plaintiff is proved, and indeed admitted to be a copyholder as well as a freeholder of the manor, and, indeed, of both divisions of it, he is entitled to sue on behalf of all. This also appears to me to be established both by authority and by the constant practice of this court shown in tithe cases and also in cases where a right of fishing comes in question, as in the case of the *Mayor of York* v. *Pilkington* (*sup.*) The evidence of user relates to twenty-nine different properties, and in eighteen of these cases it is admitted that the property constitutes either a freehold or copyhold tenement of the manor, assuming that I am right in coming to the conclusion that the tenants of either manor (if there be two manors), have indiscriminately commonable rights over the whole waste. I think, therefore, that the frame of the suit is correct, and that as regards the common right of herbage, pannage, and the cutting of furze and gorse the right is established. It remains, then, for the lord to show that he is entitled to approve, and that sufficient is left for the commonable rights of the tenants. This he has entirely failed in doing, indeed he has not attempted it, and in fact the attempt made by the late earl is only a renewal of the attempts made in 1638 and 1642, and which did not end till 1654, to inclose exactly the same land or nearly so, which was then resisted, and for which encroachment there appears to me as little justification now as there was in the seventeenth century. I consider the case of the plaintiff to be proved, and that no sufficient ground for doubt is laid to induce me, as I am asked, to send this case for further investigation, as I considered myself bound to do in the case of the Hampstead common I think, therefore, that the plaintiff is entitled to a decree in the terms of the first paragraph of the prayer of the bill, omitting the word "estovers," and omitting the right to use the common for recreation, and that a perpetual injunction must be granted in the terms of the second paragraph of the prayer of the bill. I think also that the costs must follow the event. It is true that the present defendant did not erect the fence nor did he seem to desire by any active steps to support the encroachment, and if he had abandoned the case when he succeeded the late Earl, his estate would alone have been liable for costs. But the present defendant has thought proper to stand exactly in the place of the late Earl against whom the first proceedings were instituted. I do not think that it was necessary to proceed with the action at law, and I think that the case was better fitted for a court of equity, and that the pendency of the action of trespass ought not to affect the question of costs.

Solicitors for the plaintiff, *Fawcett, Hofne,* and *Hunter.*

Solicitors for the defendant, *Nicholl, Burnett,* and *Newman.*

Saturday, Jan. 15.

Re THE LONDON AND SCOTTISH BANK; LOGAN'S CASE.

Company — Manager — Termination of engagement — Winding-up — Salary — Compensation.

By a clause in the articles of association of a company, a person was appointed manager, and it was provided that in the event of his being at any time deprived of his office for any other cause than gross misconduct he should be paid, as compensation for loss of office, a sum equal to three years' salary.

The manager's engagement came to an end in consequence of the winding-up of the company:

Held, that he was entitled to prove in the winding-up for the difference between the amount of the three years salary, and the amount remaining unpaid on certain shares which he held in the company.

Yelland's case, *L. Rep.* 4 *Eq.* 350, *followed.*

Adjourned summons.

This was an application by Mr. William Hugh Logan for leave to prove in the winding-up for the sum of 1800*l.* odd under the following circumstances.

By one of the clauses of the articles of association of the London and Scottish Bank, which was registered as a limited company in Oct. 1864, it was provided that Mr. Logan, banker, of Berwick-upon-Tweed, should be, and he was thereby appointed, the managing director of the company's affairs in Scotland, &c., at a salary of not less than 800*l.* per annum, for a period of five years from the

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date of the registration of the company. And it was provided that his salary should be raised to 900*l.* per annum when a dividend of 5 per cent. should be declared out of the net profits of the company, and that he should receive an additional 100*l.* for every additional 1 per cent. per annum. And the clause concluded with the following words: "And in the event of the said William Hugh Logan being at any time deprived of or removed from his office for any other cause than gross misconduct, the directors shall pay to him, as compensation for loss of office, a sum equal to three years' salary at the rate of salary which, on the quarter-day last preceding such termidation of his engagement, shall be payable to him, such sum to be paid within one month from the time of his removal."

The company was ordered to be wound-up in May 1865, and Logan's engagement was consequently at an end.

He also held shares in the company, and the amount for which he now asked for leave to prove was the difference between the amount of three years' salary at 800*l.* per annum, and the amount of the calls for which he would be liable on his shares, as to which latter amount he claimed a right of set-off.

Roxburgh, Q.C. and *Locock Webb*, in support of the summons, submitted that the manager's engagement having terminated without any misconduct on his part, he was clearly entitled to the compensation specified in the articles; that he was also entitled to set-off his liabilities as a shareholder against the compensation money; and that he should, therefore, have leave to prove for the difference between the two amounts. They cited

Re English Joint-Stock Bank; Yelland's case, L. Rep. 4 Eq. 350;

Re The London and Colonial Company; Clark's case, 20 L. T. Rep. N. S. 774; L. Rep. 7 Eq. 550.

Sir *Richard Baggallay*, Q. C. and *Lawson*, for the official liquidator, contended that Logan was at most entitled to an inquiry what damage he had sustained, as the cessation of his engagement by the winding-up of the company was not contemplated by the parties; the clause in the articles clearly contemplated the company as a going concern, as was proved by the provision that the compensation-money should be paid within one month from the time of his removal.

Lord ROMILLY.—I think I cannot in principle distinguish this from *Yelland's* case, and that the applicant is entitled to put in a claim for the three years' salary. The termination of the manager's engagement by the winding-up of the company was clearly not in the contemplation of the parties at the time they entered into the arrangement, but the clause in the articles must be construed most strongly against the company, and as it is thereby provided that the manager shall be paid a sum equal to three years' salary upon the termination of his engagement for any other cause than misconduct, and the cause in this instance is not misconduct, he must have leave to prove for the difference between the amount of three years' salary and the amount remaining unpaid on his shares.

Solicitors for the applicant, *Lawrance*, *Plews*, and *Boyer*.

Solicitors for the official liquidator, *Redpath* and *Holdsworth*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Dec. 14 *and* 15, 1869.

NASH *v.* HOWELL.

Solicitor and client—Trustee and cestui que trust—Bill for an account—Decree—Costs.

Where on bill, against a firm of solicitors who were the trustees of a settlement, for an account, but in which there was no charge of wilful neglect or default, and no relief prayed as against it, the plaintiff succeeded in establishing his case:

The court, in ordering an account, directed an inquiry as to the defendants' dealings with the trust fund, and if on taking the accounts it should appear that they had been guilty of wilful neglect or default in the discharge of their duty, they should be charged, in taking the accounts, with such wilful neglect or default.

This suit was instituted by Charles Nash, a carpenter, living at Chelsea, against Abraham Howell and Edward Jones, members of a firm of solicitors at Welshpool, who were the trustees of a settlement executed upon his marriage of certain property in which he took a life interest, to compel them to account for the trust moneys and to pay the costs of the suit. A sum of 800*l.* having been paid into court as the balance of the trust moneys by Messrs. Howell and Jones, the only question substantially before the court was as to the form of the decree and the costs of the proceedings. The facts were as follows:—

In 1857 the plaintiff married Mrs. Richards, a widow, who was entitled under the will of her father to one-third of certain farms, upon the security of which she had previously to her marriage received certain advances from the defendants, who acted as her solicitors—advances which were secured to them by certain deeds.

By the settlement, which was dated the 7th Jan. 1857, the property, subject to these advances, was made subject to a general power of appointment to be exercised by Mrs. Nash only with the consent in writing of the defendants, who were appointed the trustees, and subject thereto the property was settled upon Mrs. Nash for her life for her separate use, and after her death was charged with 50*l.* a year to her husband, and subject thereto for Mrs. Nash's children in equal shares.

On the 1st May 1858, on the occasion of an advance of 10*l.*, another instrument was prepared, by which, in pursuance of her power, Mrs. Nash charged the premises with the payment of 599*l.* 12*s.* 10*d.*, already advanced, and provided for future advances, not exceeding 500*l.*, being secured upon the property, which, subject to these trusts and to a power of sale, was limited upon the trusts previously declared by the marriage settlement. Further costs were incurred and further advances made, the ultimate result being that in 1861, when the property was sold and the accounts settled, the defendants brought the plaintiff in 200*l.* in their debt, which by another deed they were empowered to retain out of the purchase-money. They were then authorised to invest the balance in certain stocks, specifying, among others, the preference shares or capital of the Oswestry and Newtown Railway, and subject thereto upon the original trusts of the marriage settlement.

By these advances and the consequent costs the trust-funds were reduced by the 14th Oct. 1853, when Mrs. Nash died and Mr. Nash became entitled to his annuity, about 900*l.* The defendants paid the annuity of 50*l.* up to the 15th Nov. 1867, when they sent a letter inclosing a post-office order for 2*l.*, and stating that the reason of their not

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having sent lately was that "Mr. Howell said he wished to see the account before making any more payments, but that he went from home immediately after, and that he consequently had not been able to look over the account." The plaintiff, not receiving any further remittance, on the 9th April 1868 put the matter into the hands of another solicitor, who wrote to request a copy of the accounts. To this and to several other letters Messrs. Howell returned no answer until the 6th May, when they wrote to say that they had been in hopes that "Mr. Howell would be able to look at the papers and accounts to which they referred. He had an impression that we are not warranted in making any further advances at present, but the facts and documents are so much out of his head that he cannot call them up without perusing them again, and his time has been so much taken up of late as to put it out of his power to do so."

Further correspondence ensued; no accounts were sent, the principal reason alleged by Mr. Howell being that his time had been fully occupied and engrossed with Parliamentary work. On the 9th July 1868 the plaintiff's solicitor wrote and inquired specifically who were the present trustees of the property, warning Mr. Howell that he would be made a party to a suit in Chancery, and that his refusal to give the names of the trustees would have its weight with the court. On the 13th July (the correspondence having been opened on the 9th April) Mr. Kynaston, the solicitor, repeated his inquiry as to the names of the trustees, and his warning that he should make Mr. Howell a party to the suit, and concluded by urging that he considered that in the position Mr. Howell occupied in this matter to poor and inexperienced persons, he had acted, to say the least, with the greatest indifference, and in a way which the Court of Chancery would certainly not approve.

On the 23rd July the bill was filed. On the 27th July Mr. Howell wrote to express his surprise at the filing of the bill, and after stating that he had been engaged in carrying a Bill relating to the Cambrian railways through Parliament, he said that he had since looked at the papers in the matter, and found that the trust fund amounted to about 800*l.*; that he had been told by the cashier, when the weekly payments were stopped, that the capital was being eaten into by the advances made, and that he had requested a suspension of those payments until he had the opportunity of refreshing his memory as to the trusts. This letter was answered on the 28th by the plaintiff's solicitor. On the 29th Mr. Howell wrote direct to the plaintiff, enclosing a copy of that letter, and stating, "I can only advise you again not to expend the property in litigation," a letter which the plaintiff placed in his solicitor's hands, who wrote to beg that any future communication should be sent through him.

Karslake, Q. C. and *Townsend*, for the plaintiff, contended that the course taken by the defendants had, from the commencement, been most oppressive, considering the circumstances of the parties. They had driven the plaintiff into court by their stoppage of weekly payments, and by their refusal to render any account, and they ought to pay the whole of the costs of the suit.

Cutler, for the children, supported the plaintiff's argument.

Eddis, Q. C. and *Humphreys*, for the defendants, submitted that the costs ought to follow the result of the accounts, from which it would appear, as was the fact, that the plaintiff had received far more than his annuity, and, that at the time Mr. Howell was applied to, the plaintiff had actually received 50*l.* beyond its amount. They admitted that it was Mr. Howell's duty to render the accounts; but they contended that, in consideration of the circumstance that his time had been so fully occupied, and that he had paid the trust-fund into court, he ought to be treated with consideration. The bill did not charge the defendants with wilful neglect or default, and as there was no imputation against them they ought not to be visited with the costs of the suit. They referred to

Hale v. *Hallett*, 1 Cox 134;
Sleight v. *Lawson*, 3 K. & J. 292;
Seton on Decrees, 764.

Karslake, Q. C. in reply.

The VICE-CHANCELLOR, who had intimated an opinion that the present was an exceptional case, in which the defendants ought to be made to pay, not the ordinary costs between party and party, but the full costs incurred by the plaintiff as between solicitor and client, said that this was a case in which the amount of the property in dispute was very small, but the principles involved were of the very highest importance. The plaintiff was the beneficiary for his life under an ante-nuptial settlement of certain property to which his wife had been entitled under her father's will. The property consisted of one-third of certain farms. It appeared that the defendants Howell and Jones, who were the only material defendants to the suit, were solicitors. It appeared that they were engaged as Mrs. Nash's solicitors in the preparation of the marriage settlement. It appeared that the property was settled, not as was usual in such cases, upon trusts exclusively for the benefit of the husband, wife and issue of the marriage, but that the first trust was to secure certain sums advanced by the solicitors to her; and according to the frame of the settlement the property was only settled on her, her husband, and children, subject to a power of appointment, which could only be exercised with the consent of the trustees of the settlement. The effect was that they, being the solicitors who prepared the settlement, gave the wife a power of appointment which could not be exercised without their consent. The effect was plain—it was to keep this lady and her husband under the control of the defendants. The Vice-Chancellor, after reviewing the facts and referring to the duty of the defendants as trustees to have their accounts ready, to keep the trust funds properly invested, and to afford the fullest information to their *cestui que trusts*, expressed his opinion that the answers of the defendants were mere trifling with the plaintiff. After remarking on the impropriety of their writing directly to the plaintiff, an illiterate person, after the commencement of the litigation, and endeavouring to terrify him by threats of the heavy expenses attending a Chancery suit, the Vice-Chancellor said that the question now to be decided was by whom these expenses were to be borne. Messrs. Howell and Jones had had the advantage of having their case elaborately argued, but he considered that their conduct had been unjustifiable in every respect—that their conduct would have been unjustifiable in any case as trustees; but, considering that they had held the higher and more confidential position of solicitors towards their clients, their conduct deserved the reprobation which he expressed. The first part of the order would be that they should pay the costs of the litigation. But for the rule as to costs, he would have given the plaintiff costs as between solicitor and client, and have made the defendants bear the whole of his expenses; for, as he had already pointed out, the consequences to the plaintiff of his success would be that he would have to bear such

further costs beyond those allowed him that he had better not have come into court. He could not depart from the ordinary practice as to the costs being as between party and party, but he wished to call attention to the position of litigants who came before the court in cases of this kind. When the client came to complain in this court of the conduct of a solicitor, the court, looking upon the solicitor as one of its officers, who had duties to perform of the greatest importance, gave him, in his position as solicitor, a right to his proper charges as between solicitor and client. But where there was litigation between the solicitor and the client a different course was adopted, and a plaintiff could only recover from his solicitor costs as between party and party. He had never known a case in which costs had been given as between solicitor and client. But it was his duty to let it be known that, in his opinion, if the solicitor was allowed to charge such costs, and could not be made to pay them, he did not fight with his client on equal terms. In this case there would be a decree for an account of all sums received by Messrs. Howell and Jones, an inquiry as to all their dealings with the trust funds; and if, on taking the accounts, it should appear that they had been guilty of wilful neglect or default in the discharge of their duty, they should be charged in taking the accounts with such wilful neglect or default.

Solicitor for the plaintiff, *Kynaston.*

Solicitor for the defendants, *Milne.*

Saturday, Jan. 29.

WILLIAMS *v.* SMITH.

County Court—Will—Annuity charged on house—Sale of house without notice—Liability of vendor to pay annuity.

A testator bequeathed to "C. W., the daughter of C. W., 10l. per annum during her natural life, and if she should die before her mother, C. W., the same sum during her natural life, to be paid from the house, No. 1, Park-lane, St. Marylebone parish, to commence at my death." The daughter died before the mother; and the owner of the house subject to the annuity, paid the annuity to the mother for several years after the daughter's death, and then sold the house without notice of the charge to the purchaser. Thereupon the mother filed a plaint in the County Court against the owner, seeking to obtain a provision for the annuity out of the purchase-money.

Held (affirming the decision of the court below), that upon the construction of the will the plaintiff was entitled to the annuity.

Held, further, that she had a right to confirm the sale of the house, and was entitled to be indemnified out of the purchase-money.

This was an appeal from the County Court of Marylebone. The facts were these.

George Armroyd, by his will, dated 25th March, 1811, gave the whole of his property to his widow, and by a codicil, dated 9th Nov. 1811, gave "to Charlotte Williams, the daughter of Charlotte Williams, born at Hoxton, in the parish of St. Leonard, Shoreditch, 10l. per annum during her natural life, and if she should die before her mother, Charlotte Williams, the same sum during her natural life, to be paid from the house No. 1, Park-lane, St. Marylebone parish, to commence at my death."

The testator died in 1813. After his death his widow entered into possession of the property. She died in 1819, and by her will she bequeathed the house No. 1, Park-lane, subject to the above annuity, to her son. The son died in 1836, after appointing his wife and daughter his executrixes. They both died intestate, without having fully administered the estate, and letters of administration *de bonis non* were thereupon granted to the defendant, T. J. Smith.

In 1868 the defendant T. J. Smith entered into possession of the house in Park-lane, and sold it without giving any notice of the existence of the charge upon it to the purchaser.

The annuity was regularly paid to Charlotte Williams, the daughter, until her death in Oct. 1843, and afterwards, until the date of the sale, to Charlotte Williams the mother.

The plaint was filed by Charlotte Williams the mother, against Smith for the purpose of obtaining a provision for her annuity out of the purchase-money.

The County Court judge decided in plaintiff's favour, and from that decision the defendant now appealed.

Hemming, for the appellant, contended that, upon the construction of the words of the will, the annuity dropped on the death of Charlotte Williams, the daughter; but assuming that it had not, the plaintiff's remedy was against the purchaser, not the defendant. Although the purchaser had received no notice from the vendor, he was not relieved from liability. It was his duty to have examined the title before completing the purchase, and if he had done so he would have ascertained the existence of the will and the charge on the property. He cited,

Peto v. *Hammond*, 30 Beav. 495.

Bagshawe, for the plaintiff, was not called upon.

The VICE-CHANCELLOR.—As to the question of construction, I think it is quite plain. Although the will is very unartistically framed, there is enough to show that the testator intended the annuity to go over to the plaintiff Charlotte Williams in the event of her surviving her daughter. She did survive her daughter, and the defendant paid her the annuity for several years—up to 1867, when he sold the house on which it was charged, without giving notice of the existence of the charge to the purchaser. The plaintiff now comes before the court for the purpose of being indemnified out of the purchase-money. It is quite true that the sale does not alter the plaintiff's lien on the house, and that the fact of the defendant's selling it free from incumbrances does not relieve it from the charge in the hands of the purchaser. But as the sale has been effected without the plaintiff's consent, she has a right to confirm the transaction, and to claim her indemnity out of the purchase-money. That is the view taken by the learned judge of the County Court, and it seems a very proper one. The appeal must therefore be dismissed with costs.

Solicitor for the plaintiff, *A. E. Briant.*

Solicitor for the defendant, *J Scaife.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET, Esq., and Hon. ROBERT BUTLER Barristers-at-Law

Jan. 17 *and* 18.

TURNER *v.* RINGWOOD HIGHWAY BOARD.

Highway Act 1862—District Board of Ringwood—Freeholder—Trees on land of by side of road—Right of board to cut—Injunction.

This court has no jurisdiction to restrain a trespass unaccompanied by waste. The plaintiff was seised of lands on each side of a public road through L. common, in the parish of R., and such lands were covered with

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valuable fir trees. The district board of R. proceeded, under the above Act, to cut down, and did cut down, some of the trees, on the ground that they were an obstruction to the public highway.

Held, that primâ facie the board were justified in their acts, and upon the case made against them an injunction to restrain them was refused.

The bill in this suit stated that John Turner the plaintiff was seised of lands on each side of the public road through Leybrook Common, in the parish of Ringwood, in the county of Southampton. The land adjoining the road on each side contained or was covered or planted with valuable fir trees, many of them of the age of forty years and upwards. The highway board for the district of Ringwood, issued, under the powers of the Highway Act 1862, on the 16th May 1868 a notice of sale in the following words:—

Sale of fir trees.—To be sold by tender in one lot, upwards of six hundred fir trees, suitable for pit wood or fencing poles, now growing on the side of the road through Leybrook Common, in the parish of Ringwood, together with the heath and furze also growing thereon. The trees are marked, and may be viewed at any time. The person whose tender is accepted will be required to pay down the amount thereof forthwith, and to cut and remove the lot purchased within a reasonable time. Further particulars may be known on application at my office or to me on or before Monday, the 1st June next.—By order of the Ringwood Highway Board. RICHARD BROWN, Clerk.

Ringwood, May 16, 1868.

Mr. Henry Johns, the plaintiff's solicitor, on the 19th May 1868, wrote to Richard Brown the following letter:—

My attention has been called to a printed handbill announcing an intended sale by tender of fir trees growing on the sides of the road through Leybrook Common. I beg to give you notice that wherever the lands of Mr. Turner adjoin this road he claims the trees growing thereon as his property, and any interference with them will be considered, after this notice, a wilful trespass, and treated accordingly. I would add that if your surveyor thinks that any obstruction to the highway within the meaning of the general Highway Act, is caused by any trees claimed by Mr. Turner as above-mentioned, Mr. Turner is quite ready to do anything that may be reasonably required under the provisions of the said Act.

On the 3rd June 1868 the defendant, Richard Brown, wrote to Mr. Johns the following letter:—

Your letters of the 19th and 22nd inst., claiming the fir trees growing on the sides of the road through Leybrook Common as belonging in part to Mr. Turner and in part to Lord Malmesbury, were laid before the highway board for the district of Ringwood, at their meeting yesterday, and I am to inform you that the board consider that neither Mr. Turner nor Lord Malmesbury have a legal claim to them.

No tender was accepted by the defendants at their meeting on the 2nd June 1868, and neither the plaintiff nor Mr. Johns believed or suspected that the defendants intended to sell or cut the fir trees without notice to them or one of them. Mr. Johns understood that no steps would be taken by the defendants towards the sale without such notice, and in consequence thereof no further proceedings were then taken in the matter; and, in fact, no steps were taken by the defendants until on the 13th July 1868, when, without further notice or intimation to the plaintiff, or anyone on his behalf, the defendant sent workmen and labourers on the plaintiff's lands adjoining the road for the purpose of cutting the trees, and they cut down about 200 of the trees. Mr. Johns, on the following day, having heard of the circumstance, went to the office of Richard Brown the defendant, but was informed that he was at Jersey. Mr. Johns then went to the land where the trees were being cut, and endeavoured to prevail upon the workmen to desist cutting until they obtained further orders from the defendant Richard Brown. The workmen agreed to suspend working for the day as it was growing late in the afternoon, but said they should act next day according to such orders as they might receive from the defendant Richard Brown. The bill alleged that the fir trees were of great value, and that their loss would be irreparable to the plaintiff unless the cutting and felling of the same were restrained.

The plaintiff stated that the property in the fir trees was vested in him as the freeholder of the land through which the road passed, and that he and his predecessor in title had always exercised rights of ownership over the same without molestation, and that the defendants had no power or authority under the Highway Acts or otherwise to cut or interfere with the fir trees or other trees or furze on the plaintiff's land.

The bill, therefore, prayed that the defendants, their workmen, and agents, might be restrained by injunction from cutting or felling any fir or other trees, or any furze on the plaintiff's lands through which the said road passed, or committing any other acts of waste thereon. And that the defendants might be decreed to make due compensation to the plaintiff for the trees so cut by them or by their order, and for all damage thereby occasioned.

Osborne Morgan, Q. C. and *R. H. Sandys*, for the plaintiff, contended that there was no right in the highway board to cut or remove the trees in question, and cited the 5 & 6 Will. 4, c. 50, s. 64, which enacted, "That no tree, bush, or shrub, shall hereafter be planted on any carriage-way or cartway, or within the distance of fifteen feet from the centre thereof; but the same shall respectively be cut down, grubbed up, and carried away by the owner or occupier of the land or soil within twenty-one days after notice to him or his agent by the surveyor, on pain of forfeiting, for every neglect, the sum of 10s." The case of *Jenny* v. *Brook*, 13 L. J. 376, Q. B. was referred to. It was also contended that by nonuser the public had waived their right to the road, as originally laid out, and were now only entitled to the twenty-five feet, which had become the *via trita*.

E. E. Kay, Q. C. and *C. B. Freeling*, for the defendants, cited

Sheppard's Touchstone, 97;
41 Geo. 3, c. 109;
Rex v. *Wright*, 3 B. & Ad. 681;
Vooght v. *Winch*, 2 B. & Ald. 662;
Rex v. *Inhabitants of Hatfield*, 4 A. & E. 156;
Rex v. *Inhabitants of St. James's, Taunton*, Selw. N. P. (1869), 1264;
Reg. v. *United Telegraph Company*, 31 L. J. 166, M. C.; 5 L. T. Rep. N. S. 338;
Reg. v. *Train*, 31 L. J. 169, M. C.; 6 L. T. Rep. N. S. 390.

And contended that the defendants had a right to cut and remove the trees, and also that the right of the public to the whole fifty feet of the road remained undisturbed.

O. Morgan, Q. C. replied.

The VICE-CHANCELLOR said:—In this case the defendants are a highway board, and as such have the custody of the highway through Leybrook Common, which was set out by the Enclosure Commissioners in 1811 to be of a width of 50ft. About 25ft. have become by usage the *via trita*, but the whole 50ft. have been assigned by the commissioners, in pursuance of their authority, as the public highway. During the last twenty-five or twenty-six years trees have been allowed to grow within the limit of 50ft., and have attained a considerable size. The defendants cut down some of these trees, and this bill was filed to restrain them from cutting what remained uncut. *Primâ facie* the guardians of the highway have a right to cut down any trees which are a permanent obstruction to the use by the public of any part of the highway. The right of the public was not limited to that part only which was used as the *via trita;* the whole 50ft. had been

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dedicated to the public, and they had a right to have the whole width of the road preserved from obstruction. The plaintiff's case was that he had purchased in 1866 the land on each side of and intersected by the road. That would mean the road as allotted by the commissioners. But then he went on to say that the road was limited to the 25ft. actually used by the public, and mentioned certain acts of ownership, such as cutting and trimming the trees performed by himself and his predecessors in title, to show that the right of the public to anything beyond the 25ft. must be considered as abandoned and extinguished. Assuming that the plaintiff had whatever rights Lord Malmesbury had, either as lord of the manor or as owner of the adjoining property, many of the acts of ownership which were relied upon by the plaintiff, were those to which owners of land adjoining a highway were entitled under the Enclosure Act. By merely allowing these trees, which only made their appearance 25 or 26 years ago, to grow undisturbed until 1868, it could not be held that the rights of the public over the whole 50ft. originally set out as the width of the road had become extinguished. The same rights which belonged to the public over this ground in 1811, belonged to them in 1868, when the acts complained of were done. The plaintiff therefore had no right to file this bill to restrain the cutting and removing of these trees, which were an obstruction to the highway. The plaintiff had not even made out in a satisfactory manner to the court that he had a good title to the soil on which the trees in question were growing, he merely asserts his right to the land on each side of and intersected by the highway. If the bill had included the property in the trees so as to entitle the plaintiff to his action of trover for the trees after they were cut, I might have had to give more consideration to this part of the case, but being clearly of opinion that the plaintiff has failed upon the case alleged by his bill, and that the rights of the public to the whole fifty feet of the road remains unaffected, the bill must be dismissed with costs, but without prejudice to the right of action (if any) which the plaintiff may have in respect to the sale or removal, for the purpose of sale, of the trees in question. This court has no jurisdiction to restrain a mere trespass unaccompanied by waste.

Solicitors for the plaintiff, *Sandys* and *Knott*.

Solicitors for the defendants, *Vizard*, *Crowder*, *Anstie*, and *Young*.

Thursday, Jan. 20.

FINNEY *v.* GODFREY.

Practice—11 Geo. 4 & 1 Will. 4, c. 36, s. 3—Absconding defendant—Notice to appear—Extra-parochial place—Publication.

A defendant absconded to avoid process, but was known to have last resided at Barnard's-inn. That place was extra-parochial, but it had a chapel of its own.

The above enactment was

Held to have been complied with by affixing the notice to the Royal Exchange as well as the chapel door.

This was an application to the court with respect to an order directing the defendant to enter an appearance to the bill, but which order he had not obeyed. By the 11 Geo. 4 & 1 Will. 4, c. 36, s. 3, it is enacted as follows:—

And whereas sometimes persons have withdrawn themselves beyond the seas, or otherwise absconded, to avoid appearing in courts of equity, or being served with process for that purpose, or being brought into court by *habeas corpus* have refused to appear, for remedy of the inconvenience thence ensuing: Be it further enacted, that if in any suit which hath been or hereafter shall be commenced in any court of equity, any defendant against whom any subpœna or other process shall issue, shall not cause his appearance to be entered upon such process within such time and in such manner as according to the rules of the court the same ought to have been entered in case such process had been duly served, and an affidavit or affidavits shall be made to the satisfaction of such court that such defendant is beyond the seas, or that upon inquiry at his usual place of abode he could not be found so as to be served with such process, and that there is just ground to believe that such defendant is gone out of the realm, or otherwise absconded, to avoid being served with the process of such court, then and in such case the court out of which such process issued may make an order directing and appointing such defendant to appear at a certain day therein to be named, and a copy of such order shall, within fourteen days after such order made, be inserted in the *London Gazette*, and published on some Lord's Day immediately after Divine service in the parish church of the parish where such defendant made his usual abode within thirty days next before such his absenting; and also a copy of such order shall, within the time aforesaid, be posted up as after mentioned (that is to say), a copy of every such order made in his Majesty's High Court of Chancery, Court of Exchequer, or the Court of the Duchy Chamber of Lancaster at Westminster, shall be posted up in some public place at the Royal Exchange, in London; and a copy of every such order made in any of the courts of equity of the Counties Palatine of Chester, Lancaster, and Durham, or of the great sessions in Wales, shall be posted up at some public place in some market town within the jurisdiction of the court by which such order was made, and nearest to the place where such defendant made his usual abode as aforesaid, such place of abode being also within the jurisdiction of the said court; and if the defendant do not appear within the time limited by such order, or within such further time as the court shall appoint, then on proof made of such publication of such order as aforesaid, the court being satisfied of the truth thereof, may order the plaintiff's bill to be taken *pro confesso*, and make such decree thereupon as shall be thought just, and may thereupon issue process to compel the performance of such decree, either by an immediate sequestration of the real and personal estate and effects of the party so absenting (if any such can be found), or such part thereof as may be sufficient to satisfy the demands of the plaintiff in the said suit, or by causing possession of the estate or effects demanded by the bill to be delivered to the plaintiff, or otherwise, as the nature of the case shall require; and the said court may likewise order such plaintiff to be paid and satisfied his demands out of the estate or effects so sequestered according to the true intent and meaning of such decree, such plaintiff first giving sufficient security in such sum as the court shall think proper, to abide such order touching the restitution of such estate or effects as the court shall think proper to make concerning the same, upon the defendant's appearance to defend such suit, and paying such costs to the plaintiff as the court shall order; but in case such plaintiff shall refuse or neglect to give such security as aforesaid, then the said court shall order the estate or effects so sequestered, or whereof the possession shall be decreed to be delivered, to remain under the direction of the court, either by appointing a receiver thereof, or otherwise as to such court shall seem meet, until the appearance of the defendant to defend such suit, and his paying such costs to the plaintiff as the said court shall think reasonable, or until such order shall be made therein as the court shall think just.

The place at which the defendant was known to have last resided was Barnard's-inn. That inn had a chapel of its own, but was extra-parochial.

Graham Hastings in support of the application, said that under the above stated circumstances the question was whether the affixing of the notice to the chapel door was a sufficient compliance with the requisition of the statute.

The VICE-CHANCELLOR said that it would be sufficient to post the notice in some public place at the Royal Exchange, and on the door of the chapel at Barnard's-inn.

Solicitors, *Deane* and *Chubb*.

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Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Tuesday, Nov. 23, 1869.

Ex parte MARKHAM.

Magistrate—Stating a case—Ground of appeal not distinctly raised before him—20 & 21 Vict. c. 43.

A magistrate cannot refuse to state a case on the ground that an objection has not been formally brought to his notice, where the objection is of such a kind as goes to the root of the whole matters before him for adjudication, and one, therefore, which he must be presumed to have known.

In making absolute a rule to compel a magistrate to state a case under such circumstances, the court refused to allow the appellant the costs of the rule, because he had not raised the objection distinctly before the magistrate.

In this case *Tayler* had obtained a rule calling on Mr. Dayman, a police magistrate, to show cause why he should not state a case, pursuant to 20 & 21 Vict. c. 43.

The applicant was a broker employed on the 22nd April 1869, by a company incorporated under the Companies Act 1862 (25 & 26 Vict. c. 89), to make a distress on the goods of one Howard Augustus Hanrott, who was a tenant of the company, for one quarter's rent. He headed the inventory of the goods so distrained with a notice in the following terms: "Mr. Howard Augustus Hanrott. Take notice that by the authority and on behalf of your landlord, Wm. Nash, secretary to the Fulham Building Society, I have this 22nd day of April, in the year of our Lord 1869, distrained, &c."

Sect. 41 of the Companies Act 1862 provides that—"Every limited company under this Act, whether limited by shares or guarantee, shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company."

Sect. 42 enacts that—"If any director, manager, or officer of such company, or any person on its behalf, issues or authorises the issue of any notice, advertisement, or official publication of such company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of 50*l.*"

The magistrate was of opinion that the defendant was a person acting on behalf of the society in the exercise of an important privilege, viz., the right of distraining, and that he was bound to disclose the true name of his principal in the notice of distress which the law required him to deliver to the plaintiff, and convicted the defendant in the mitigated penalty of 15*l.* On being afterwards applied to to state a case for the opinion of a Superior Court, the learned magistrate refused.

H. Wildey Wright now showed cause against the rule.—According to the affidavit of Mr. Hanrott the point whether a broker serving a notice of distress is such an officer or person as is alluded to in sect. 42 of the Companies' Act 1862, was never taken before the magistrate. If the point were taken it must have been raised in the most incidental manner. [BLACKBURN, J.—It seems to lie at the bottom of the whole matter.] It was held in *Parkis* v. *Huxtable*, 28 L. J. 221, M. C., that upon the argument of a case stated by justices under the 20 & 21 Vict. c. 42, the appellant will not be allowed to take objections which were not raised before the justices; and therefore, where the appellant was charged with knowingly permitting persons of bad character to meet in his house, and the only defence suggested before the justices was that the persons were there only for the purpose of obtaining refreshment, and therefore that the appellant could not be convicted, the court refused to hear an objection that the appellant knew that the persons in his house were bad characters. Crompton, J. said to the counsel for the appellant, "We are asked to decide upon the facts with reference to the objection stated before the justices. The point you now raise was not mentioned before them." [BLACKBURN, J.—The point in that case was one to be determined by evidence of facts, and so differs from that involved in the present case, where all the facts are admitted.] It is submitted that whether the point be one of law or fact, if it is not raised before the magistrate, it cannot afterwards be raised. [BLACKBURN, J.—There is a great difference between an objection which can be met and cured at the time, and one which could not be cured by any evidence taken at the time. LUSH, J.—Suppose the case of a ruling at Nisi Prius, and counsel took no legal objection at the time, would that prevent him from afterwards objecting to the ruling of the judge in point of law?]

Tayler, in support of the rule, was not called upon.

COCKBURN, C. J.—The magistrate, like the judge, is bound to know the law, and if he sees the existence of any fatal objection, even though that objection is not taken by either of the parties, it is the duty of the magistrate to act on what he knows to be the law. I think, however, that there should not be any costs allowed in this case, because, though the point must inevitably have been mentioned before the magistrate, it was not brought before him in the manner in which it ought to have been, and properly discussed. If it had, the magistrate might have come to a different conclusion.

BLACKBURN, MELLOR, and LUSH, JJ., concurred.

Rule absolute.

Attorneys for the appellant, *Norris*, *Allens*, and *Carter*.

Thursday, Jan. 27.

REG. *v.* THE MAYOR AND ASSESSORS OF MONMOUTH;

REG *v.* THE MAYOR AND ASSESSORS OF BOLTON.

Municipal corporation — Burgess list — Objections to burgesses—Sufficiency of notice of objection.

The notice of objection to a voter being retained upon the burgess list need not state the parish in which the objector resides.

Where, therefore, the objector described himself as "of Glendower-street, in the borough of Monmouth, on the burgess list of the said borough for a house described to be situate in Almshouse-street, in the said borough:"

Held, a good description.

In such a notice it is not necessary to describe the qualifying property of the burgess objected to.

Where, therefore, the notice was as follows: "I hereby give you notice that I object to the name of Robert Gooden, Bridge-street, in the township of Great Bolton," &c., not naming the nature of the qualifying property:

Held, sufficient.

In the first of these cases, a rule had been obtained calling upon the mayor and assessors of the borough of Monmouth to show cause why a writ of *mandamus* should not issue directed to them, commanding them to hold a court and hear the objections of one Henry Evans, to the name of James Beach and twenty-

one other persons as not being entitled to have their names retained on the list of burgesses for the said borough, and proceed to revise such list accordingly.

It appeared that one Henry Evans, a burgess of the borough of Monmouth, in due time prior to the last revision of the burgess list for the said borough, gave notice of objection to one James Beach and twenty-one other persons as not being entitled to have their names retained on the burgess list of the said borough.

At the revision before the mayor and assessors, upon the first name objected to being called an objection was taken that the notice of objection was bad, inasmuch as it did not state the parish in which the objector was rated for his qualifying premises; and the court having held the objection to be good, the objection against this burgess, and the whole of the burgesses objected to by the notice (which were similar in form) were retained upon the burgess list. It further appeared that the borough of Monmouth is not divided into wards—that it consists of the parish of Monmouth and a part of another parish, and that the burgess list contains 611 names.

By sect. 17 of the 5 & 6 Will. 4, c. 76 (The Municipal Corporation Act) it is enacted that—

Any person whose name shall have been inserted in any burgess list for any borough may object to any other person as not being entitled to have his name retained in the burgess list for the same borough, and every person so objecting shall, on or before the 15th Sept. in every year, give to the town clerk of such borough, and also give to the person objected to, or leave at the premises for which he shall appear to be rated in the burgess list, notice thereof in writing according to the form No. 3 in the said schedule D, or to the like effect, &c.

Sect. 18 enacts:

That the mayor and the two assessors hereinafter mentioned to be chosen in every year by the burgesses of every borough shall hold an open court within such borough for the purpose of revising the said burgess lists. . . . And where the name of any person inserted in any one of the said lists shall have been duly objected to, and the person objecting shall appear by himself or by some one on his behalf in support of such objection, the court shall require proof of the qualification of the person so objected to. . . . Provided always that no person's name shall be inserted by the mayor in any such list or shall be expunged therefrom, except in the case of death, unless notice shall have been given as is hereinbefore required in each of the said cases.

The 19th section gives the mayor and assessors power upon the hearing to "determine upon the validity of such claims and objections." The form No. 3 in section D sets out the particulars of the signature of the objector thus—

(Signed) JOHN ASHTON of [*here state the place of abode and property for which he is said to be rated in the burgess list*].

The objector in the present case had described himself under his signature as, "*of Glendower-street in the borough of Monmouth, in the burgess-list of the said borough for a house described to be situate in Almshouse-street, in the said borough.*"

Macnamara showed cause.—The notice of objection was bad in not describing the house he occupied as of any parish. This was altogether a question for the mayor and assessors, and they having decided this court will not interfere. The 24th section of the 1 Vict. c. 78, which gives a claimant a power to come to this court for a *mandamus* to have his name inserted or restored where it has been rejected by the mayor and assessors, does not contemplate or provide for a case like the present, and in the *Hythe* case, 5 Ad. & Ell., 832, which was decided before the 1 Vict. c. 78 came into operation, it was held that this court had no power to grant a *mandamus* in such a case. [LUSH, J.—He describes his qualification as it appears in the burgess list. COCKBURN, C. J.—Is this not a declining of jurisdiction. LUSH, J.—If this were merely a question of fact, this court could not interfere; but here it is a question of law.] The case of *Reg.* v. *The Mayor of Harwich*, 1 Ell. & Bl. 617, is in point. He also referred to and endeavoured to distinguish *Reg.* v. *The Mayor of Rochester*, 27 L. J. 45, Q.B.

Quain, Q. C. and *E. Williams*, in support of the rule, were not called upon.

The court, before pronouncing judgment, proceeded to hear the case of

REG. v. THE MAYOR AND ASSESSORS OF BOLTON.

This was a rule calling upon the Mayor and assessors of the borough of Bolton to show cause why a writ of *mandamus* should not issue directed to them commanding them to hold a court and hear the objections of William Ellison, to certain other persons as not being entitled to have their names retained on the lists of burgesses for the said borough, and proceed to revise such lists accordingly.

In this case one William Ellison, a burgess of the borough of Bolton, had given notices of objection in respect of 1696 persons, and the question was whether his notices of objection as applicable to nearly 700 of these were valid? The following was one of the forms:

Exchange Ward.

Notice of Objection.

To the town clerk of the borough of Bolton, in the county of Lancaster.

I hereby give you notice that I object to the name of Robert Gooden, Bridge-street, in the township of Great Bolton, in the borough of Bolton, being retained on the burgess list of the borough of Bolton.

Dated 14th Sept. 1869.

Signed, William Ellison, of 4, Knight-street, Little Bolton (late of 140 and 142, Higher Bridge-street, Little Bolton), in the borough of Bolton. Rated for house 4, Knight-street, Little Bolton, in the borough of Bolton in the county of Lancaster.

At the revision it was objected that the notice was bad inasmuch as it did not state the nature of the property rated as described in the burgess list, which was "warehouse." The mayor and assessors being of opinion that this objection was valid and the notice of objection bad, retained the name of the party objected to, as also the names of the other parties with reference to whom there were similar notices.

The form No. 3 in Schedule D of the 5 & 6 Will. 4, c. 76, is as follows:

No. 3.—Notice of Objection.

To the town clerk of the borough of [*or to the person objected to, as the case may be*].

I hereby give you notice that I object to the name of Thomas Bates, of Brook's Farm, in the parish of [*describe the person objected to, as described in the burgess list*] being retained on the burgess list of the borough of .

Dated, &c.

By sect. 15 the overseers are to make out a burgess list according to the form No. 1 D, and to deliver the same to the town clerk, which he is to have printed and published—and according to such form there are three columns: 1. For the name of the burgess; 2. The nature of the property rated; 3. The street, lane, or other place in the parish, where the property is situated, for which the burgess is rated. The town clerk also is to make out and publish a list of all persons objected to, according to No. 5 in Schedule D, which form has four columns; 1. Name of the person objected to; 2. Nature of the property for which he is now rated; 3. Situation of the property for which he is said to be now rated in the overseers' list; 4. Parish in which is the property for which he is now said to be rated in the overseers' list.

Holkar, Q.C. and *J. Edwards* showed cause.—The objection is that the voters in these cases were not duly described. The description of the qualifying

property ought to be inserted in the notice of objection. [Cockburn, C. J.—The property is not required to be described, but only the person. Mellor, J.—It is only necessary to identify the burgess.] The form in schedule D says, "describe the person objected to *as described in the burgess list.*" [Mellor, J.—The statute makes the most signal difference in the two parties. As regards the objector, he must describe the property for which he is rated; but as regards the party objected to he must merely be described as in the burgess list.] The mayor and assessors have decided the question which was properly for their consideration, and they have not declined jurisdiction. [Blackburn, J.—If you think that is an answer, you can make it upon a return to the writ. Cockburn, C. J.—The mayor and assessors have required a condition precedent to be observed which the Legislature does not require. Lush, J.—It is their duty to decide upon the facts; but if this court finds that a valid notice has been given, to which the mayor and assessors will give no effect, it is a case for its interference.] This court, however, will exercise its discretion, and will not grant the writ where manifest inconvenience, as in this case, will result. All difficulty will be cured at the next revision in November.

Manisty, Q. C., and *Watkin Williams*, were not called on.

Cockburn, C. J.—I am of opinion that the mayor and assessors in each case were clearly wrong. The notice of objection required by the statute only need contain the description of the burgess objected to, and not a description of the property, whilst as regards the objector it is necessary that his qualifying property should be described. The Legislature requires a description of the property in the one case, and not in the other. Each notice of objection, therefore, was good according to the provisions of the statute. The question then arises, whether or not the decision of the mayor and assessors is final? I think that it is not. I am of opinion that they imposed a condition upon the objectors not warranted by law, and that in refusing to act upon the objections they in fact declined to exercise jurisdiction. I do not at all mean to say that if a question of fact had arisen, and they had decided upon it, their jugdment would not have been final, but where as in these cases the whole question turns upon a view of the notice itself, I think their conduct amounts to a declining of jurisdiction. The only other question then is as to our discretion in awarding the *mandamus*. It is said that as it will be inconvenient to hold another revision, we ought not to grant the writ; and I admit that if the question only went to the dealing with a very few voters, it might not be worth while to disturb the present state of things. But that is not so here, for we find that a very large number of burgesses have been objected to, and the result may very seriously affect the burgess roll, so much so probably as upon an election actually to turn the scale. The writ therefore ought to go.

Blackburn, J.—I am of the same opinion. Both cases stand upon the same footing. The 17th section requires a burgess objecting to another to give a certain notice, and then by a subsequent section the mayor and assessors are to entertain the objection. They had, therefore, a duty to see that the notice was a proper one. But what they have done is this—the notice being in the precise form directed by the statute, they have taken it into their heads to require something more, and, therefore, refused to act upon it. Now, was that a declining of jurisdiction? I think that it was. If an inferior jurisdiction refuses to hear when it should hear, this court interferes to compel it to do so. Then as to our discretion not to grant this suit. If, indeed, this were a matter of very little consequence it might, perhaps, be better not to disturb the boroughs, but considering the number of persons to be affected, I think that the writ should go.

Mellor, J.—I am also of the same opinion. What the mayor and assessors have really done is to impose a condition which the statute does not require, and so they have prevented an inquiry upon which they ought to have entered. They have, in fact, declined jurisdiction.

Lush, J.—I am entirely of the same opinion.

Rules absolute.

Reg. v. *Mayor of Monmouth*—Attorney for the Crown, *John S. Williams*, Monmouth.

Reg. v. *The Mayor of Bolton*—Attorney for the defendants, *Hinnell*, town clerk, Bolton.

Monday, Jan. 31.

Ex parte Isabella Cole.

Imprisonment—Costs of an appeal at quarter sessions—32 & 33 Vict. c. 62, s. 4.

By the Debtors' Act 1869 (32 & 33 *Vict. c.* 62) *it is by sect.* 4 *enacted that "with the exceptions hereinafter mentioned, no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money," and then follow certain exceptions, one of which is, "Default in payment of any sum recoverable summarily before a justice or justices of the peace:"*

Held, that costs of an appeal ordered by the quarter sessions are within this exception.

Where, therefore, upon an appeal against an order of affiliation the quarter sessions quashed the order with costs, and the respondent was afterwards committed to prison for two months in default of payment of such costs:

Held, that she was lawfully committed.

This was a rule calling upon the Rev. George Henry Pratt to show cause why a writ of *habeas corpus* should not issue to bring up one Isabella Cole, now a prisoner, and why, in the event of the rule being made absolute, she should not be discharged from custody without being actually brought up.

It appeared that the applicant, Isabella Cole, had obtained an order of affiliation against the Rev. George Henry Pratt, against which he appealed to the quarter sessions, and that upon the hearing the order was quashed with costs, and that subsequently in due form she was apprehended under a warrant of a justice and committed to prison for the period of two months in default of payment of such costs.

By the 7 & 8 Vict. c. 101, sect. 4, a power of appeal is given against an order of affiliation, "and the justices in such quarter sessions assembled . . . shall thereupon hear and determine such appeal, and shall order such costs to be paid by either party as to them or him may seem fit."

By the 12 & 13 Vict. c. 45, s. 5 (commonly called Bains's Act) it is enacted—

That upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought, may, if it think fit, order and direct the party or parties against whom the same shall be directed, to pay to the other party or parties such costs and charges as may to such court appear just and reasonable, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by an Act passed in the twelfth year of Her Majesty's reign, intituled, "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders."

By the statute last referred to (11 & 12 Vict. c. 43, s. 27), it is enacted that—

If upon any such appeal the court of quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay the same shall not be bound by any recognisance conditioned to pay such costs, such clerk of the peace, or his deputy, upon application of the party entitled to such costs, or of any person on his behalf, and on payment of a fee of 1s. shall grant to the party so applying a certificate that such costs have not been paid; and upon production of such certificate to any justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, it shall be lawful for him or them to enforce the payment of such costs by warrant of distress in manner aforesaid, and in default of distress he or they may commit the party against whom such warrant shall have issued in manner hereinbefore mentioned for any time not exceeding three calendar months, unless the amount of such costs and all costs and charges of distress, and also the costs of the commitment and conveying of the said party to prison, if such justice or justices shall think fit so to order (the amount thereof being ascertained and stated in such commitment) shall be sooner paid.

By the 32 & 33 Vict. c. 62 (The Debtors' Act, 1869) it is (sect. 4) enacted, that—

With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment:—(1) Default in payment of a penalty, or sum of money in the nature of a penalty other than a penalty, in respect of any contract. (2) Default in payment of any sum recoverable summarily before a justice or justices of the peace, &c., &c.

The proceedings taken against the applicant were in conformity with the foregoing enactments.

Seymour, Q. C., and *Hopwood* showed cause.—The question is whether an order of quarter sessions for the costs of an appeal comes within the operation of the second exception in sect. 4 of the 32 & 33 Vict. c. 62? Can it be said that a person who is so ordered to pay costs is a debtor in any sense? The Act was passed to relieve debtors from imprisonment, and not those who are not in that relation. [COCKBURN, C. J.—Can it be said that the issuing of a warrant upon a judgment of the quarter sessions is a *recovering* of the amount?] It would seem to be so; both the words *recoverable* and *recovery* are mentioned in the 5th section of Bains's Act, and that section points out the mode of recovery, namely, by the course enacted by the 27th section of Jervis's Act. So that the issuing of the warrant by the justice would seem to be intended by the Legislature, as the process by which the costs are recovered. The recent Act has reference to debts in the popular understanding of the term. This is not a debt in any sense. The Legislature was certainly not legislating for the quarter sessions, nor would it be reasonable that they should have been, for there was no grievance, since, under Jervis's Act, the justice could imprison for any time not exceeding three months, so that he may have given the imprisonment for only a single day if he had chosen. The committing to prison is in the nature of a penalty, and certainly the amount is recovered summarily. The meaning of recovering a thing is the obtaining of it.

J. W. Mellor and *Lumley* contra.—It has been assumed on the other side that this is a criminal proceeding, which it is not. The 32 & 33 Vict. c. 62, being an Act in favour of the liberty of the subject should be construed liberally. The words "recoverable summarily" must be taken to refer to that numerous class of cases in which justices have a summary jurisdiction to hear and determine, and where the party is summoned to show cause. The costs in the present case were not recovered before a justice, but were leviable by his warrant; they had already been recovered by the judgment of the quarter sessions, just as costs in an action in a Superior Court are recovered by the judgment. There is no doubt some difficulty in giving to the word "recoverable" a perfectly satisfactory interpretation, but, as used in connection with proceedings before justices, it should be taken to mean those summary proceedings so well known in which a party is summoned to show cause why he should not be convicted, or why some order should not be made upon him. The words "summary recovery" are terms of art, and mean an adjudication by justices.

COCKBURN, C. J.—Everything has been advanced that well could be, but it fails to remove the view that I have adopted that this case does fall within the second sub-division of the section. It must be admitted, certainly, that costs are within the terms of the first section, otherwise costs of a defendant, who has obtained a judgment in a Superior Court, would not be within the statute. The question therefore, is, whether or not these costs are within the exception? I think they are; and I must say I should have been surprised if, in an Act of Parliament for abolishing imprisonment for debt, where there are numerous exceptions, this particular case should not have been mentioned in express terms if so intended. We should therefore look to see what has been the language of the Legislature in other Acts of Parliament. Now, in both the former Acts—Bains's Act (12 & 13 Vict. c. 45), and Jervis's Act (11 & 12 Vict. c. 43)—where costs are given by the quarter sessions, they are spoken of in the terms as being "recoverable," as in the present case. Mr. Lumley argues that "summary manner" does not refer to such a case as this, but to that kind of procedure before justices in which they act judicially, as where an information is laid, and a summons issues; but I think that the statute was intended to include all cases where the matter was to be done before a justice, whether or not in the first instance, judicially or ministerially. I think, therefore, that these costs were intended to be exempted from the general enactment, and that the rule must be discharged.

BLACKBURN, J.—I am of the same opinion. In this case the party was committed to prison under perfectly regular process, unless the recent Act renders it otherwise. The 4th section says, "with the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money." Then there are certain exceptions, and the question is, whether this case falls within the second exception? Now Mr. Lumley argues that the language of this exception applies only to ordinary summary convictions, but it often occurs that sums of money are recoverable summarily before justices when there has been no hearing of an information, such as granting a warrant for the recovery of a poor rate, or other rates, or as in the present case where costs are given by the sessions. We must certainly take it that the Legislature was aware that the justices had power to imprison in such cases. Now bearing this in remembrance, the Legislature may have intended not to include in the exceptions those cases where the imprisonment is upon the process of a justice of the peace, and that it might be well to leave that matter for the present as it is. It would, indeed, be remarkable that if upon a summary conviction a party could be committed for the costs, the exception would not apply where there is an appeal against the conviction to the quarter sessions. But when we see how costs at quarter sessions are recovered, and then refer to the two former Acts, we

find the very words "recovered" and "recoverable," and the mode indicated by those Acts of obtaining the costs is the mode adopted in the present case. We may, therefore, fairly say that the Legislature, when making an exception as to the power of imprisonment, by using similar words intend them to be understood in the same sense.

LUSH, J.—I am also of the same opinion. I think this case is taken out of the Act by the second branch of the exceptions in the 4th section. The enactment is in these terms: "With the exceptions hereinafter mentioned no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money." These words were obviously advisedly used instead of the word "debt," to meet cases which could not be properly considered as "debts," such as the costs of a defendant or of a nonsuit. The words, indeed, embrace all cases in which a *ca. sa.* might be issued. Well, then, the words apply to all cases of costs with the exceptions pointed out in the 4th section. Now, the second exception excepts "default in payment of any sum recoverable summarily before a justice or justices of the peace." Then, were the costs in the present case recoverable before a justice of the peace? They were ordered by the court of quarter sessions, and the authority of the justice to grant his warrant is based on the 12 & 13 Vict. c. 45, s. 5, which gives the quarter sessions power to give costs upon all appeals to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction as pointed out by the 11 & 12 Vict. c. 43, s. 27. Now Bains's Act (12 & 13 Vict. c. 45) s. 5, uses the very same word "recoverable," as we find in the second exception. Is there then any reason why we should give a more limited meaning? It is said that the words in the second exception apply only to cases where there is a summary hearing. But if so, this anomaly would arise, that if there were no appeal the party might be committed for the costs; but that if he appealed and costs were awarded against him, he could not be committed for them. I think there is no ground whatever for such a distinction. Indeed, this is not a matter within the mischief intended to be remedied by the Act, which was intended to apply to imprisonments which might operate for a lengthened period. The words in the second exception are large enough to embrace the construction contended for, and I think they apply.

Rule discharged.

Attorneys for appellant, *Brooksbank* and *Galland*, for *Sharpley*, Louth.

Attorneys for respondent, *Woodrooffe* and *Plaskitt*, for *Tweed*, Lincoln.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Wednesday, Jan. 26.

SINCLAIR *v.* GREAT EASTERN RAILWAY COMPANY.

Costs—Arbitration—Fees to counsel—Fees to arbitrator.

There is no inflexible rule in this court by which an arbitrator is bound in taxation of costs to refuse to allow for two counsel on a reference. Hawkins *v.* Rigby, 8 C. B., N. S., 271, *commented on.*

There is no particular scale of fees payable to Queen's counsel when acting as arbitrators.

This was an action brought to recover the sum of 40,000*l.*, alleged to be due from the defendants to the plaintiff, on account of several distinct causes of action. The case came on for trial before Bovill, C. J., when it was, by consent of the parties, referred. The arbitrator agreed on by the parties was one of Her Majesty's counsel. The reference before him lasted twenty-four days. It was conducted by two counsel (a Queen's counsel and a junior) on either side, the defendants having, moreover, the assistance of a shorthand writer. In the end the arbitrator made an award in favour of the plaintiff, awarding him the sum of 28,000*l.*, with costs. On taxation of the plaintiff's costs, the master refused to allow costs for two counsel, and allowed only for a junior counsel. For the arbitrator, he allowed at the rate of ten guineas a day, adding an extra 100 guineas on account of the alleged difficulty and intricacy of the case.

Sir *Geo. Honyman*, Q. C. obtained a rule *nisi* calling on the defendants to show cause why the master should not review his taxation in respect of the number of counsel engaged on the reference, the fees paid to the Queen's counsel engaged, and the fees paid to the Queen's counsel engaged as arbitrator.

Keane, Q. C. showed cause.—It is the rule that only one counsel should be allowed for on a reference. An inflexible rule was laid down to that effect in *Hawkins* v. *Rigby*, 8 C. B., N. S., 271, where, although it was conceded that, if ever there was a case requiring two counsel, that was one, only one counsel was allowed for. As for the arbitrator's fee, there is no recognised scale of fee to be paid to a Queen's counsel. The fee is in the discretion of the master. The master has in this case exercised his discretion in allowing the extra sum of 100 guineas.

Sir *George Honyman*, Q. C. (*Watkin Williams* with him).—From the nature of this case two counsel were absolutely necessary. It was a case of much more than usual intricacy and difficulty, and the defendants charged fraud against the plaintiff. *Hawkins* v. *Rigby* (*ubi sup.*) does not lay it down as an inflexible rule that only one counsel is to be allowed for. [M. SMITH, J.—Keating, J., who was then at the Bar, and who was arbitrator in that case, reported that if ever two counsel were needed they were there. It does seem as though the court laid down an inflexible rule.] There is no such rule in the Queen's Bench. The master in this case seems to have thought himself precluded by the decision in that case from entering into the question and from exercising his discretion. He cited

Marshall on Costs, p. 434;
Sharp v. *Ashby*, 12 M, & W. 732;
Lockstone v. *The London, Brighton, and South Coast Railway*, 12 C. B., N. S., 243;
Croomes v. *Gore*, 1 H. & N. 14.

in the latter case the master had refused to allow for a shorthand writer, and the court, in refusing a rule to review his taxation on this point, asked why a second counsel had not been employed instead of a shorthand writer. As to the arbitrator's fee, the master has refused to recognise that the arbitrator was a Queen's counsel. He has allowed him only the same fee as he would have allowed to a junior counsel. He has allowed, it is true, an extra 100 guineas, but that is only for the extraordinary difficulty and intricacy of the case. If the master exercised his discretion in this matter, there is an end of it; but if he thought himself precluded from considering the fact, that the arbitrator was a Queen's counsel, then he was wrong, and the case ought to be sent back to him. As to the third point, if the master is to allow for two counsel, he must exercise his discretion in allowing costs for one of them as for a Queen's counsel.

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BOVILL, C. J.—As to the arbitrator's fee, I am of opinion that this rule must be discharged. The fee given to the arbitrator was 553*l.* 17*s.* 9*d.* The master taxed off 213*l.* 17*s.* 9*d.*, leaving the sum of 340*l.* as the fee to be allowed. The charge was made in one sum. The master has inquired into the matter, and has been guided by the general scale of costs acted on by the taxing masters of the Superior Courts. That scale is not an immutable one. It is competent for the master, if he see fit, to increase it in any individual case, and here the master has allowed an additional 100 guineas. He has made this addition after a consideration of all the circumstances; he has used his discretion, and under such circumstances the court will not interfere, unless satisfied that the master has acted under a wrong impression, or has been manifestly incorrect in his estimate. It is said, on behalf of the plaintiff, that the master, in allowing the arbitrator's fees, has allowed as for a junior counsel only, whereas, as both parties concurred in the appointment of an eminent Queen's counsel as arbitrator, the master ought to have allowed as for a Queen's counsel. The plain answer to that is, that the scale of fees to be allowed to arbitrators does not vary according to the rank of the arbitrator at the bar. The fee to be allowed is in the discretion of the master. There is no inflexible scale of fees. The ordinary scale is shown to be capable of being raised in a special instance, by the fact of an addition being made in this case. The gentleman applied to to act as arbitrator may decline to accept the ordinary fee, or he may consent to act on such higher remuneration as the parties may agree to. In this case, however, the master has exercised his discretion; and as it is not made manifest that he has improperly exercised it, the court will not interfere. As to the other question, as to whether the master was right in refusing to allow for a second counsel, it is plain that the master has so refused on the assumption that the case of *Hawkins* v. *Rigby* (*ubi sup.*) laid it down as an inflexible rule that in no arbitration would a second counsel be allowed for. But in that case, although the court refused to interfere, it laid down no inflexible rule upon the subject. It is clear that there is no rule forbidding an allowance for a Queen's counsel. It has been so laid down in two cases in the Exchequer; in *Lockstone* v. *The London, Brighton, and South Coast Railway Company* (*ubi sup.*) and in *Hawkins* v. *Rigby* (*ubi sup.*) in this court. In *Croomes* v. *Gore*, 1 H. & N. 14, the question was whether, in an arbitration, the costs of a shorthand writer might be allowed. The necessity of notes was insisted on, when the court distinctly said that if notes were needed a second counsel should have been employed. After those cases and the decision in *Hawkins* v. *Rigby* (*ubi sup.*) that there was no inflexible rule upon the subject, it is clear that there are some cases in which the allowance may be made. This case came before me at Nisi Prius, and I should say that the employment of two counsel was quite proper under the circumstances, and I am not surprised to hear that the company employed two counsel beside a shorthand writer. It was reasonable to have two counsel in such a case, and the costs of two ought to be allowed. The number of years over which the transactions between the parties extended, the nature of the investigation, the questions of fact, and the points of law to be considered, all show that two counsel were necessary, and if the master has acted on the assumption that he had no power to allow costs for more than one, the question must go back to him. In actions at Nisi Prius for goods sold and delivered, or of assault, and in motions in court, two counsel are allowed, and as matters progress, everything is done upon a larger scale. Our decision does not interfere with the ordinary rule, that, in most cases of arbitration, only one counsel is to be allowed. But in cases of extraordinary difficulty and complexity, where two counsel are engaged on each side, the court ought not to refuse an allowance for two counsel. The question must be left to the discretion of the master. After what I have said, I do not think it necessary to enter upon the other point as to the employment of a Queen's counsel.

BYLES, J.—I entirely agree with the opinion of the Lord Chief Justice. Having been a party to the decision of the court in the case of *Hawkins* v. *Rigby* (*ubi. sup.*), I think that it ought to be understood that that case laid down no inflexible rule upon this subject. My brother Smith who was counsel in that case, began his argument by saying that there was no inflexible rule, and none of the judges dissented from that proposition. That no inflexible rule was laid down in that case appears even from the marginal note to the report. The refusal of the master to allow for more than one counsel in the present case proceeded on the assumption that *Hawkins* v. *Rigby* did lay down an inflexible rule on the subject. That assumption, however, was wrong. Such a rule might be productive of great inconvenience. I think that this case must be sent back to the master for him to reconsider his decision on this question.

M. SMITH, J.—I am of the same opinion. I think that the case must be sent back to the master as to the disallowance of the costs of a Queen's counsel. It is agreed on all hands that there is no inflexible rule on this subject. If there had been such a rule, I should have said it was high time that it was repealed. The master has put a construction on the decision of this court in *Hawkins* v. *Rigby*, which I must say I think it may possibly bear, as the court there refused to interfere with the discretion of the master, although the case was said to be one in which two counsel were required, if ever they were. After that decision, then, I think the master might very well suppose that the court had laid down something like a rule upon the subject. In these large cases, the parties might very well like to engage the services of a man, who from his eminence might in the course of a long inquiry, be raised to the bench. If, however, they were only to have one counsel, it might be dangerous for them to engage such a man. I entirely agree that, in ordinary cases of arbitration, one counsel is sufficient. But in cases of great length and perplexity, two may be absolutely necessary. These cases have very much increased, both in number and importance, since the decision in *Hawkins* v. *Rigby* (*ubi sup.*). Many cases are compulsorily referred. A trial before an arbitrator is one of great importance often involving not only very complicated questions of fact, but very important questions of law and equity. I think, then, that it is right that the arbitrator should have every assistance that he can have from counsel. It seems to me, then, that there is every reason for the employment of two counsel. At the same time, however, I think that, in ordinary cases of no particular difficulty or perplexity, two counsel ought not to be allowed, though the inquiry may be a long one. The master must in each case exercise his discretion; and when he has done that the court will be loth to interfere. As to the question about the arbitrator's fee, I quite agree with what has fallen from the Lord Chief Justice. The master has used his discretion. He has allowed what is usual for an arbitrator, and he has, in the exercise of his discretion, allowed an extra 100*l.* In the scale of fees to be allowed to arbitrators, there is no distinction between Queen's

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counsel and junior counsel. The arbitrator knows the usual scale, and if there appears to have been extraordinary difficulty he allows something extra. If there are any reasons for submitting a question to an arbitrator, who from his eminence may be entitled to more than the usual fee, an arrangement should be made between the parties beforehand. With regard to the question as to the allowance for one of the two counsel as for a Queen's counsel, I quite agree with the Lord Chief Justice.

BRETT, J.—As to the fee to be allowed for the arbitrator, I quite agree with the rest of the court that this rule must be discharged, on the ground that the master has exercised his discretion in the matter, and if he has refused to draw any distinction between the fee to be allowed to a Queen's counsel and that to be allowed to a junior counsel, when sitting as arbitrator, I think he has only followed the usual practice of the court, and that he has acted rightly. As to the question whether the master was right in refusing to allow for a second counsel, I think that this rule must be made absolute. The master has acted on the assumption that *Hawkins* v. *Rigby* (*ubi sup.*) laid down as an inflexible rule, that in all arbitration cases the cost of one counsel only is to be allowed. He has accordingly allowed for one, and has allowed for that one as for a junior counsel only. It is contended on behalf of the defendants, that the rule as to one counsel is really inflexible; secondly, that as one of the counsel did not attend all day every day, only one was necessary; and, thirdly, that this was a case of only ordinary difficulty. As to the first point, I am of opinion that *Hawkins* v. *Rigby* (*ubi sup.*) did not lay down any inflexible rule upon the subject. If it had done so, I should have thought that, as the practice of referring questions to arbitration was so much increased, the time had arrived for altering the rule. As to the second point, I think that no such allegation ought to have been made, and that the court ought not to listen to any such assertion. As to the last point, I think, having regard to the sum claimed, to the nature of the inquiry, and to the fact that the company charged fraud against the plaintiff, it would have been a want of ordinary prudence on the part of the plaintiff if he had not availed himself of the services of two counsel. If, under such circumstances, he is not allowed the costs of two counsel, I think great injustice will be done. As to the further question, as to allowing for one counsel as for a Queen's counsel, I agree with the rest of the court.

Rule accordingly.

Attorneys for the plaintiffs, *Thomas* and *Hollams*.

Attorney for the defendant, *W. H. Shaw*.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Jan. 21 and 22.

NICKLING v. HEAPS AND OTHERS.

Goods obtained by false pretences—Subsequent sale of—Seizure of by original owners in hands of vendee—Trover—Conviction of felon—Effect of on property in goods—Relation back to original fraud—7 & 8 Geo. 4, c. 29, s. 57—Damages.

Goods were obtained from the defendants by A. by false pretences, and were afterwards sold by him to the plaintiff, from whose possession they were subsequently retaken and removed by the defendants; and in trover against the defendants, for such seizure and conversion, the plaintiff recovered a verdict for 145l., the value of the goods. At the time the action was brought and tried, the plaintiff was aware that A. was in custody awaiting his trial for the above offence, and A. was, in fact, tried and convicted thereof on the day after the plaintiff had recovered the aforesaid verdict. Upon a rule for a new trial, on the ground that the jury should have been directed to take into consideration the probability of A.'s conviction for false pretences, and that the damages were excessive, it was

Held, by the Court of Exchequer (Kelly, C.B. and Martin, B.), that, by the effect and operation of sect. 57 of the 7 & 8 Geo. 4, c. 29, upon the conviction of A. there was relation back to the time of the fraud committed by him upon the defendants, and that the goods remained the property of the defendants from the first, the property therein never having been out of them, and that what they did was simply to retake possession of their own property; and the court made the rule for a new trial absolute, subject to the plaintiff's assenting to a stay of proceedings upon payment of the costs of the action and of the rule, with 40s. damages.

Scattergood v. Sylvester, 15 *Q. B.* 506; 19 *L. J.* 447, *Q. B., considered and approved.*

This was an action of trover. The first count of the declaration was for certain goods, that is to say, household furniture of the plaintiff, seized and taken by the defendants, and carried away by them and converted and disposed of to their own use. The second count charged that the plaintiff was the owner of certain goods let to hire to one T. J. Wood, who had the possession thereof under such letting to hire, the reversionary property and interest in the said goods then belonging to the plaintiff, and the defendants injured the plaintiff's reversionary property and interest in the said goods by wrongfully carrying away and converting the same to their own use, whereby the same goods became and were dispersed and wholly lost to the plaintiff.

Pleas. 1. To the first and second counts not guilty. 2. Denial of property of the goods in the plaintiff. 3. That the said reversionarry interest in the said goods did not belong to the plaintiff. Upon these pleas, issue was taken and joined.

At the trial before Hannen, J. and a special jury, at the last summer assizes for Manchester, it appeared that the following were the facts of the case. The plaintiff was and for some years had been in business in Manchester as a furniture broker and auctioneer, and two of the defendants, Messrs. Heaps and Harrison, were general house furnishers, also in business at Manchester, and the other defendant, Sutcliffe, was an officer of the Manchester detective police force. It appeared that the goods or furniture in question had been bought by the plaintiff of a person of the name of Ford, who was then living at a house in Clarendon-road, Manchester, and who applied to the plaintiff as a furniture broker to purchase the furniture, which was then in the house at Clarendon-road, occupied by Ford.

The plaintiff, on the 8th April 1869 saw the furniture at the house in Clarendon-road, and upon a rough estimate of it offered 100*l.* as the price for its purchase. Ford declined to accept that sum, and asked 160*l.* for it. In the course of the conversation between the plaintiff and Ford on the subject of the sale of the furniture, Ford stated to the plaintiff that he (Ford) was a sufferer in the Abergele accident on the London and North-Western Railway, and had brought an action against the company for 4000*l.* damages, and that the company had offered him 1500*l.*, but that he would not take less than 4000*l.* The reason for his parting with the furniture was alleged to be that he was going to move into the south of England, as change of air was necessary for his health. The plaintiff declined to pur-

chase the furniture at Ford's valuation, and left, but on the following day, the 9th April, received from Ford a letter requesting him to reconsider the matter, and accordingly he went again on Friday, the 9th April, to Ford's house, and after further negotiations offered Ford 110*l.* for the furniture, which Ford refused, stating that the furniture, when new, had cost him nearly 250*l.* Subsequently to this a person named Wood, whom the plaintiff knew, and with whom he had had dealings, applied to the plaintiff to take and furnish a house on hire for him, which he (Wood) had seen at Blackpool, as he (Wood) wished to go there and keep a lodging house. The matter was discussed, and the plaintiff mentioned and described to Wood the furniture he had seen at Ford's house, which Wood said would just suit. Accordingly the plaintiff thereupon again went to Ford's house, and saw the furniture there with Wood, and after some further bargaining and negotiation, a sale of the furniture by Ford to the plaintiff at 120*l.*, except certain articles which Ford stipulated to keep back for himself, was agreed upon on Saturday the 10th April. A subagreement between the plaintiff and Wood for the sale or hire of the furniture by the plaintiff to Wood being at the same time entered into. 30*l.* was then paid by the plaintiff to Ford, and on the following Monday, the 12th, the balance of 90*l.* was paid, and the goods were taken away away by the plaintiff and removed by him in a lorry or van from Manchester to Blackpool, where they arrived on Tuesday afternoon the 13th April, and were placed in the house there which Wood had desired to take as a lodging-house. On the 15th April they were seized and taken away by the defendants under the following circumstances:—It appeared that the goods in question had originally been purchased or obtained by Ford of the defendants Heaps and Harrison, who were furniture dealers at Manchester, under representations by him as to his being a sufferer in the Abergele accident, and claiming a large sum as compensation from the railway, and their having offered him 1500*l.*, very similar to those which were made by him to the plaintiff on the resale of the furniture as aforesaid. The invoice price of the furniture to Ford was 220*l.*

The defendants Heaps and Harrison, having subsequently ascertained that there was good ground for believing that the representation made to them by Ford, of his having been a sufferer in the Abergele accident, and having had the offer of a sum of 1500*l.* made to him in settlement of his claim upon the railway company of 4000*l.* was entirely false, instituted a prosecution against him for obtaining the goods in question from them under false pretences. They also followed the goods to Blackpool, to the house to which the plaintiff had removed them, and with the aid and assistance of the third defendant, Sutcliffe, a detective police-officer, of Manchester, recovered and removed them from the plaintiff's custody as before mentioned, on the 15th April, which was the conversion complained of in the declaration. The trial of the action took place at the last Manchester Summer Assizes, on the 6th Aug., before Hannen, J., and a special jury, when, upon the above facts being proved, a verdict was found for the plaintiff for 145*l.* damages.

At the time of the trial of the action on the 6th Aug. Ford was in the gaol at Manchester awaiting his trial on the charge of obtaining the goods in question from the defendants on false pretences; and he was, on the subsequent day, the 7th Aug., tried and convicted on that charge and sentenced to a term of imprisonment. In Michaelmas Term last a rule was obtained on affidavits by *Pope*, Q. C., on the part of the defendants, for a rule calling upon the plaintiff to show cause why the verdict found for him should not be set aside and a new trial had on the grounds, first that the learned judge misdirected the jury in not directing them, in assessing the damages, to consider the probability of conviction for false pretences of Ford; secondly, that the verdict was against the weight of evidence; thirdly, that the damages were excessive; fourthly, on the ground of fresh evidence as disclosed in the affidavits.

The 57th section of the 7 & 8 Geo. 4, c. 29 (the Act for consolidating and amending the laws in England relative to larceny and other offences connected therewith), which is the section on the construction of which the question decided in the case depended, enacts that, to encourage the prosecution of offenders, if any person guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case *the property shall be restored to the owner* or his representative; and the court before whom any such person shall be so convicted shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner.

Holker, Q. C., and *R. C. Fisher*, for the plaintiff, now showed cause against the above rule. At the time the action was brought and tried the plaintiff had an absolute property in the chattels in question. It is said, on the other side, that the subsequent conviction of Ford revested the property in the defendants. The question is, whether that is so to the extent of rendering the plaintiff disentitled to retain his verdict, or entitled to nominal damages only. [*Pope*, Q. C., *contra*, referred to the case of *Scattergood* v. *Sylvester*, 15 Q. B. 506, 19 L. J., N.S., 447, Q. B.] [MARTIN, B.—The Court of Queen's Bench there held that by the operation of the 57th section of the Act of Geo. 4, the property in the stolen chattel revested in the owner on conviction of the thief, and that the owner might maintain trover for it, although no order of restitution had been made.] If the defendants had waited until after Ford's conviction they would have gotten their goods again all the same, and the plaintiffs might have in the mean time sold them to Wood or any one else, and not have suffered. It is a question which of two innocent persons is to suffer, and the defendants having done a wrongful act, and taken the law into their own hands in seizing the goods before the conviction, the court will not go out of its way to cast the lot on the plaintiff rather than on the defendants. There is here no warranty of title. [MARTIN, B.—Had Ford been convicted the day before, it is clear the plaintiff would only have been entitled to nominal damages.] That is not admitted. Suppose a mortgagor in possession of goods under a covenant for quiet enjoyment until default, and a stranger and wrongdoer takes them, the measure of damages is not the mortgagor's interest in the goods, but the value. So it is in the case of carriers. Defendants here were wrongdoers. The damages should be more than nominal, as the plaintiff bought the goods fairly for the purposes of resale, and was in negotiation with Wood, and might have sold them and received the money. [MARTIN, B.—The question is, was the property ever out of the defendants?] The case of *Horwood* v. *Smith*, 2 Term Rep. 150, is an authority to show that the defendant's property vests only from conviction, and that there is no relation back. In that case, Buller, J., says, "When did the plaintiff's property begin in this case? Not till after the conviction of the felon." The question of "market overt" there referred to has nothing to do with the

present case. It would be unjust to enable the defendants to anticipate the operation of the statute, on which the whole question rests, whether, at the time of the conversion, the plaintiff had a property in the goods. It is contended that he had, and that the action is maintainable. [KELLY, C.B.—You had notice of the coming trial and probable conviction of Ford, and had you sold before it took place your vendee would have had an action against you.] In *Horwood* v. *Smith* there was notice, but it was held, nevertheless, that the defendant there (the same as the plaintiff here) might keep the proceeds of the sale. *Barnett* v. *The London and South Western Railway Company*, 5 H. & N. 604; 29 L. J. 334, Ex., was also referred to.

Pope, Q.C., for the defendants, *contra*, was not called on to support his rule.

KELLY, C. B.—It is clear, I think, that in this case there must in any event be a new trial. The question then is, should the damages in any case be more than nominal? Looking to the equity of the case, I think there can be no doubt that we ought to give the value of the goods to the person entitled to them. Who then is that? Now, having regard to the authorities and to the statute, I am clearly of opinion that, upon the conviction of Ford for obtaining these goods by false pretences, there was a relation back to the time of the original fraud committed on the defendants, namely, the time at which Ford obtained these goods from them. These goods, therefore, were the property of the defendants from the first, and the property was in law never out of them. They, therefore, are the persons entitled, and it is to them that we ought to give the goods in question. The plaintiff, moreover, had notice at the time of the action brought, or, at all events, before the trial of it, of the coming trial of Ford for false pretences with respect to his purchase of this very furniture, and of the probability of his conviction; and so, had he sold or disposed of these goods before such trial and conviction, with such notice, his vendee would have had a good action against him. I think the rule for a new trial must be made absolute; but, treating this as an application to the equity of the court, it may be made absolute, subject to the plaintiff's consenting to a stay of proceedings on payment of the costs of the action and of this rule, and of 40*s.* damages.

MARTIN, B.—I am entirely of the same opinion. What the defendants did was really in fact no more than to take their own goods. The case may be argued for ever, but that is what it comes to after all. On a more mature consideration of the section of the Act of Parliament, and the case of *Scattergood* v. *Sylvester*, in the Queen's Bench Reports, to which Mr. Pope referred us, the effect and operation of the statute, in my judgment (though I was at first inclined to take a different view of it), is that the property in these goods was never out of the defendants at all, and that therefore they only, in fact, possessed themselves of their own property.

Rule absolute for a new trial, unless the plaintiff consents to a stay of proceedings on payment of costs of the action and of this rule, with 40s. damages.

The court refused leave to the plaintiff to appeal.

Attorneys for the plaintiffs, *Edwards, Layton*, and *Jaques*, 8, Ely-place, Holborn, E.C., agents for *Eltoft* and *Hampson*, Manchester.

Attorneys for the defendants, *Gregory* and *Rowcliffes*, 1, Bedford-row, W.C., agents for *A.* and *W. Fox*, Manchester.

Friday, Jan. 28.

ANDERSON v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Carriers' Act—Picture—Frame—Accessory.

Framed pictures were delivered to a railway company as carriers, but no declaration was made of them under the Carriers' Act; damage was done to the pictures and also to the frames in the course of carriage:

Held, that the Carriers' Act protected the defendants from liability in respect of the damage done to the frames, as well as that done to the pictures, on the ground that the frames were merely accessory to the pictures, and so included in the term "picture" used in the Act.

This was an action brought by the plaintiff against the railway company for damage done to certain pictures and their frames, which had been delivered to the company for carriage upon their railway. The defendants pleaded the Carriers' Act, by which it is provided that with respect to various articles, among which are pictures, the carrier shall not be liable unless a declaration of their value has been made, and an increased charge or an engagement to pay the same be accepted. The trial took place in the Passage Court, at Liverpool, and the plaintiff's counsel then contended that though the damages to the pictures might not be recoverable, the plaintiff was entitled to a verdict for the damage to the frames, picture frames not being among the articles specified in the Act. The verdict was entered for the plaintiff in respect of such damage, leave being reserved to defendants to move to enter a nonsuit.

A rule had been accordingly obtained, against which

L. Temple now showed cause.—The question is, whether a frame is necessarily so mere an accessory to a picture as to be included in the protection afforded by the Act. The point really comes to this: is a frame a part of the picture? A picture is none the less a picture because it has no frame. Many cases have been frequently referred to of mere accessories, such as hooks and eyes to a silk dress; but in those cases the principal article could not be made use of and was not complete without the accessories, but a picture is a complete picture, and may, though not so conveniently, be used without a frame. The frame by itself would clearly not be within the Act. Then what difference can it make that it has been joined to an article which is perfectly complete without it? It is contended that a frame is not so far an accessory to a picture as to come within the expression "picture" in the Act. In *Tredwin* v. *Great Eastern Railway Company*, L. Rep. 3 C. P. 308; 17 L. T. Rep. N. S. 701, a lace corporal, in a gilt frame covered with glass, being intended for an exhibition, was inclosed in a packing case, and sent without any declaration under the Carriers' Act by the defendants' railway and lost; it was held that as a matter of fact the gilt case was distinct from and not accessory to the lace and the packing case accessory to both or to the frame only, and that the carrier was therefore not protected from liability as respected either the gilt frame or the packing case. He also cited

Wyld v. *Pickford*, 8 M. & W. 443;
Bernstein v. *Baxendale*, 6 C. B., N. S., 251.

Quain, Q.C. and *Russell*, in support of the rule, were not called upon.

KELLY, C. B.—I am of opinion that in this case the defendants are within the protection of the Act, and this rule must be made absolute. The case cited from the Common Pleas Reports is altogether dif-

ferent. The corporal there mentioned is merely a piece of lace, which might have been packed up and sent without a frame, and the frame was quite unnecessary to its usefulness for the purpose for which it is used. Whereas a picture is generally set in a frame, and the whole is then considered as one article of merchandise. It is necessary for the protection of the picture when to be used, and I should expect when being sent about that it should be in a frame in order to prevent injury to the surface. It seems to have been the opinion of the Court of Common Pleas that if the case had contained nothing but the corporal, it would have been accessory to that alone; so here if as I suppose the frame is necessary for the protection of the picture from injury during carriage, it is a mere accessory to it as a outward case would be.

MARTIN, B.—The question appears to me to be what is the meaning which the general understanding of mankind gives to the word "picture." A picture may be said to consist of the canvas on which it is painted, the painting which really gives the value, and the frame. But all these constitute an entirety which is ordinarily meant by the word "picture." Jewellery is included in the Act; it is the constant practice to put up jewels in little cases. Of course the jewellery might be sent without them; but still I do not think in such a case the plaintiff could recover a shilling for the case without the jewel.

PIGOTT, B.—I am of the same opinion. A picture may be framed or unframed, but if it is sent framed you cannot treat the frame as a separate thing. The state of being framed is that in which it is most generally used.

Rule absolute.

FROST v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Costs—Taxation—Review of—Writ of inquiry—Fees to counsel.

In an action for damages caused by a railway accident, the company allowed judgment to go by default, and a writ of enquiry to assess the damages was executed in the Sheriff's Court. Upon taxation of costs, the master allowed the plaintiff fees, &c., for two counsel. Upon motion to review the taxation in this respect:

Held, that there was no inflexible rule with respect to the number of counsel to be allowed for on an inquiry to assess damages; but that it was a matter for the discretion of the master, upon consideration of the nature and circumstances of each particular case, and that the court would not interfere with the exercise of such discretion, except in cases of a very extreme and exceptional character.

This was an action against the company for damages in respect of injuries caused by a railway accident. The company allowed judgment to go by default, and an inquiry to assess the damages was held in the Sheriffs' Court before the Secondary.

Upon taxation of the costs the master allowed the plaintiff fees, &c., for two counsel at the inquiry. A rule had been obtained by the defendants for a review of taxation on the ground that only one counsel ought to have been allowed.

C. Russell now showed cause.—There is no inflexible rule that only one counsel should be allowed on an inquiry before the sheriff. It is a matter in general for the discretion of the master, and the court will not interfere with the exercise of that discretion except in extreme cases. He cited

Hawkins v. *Rigby*, 8 C. B., N. S., 271; 2 L. T. Rep N. S. 243.

Lopes supported the rule.—It must be admitted that there is no rigid rule that one counsel only is to be allowed, but still it is a guiding rule only to be departed from in cases of an exceptional character. There was nothing in the character of the present case to warrant a departure from it. He cited

Dax on Costs, 160.

KELLY, C. B.—It was certainly at first suggested that there is an absolute rule against the allowance of two counsel on the execution of a writ of inquiry. No direct authority was cited for this proposition; all that was put forward to support it was a sentence or two in a book, no doubt of utility, but not in any way of authority. I observed that it was surely impossible, in modern times, that any of the courts should hold that in no case, of whatever importance or magnitude, could more than one counsel be allowed, and the proposition was virtually abandoned. It was, however, contended that the general rule was that one counsel only was allowed for, except in cases of exceptional importance. The answer made to this objection was, that there was a most extensive discretion vested in the master as to questions of amount, and that the court ought not to enter into the question whether that discretion had been properly exercised in the particular case. I am clearly of opinion that we ought not to interfere with the exercise of that discretion unless we are perfectly satisfied that the master has committed some great and substantial error of principle, which it is our duty to rectify. I hold, therefore, that it is open to us to review the master's taxation with reference to such questions, but such a course ought only to be pursued in very extraordinary and glaring cases. Let us look then at this case: It arose out of a railway accident, and the claim was for damages arising out of such accident. Is there anything necessarily improper in the allowance of two counsel in such a case? On looking at the questions which may arise on the inquiry in such a case the contrary will appear. The plaintiff has to show injuries received actually resulting from the accident, and the amount of damage resulting therefrom. It is obvious that the question may, and often does, arise, whether the case submitted is a real and *bona fide* claim, or whether the extent of injury and suffering alleged is or is not a pretence and fictitious. That involves a question of character. Again, it is often necessary to call medical witnesses and discuss questions of medical science of a doubtful and difficult nature. In such cases, the advantage and even necessity of two counsel is obvious. It is essential that notes should be taken of the evidence, it is often highly material that the exact words of the witness should be taken down. In many such cases no attorney would do justice to his client who only instructed one counsel. In addition to those considerations, I cannot help making a further observation. It is a matter of constant experience that in such cases railway companies retain at least two counsel. If they think that they would not be doing duty to their shareholders without employing two or more counsel, it hardly lies, I think, in their mouths under these circumstances, to say that it is unnecessary for their opponents to do so. It is obviously a great advantage to employ two counsel, for it enables the company to retain counsel of eminence who probably would not accept a retainer if not provided with a junior. I do not think the company can complain if the plaintiff shows a desire that both sides should be equally matched in this respect. Of course I do not mean to say that all cases are alike in this respect, or that

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there is never extravagance in the matter of fees paid to counsel. The masters ought to exercise their discretion in preventing unnecessary expenses of this sort, but we ought not to interfere with their discretion, except in extreme cases, and without much stronger grounds than are shown here.

Martin and Pigott, BB. concurred.

Rule discharged.

CROWN CASES RESERVED.

Reported by John Thompson, Esq., Barrister-at-Law.

Jan. 22 and 29.

(Before Cockburn, C. J., Byles and Keating, JJ., and Pigott and Cleasby, BB.)

Reg. *v.* Stainer.

Trades union—Embezzlement of funds by its officers—32 & 33 Vict. c. 61, s. 44.

An unregistered friendly society or trades union may prosecute its servants for embezzlement of its property, though some of its rules may be void as being in restraint of trade, and contrary to public policy.

Rules in a trades society or union imposing fines upon members for working beyond certain hours, or for applying for work at a firm where there is no vacancy, or for taking a person into a shop to learn weaving where no vacant loom exists, though void as being in restraint of trade, do not render the society criminally responsible.

Case reserved by the Chairman of the Worcestershire Quarter Sessions for the opinion of this Court:—

At the Worcestershire Quarter Sessions, held on the 3rd Jan. 1870, a prisoner named James Stainer was tried before me on a charge of embezzling certain moneys received by him on account of the society known as "The Power Loom Carpet Weavers' Mutual Defence and Provident Association of Kidderminster and Stourport."

This society was established many years ago under rules, of which a copy accompanies and is to be taken as a part of this case.

In March 1868 these rules were revised, and such revised rules, of which a copy also accompanies and is to be taken as part of this case, have ever since been, and are now, in force and define the object and the constitution of the society, and the duties of its several officers.

Neither the original nor the revised rules were enrolled or certified under the Friendly Societies' Acts.

Some time before the revision of the rules the prisoner became a member of the society, and was duly appointed what was called a local secretary, to keep the accounts and collect the contributions of members of the society employed at the works of Messrs. Dixon and Co. of Kidderminster, and after such revision he continued to be a member of the society and to act under the 18th of the revised rules, as such local secretary, until the embezzlement charged against him was discovered towards the end of Oct. 1869, and it was in respect of moneys received by him, as such local secretary, in September and the early part of Oct. 1869, that the charge of embezzlement arose.

It was proved by Robert Gillam, the general secretary of the society, who was called on the part of the prosecution, that the 34th and 35th of the revised rules had never been acted upon, that the 37th of the revised rules had been acted upon with respect to the clearance card therein mentioned, but not otherwise, and that the 36th of the revised rules had never been acted upon, except that two members, named respectively Thomas Painter and John Brasford, who worked at the said Messrs. Dixon's, and who had each, at different times, taken a son into their working shed to learn weaving contrary to the provisions of the said 36th rule, were told that they would have to pay the fine mentioned in the rule, and both left the society to avoid such payment.

It was also proved by the said Robert Gillam, that, prior to the revision of the rules, the society had occasionally contributed towards the support of men out on strike, and that the last of such occasions was at Christmas 1866, when a sum of 90*l.* was given to men out on strike at Stourport, and that on one occasion, since the revision of the rules, viz., on the 13th May 1868, a sum of 5*l.* per week was voted to some ironmakers and chainmakers who were out on strike. The following entry relating to the last-mentioned vote appears in the minute book of the society.

At a delegate meeting held at the Vine Inn, on Wednesday, May 13, 1868, the following resolution was unanimously passed—"Proposed by Joseph Arnold, seconded by James Inston, that the ironmakers and chainmakers have the sum of 5*l.* per week granted to them from the funds so long as they are out, to be equally divided between them."

Except as above mentioned no evidence was given at the trial of any application of the funds of the society towards the support of men on strike, or for any illegal purpose.

There are between 500 and 600 members of the society, and their funds at the present time exceed 2000*l.*, invested in the savings bank in the names of several sets of trustees appointed for that purpose.

At the close of the case for the prosecution, Mr. Streeten and Mr. Jelf, on behalf of the prisoner, objected that the society was proved to have been established, in part at least, for an illegal object, and that I ought on that ground to direct the prisoner to be acquitted. Nos. 30, 35, 36, and 37 of the revised rules (*a*) were principally relied upon as showing the illegality alleged, and the following cases were cited in support of the objection: *R.* v. *Hunt*, 8 C. & P. 642; *Hornby* v. *Close*, L. Rep. 2 Q. B. 153; *Farrer* v. *Close*, L. Rep. 4 Q. B. 602.

I overruled the objection and refused to withdraw the case from the consideration of the jury, but I consented to reserve the point if necessary.

The trial accordingly proceeded and the jury returned a verdict of guilty, whereupon the prisoner was sentenced to one year's imprisonment with hard labour, and he is now detained in Worcester Prison in pursuance of that sentence.

The question on which I respectfully desire the opinion of the Court for the consideration of Crown Cases Reserved, is, whether I was right in overruling the objection so taken on behalf of the prisoner, or whether such objection was valid in

(*a*.) Rule 30. The hours of work allowed by the Factory Acts shall be the recognised work hours for members of this society, and any member infringing on such hours by working overtime—that is, by working before six o'clock in the morning, after six in the evening, after two o'clock on Saturdays, or meal hours, shall be fined 2s. 6d., and shall likewise be suspended from all the privileges of membership for twelve months.

Rule 35. Any member of this association making an application for work at firms where there is no vacancy, and thereby creating that spirit crushing influence which all good men deplore, shall upon proof of the offence be fined 2s. 6d. in each and every case, such fines to be placed to the offender's arrears.

Rule 36. Any member of this society taking a person into a shop to learn the weaving where no vacant loom exists, and against the expressed wishes of his shopmates, shall be fined 2s. 6d., and shall likewise be suspended from all the privileges of membership for twelve months.

Rule 37. Should any member leave one firm to work at another, he shall get a clearance card to certify his position with respect to this society, and if he is in arrears of his contributions, levies, fines, &c., he shall pay in the same to the secretary acting for the shop wherein he has obtained employment. And any member producing a false certificate shall be fined 1s., and any secretary wilfully drawing up a false certificate shall be expelled from his office.

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point of law and entitled the prisoner to be acquitted.

(Signed) R. Paul Amphlett,
Chairman of the above Court of Quarter Sessions.

Streeten (*Jelf* with him) for the prisoner.—The conviction was wrong. The relation of master and servant must exist to support a conviction for embezzlement. In this case the society was an illegal one, and the service in which the prisoner was engaged was consequently illegal, and the law does not therefore recognise the relation of master and servant in such a case. That such a society is illegal is shown by *Hornby* v. *Close*, 15 L. T. Rep. N. S. 563, and *Farrer* v. *Close*, 20 L. T. Rep. N. S. 801. Rule 36 of this society is much stronger and more illegal than the rules relied upon in those cases. [Cockburn, C. J.—Those cases decided that the societies there in question were only so far illegal that they could not enforce civil contracts.] It is submitted that such a society cannot have property which can be embezzled. The prisoner was a servant only under the rules of the society. Such a service is not a lawful one because the rules are not lawful. Service implies some duty which can be legally enforced, and the money received and embezzled must be money which can be recovered in a court of law. This is a society which is indictable at common law, its rules are illegal, as being against public policy, and they are also criminal in the sense of the society being a conspiracy to effect an unlawful object by illegal rules. *Hornby* v. *Close* followed the decision in *Hilton* v. *Eckersley*, 6 Ell. & Bl. 47, 66, where the court refused to enforce a bond by which a number of masters bound themselves to act according to the resolution of a majority in the employment of their workmen. In delivering the judgment of the court Crompton, J. said: "I am of opinion that the bond is void, as being against public policy. I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture. The precedents of indictments for combinations of two or more persons to raise wages and for other offences of this nature, which were all framed on the common law, and not under any of the statutes on the subject, sufficiently show what the common law was in this respect. In *Rex* v. *Mawbey*, 6 T. R. 619, Grose, J. assumed the illegality of such combinations as well-known law. Combinations of this nature, whether on the part of the workmen to increase, or of the masters to lower wages, were equally illegal." [Cockburn, C. J.—What authority is there for saying that where half a dozen men or more agree not to work at a factory where machinery is used, or where more than a certain number of apprentices are taken, that such a combination, although it may be in restraint of trade, is a criminal offence?] Such an agreement is contrary to public policy. In 2 Russell on Crimes, p. 442, it is laid down that a person cannot be convicted for embezzlement as a clerk or servant to a society which is illegal, as of a society where the members on admission took an unlawful oath: (*Rex* v. *Hunt*, 8 C. & P. 642.) In this case the defendant received the moneys which were to be applied in an illegal way. "The objection," says Lord Mansfield in *Montefiori* v. *Montefiori*, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff; by accident if I may so say. The principle of public policy is this, *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis.*" It is submitted the same reason applies to the offence of embezzlement, and the court will not lend its aid in the protection of funds to be applied to an illegal purpose. Any combination to do that which is an infraction of a civil right is indictable. A conspiracy for raising the prices of victuals or goods by forestalling or regrating, or to carry out a monopoly, is indictable at common law. So also is a conspiracy to force workmen to work at a particular rate of wages or for certain hours, 4 Broom & Hadley's Comm. 189, 190. Notwithstanding the 32 & 33 Vict. c. 61, these are still indictable offences.

J. O. Griffits for the prosecution.—The conviction was right. It may be that a partnership for an illegal object, such as in rule 22, cannot enforce its rights in the civil courts, but it is submitted that the society is not criminally illegal. In *Rex* v. *Hunt* every one of the members of the society was clearly indictable for the felony of taking and administering illegal oaths. The present is a case of a legal partnership having among its rules some very laudable and two or three in restraint of trade (rules 35, 36), which are therefore void. The rules which regulate the partnership are divisible, and those which are not illegal may be enforced in courts of law: (*Price* v. *Green*, 16 M. & W. 346.) Friendly societies which are not registered are nothing more than ordinary partnerships, and the secretaries and officers are the servants of the members:

Reg. v. *Tongue*, Bell's C. C. 289;
Reg. v. *Meller*, 2 Moo. C. C. 249;
Reg. v. *Redford*. 21 L. T. Rep. N. S. 508.

In the civil courts the agent of a party to an illegal contract cannot set up the illegality to an action by the principal against him:

Tennent v. *Elliott*, 1 Bos. & Pul. 3;
Sharp v. *Taylor*, 2 Phil.

That this society is not criminal is shown by the stats. 6 Geo. 4, c. 129; 32 & 33 Vict. c. 61; 18 & 19 Vict. c. 63, which were passed to regulate similar societies, and are, in fact, a recognition of them. It may be that the funds of the society will never be applied to the purposes in rules 35 and 36. (He was then stopped by the court.)

Streeten in reply.—The 32 & 33 Vict. c. 61, and 18 & 19 Vict. c. 63, have no application, because this society was not registered under the Friendly Societies Act. The rules relied on render this society criminally indictable for a conspiracy. There is a precedent of an indictment (4 Went. 100) against journeymen leather dressers for a conspiracy not to work at any shop where apprentices were taken for a less period than seven years. In the cases cited on the other side the rules were rather irregularities and not illegal in substance affecting the constitution of the society.

Cockburn, C. J.—I am of opinion that there is nothing in the circumstances of this case that affects the validity of the conviction, and that the conviction must stand. It is unnecessary to determine whether if a society be established for criminal pur-

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poses that would affect its legal title to the protection of its property, because in this society there are no rules that can be said to be of a criminal character. The principal purposes for which this society was established are lawful, but there may be one or two having reference to the employment of its members and wages which might come within the objects of a trades union according as they were carried out. According to the cases of *Farrer* v. *Close* and *Hilton* v. *Eckersley*, such rules would be illegal and void, and any contract arising on these rules would also be void as being in restraint of trade, and contrary to public policy, but the court, in those cases, carefully abstained from saying that there was any criminal illegality. And I do not think that such rules must be considered as criminal, and as affecting the society's title to its property. The late Act (32 & 33 Vict. c. 61) has said that trades union societies are to have the privileges and advantages of the Friendly Societies Acts, which give a right to proceed against their officers for embezzlement of funds in a summary way before magistrates to conviction and punishment. It was urged that this statute only applies to societies registered under the Friendly Societies Act, but whether that be so or not, the statute may be regarded as an intimation of the Legislature that such societies should not be prevented from having the protection of the law against those persons who may embezzle their property. That enactment, therefore, shows that there is nothing of a criminal nature in such rules. It would be a great absurdity to say that, although such societies, when registered, could go before a magistrate and prosecute in a summary way to conviction, that they were prevented from preferring an indictment for the same offence at the assizes, yet that is what the argument for the defence comes to. I therefore think the conviction was right.

Byles, J.—I also think that the conviction was right. The objects of the rules pointed out may be unlawful in the sense of being void, as in restraint of trade and contrary to public policy, but they are not unlawful as being within the criminal law.

Keating, J.—I am of the same opinion. The only illegality relied on is to be found in two rules, which are said to be illegal and void as in restraint of trade, and which could not be enforced in a court of law. Now, is that a criminal illegality that would deprive the society of the right to have the protection of the law to prevent its funds being plundered? It seems to me that it is not. The late Act (32 & 33 Vict. c. 61), if confined to registered friendly societies, contains a clear indication of the intention of the Legislature that the mere fact of societies having rules that are void as being in restraint of trade, shall not cause such societies to be deemed illegal so as to deprive them of the protection of the law in respect of their property. In the argument it was said that the society was indictable at common law, but in the absence of any authority for that position, it seems to me that it is not. There is no instance of any such indictment.

Pigott, B.—I am of the same opinion. It is said that this society cannot hold property because its rules are illegal. Now they are only illegal as being in restraint of trade, and not affecting their right to property. By the 32 & 33 Vict. c. 61, the Legislature has recognised their right to property, and provides that they may go before a magistrate and proceed summarily to conviction and punishment against persons who may have embezzled their funds.

Cleasby, B.—I am of the same opinion.

Conviction affirmed.

NISI PRIUS.

COURT OF QUEEN'S BENCH.

(Before Cockburn, C. J.)

Tuesday, Feb. 1.

Anderson v. The Carlisle Horse Clothing Company, Limited (a.)

Goods sold and delivered—Agreed terms of payment.

If the agreed terms of payment for goods sold be by a three months' bill, the buyer to have the option of paying cash at 2½ discount, the buyer is not bound to accept a bill for a larger amount than his debt, and even if he refuse to accept a bill correctly drawn the seller cannot sue for goods sold and delivered before the end of three months from the date of the bill drawn by him.

If, however, the agreed terms be cash, with buyer's option of a bill, the seller can sue immediately upon the buyer's refusal to accept.

This was an action for goods sold and delivered, and on accounts stated. The action was commenced on the 23rd Dec. 1869.

The plaintiffs, a firm of indiarubber manufacturers at Limehouse, had for a long time carried on business with the defendants, and up to the beginning of last September all accounts were settled between them. The balance alleged by the plaintiffs to be due to them on the 20th of that month was 46*l.*, but the defendants maintained that the plaintiffs had agreed to take back two riding-coats which had been supplied them about a year before, and paid for by the defendants. The value of these coats was 3*l.* It was admitted by both parties that they agreed the balance between their accounts on the 20th of each month should be paid either by acceptances due three months from the 1st of the following month, or by cash at 2½ per cent. discount; it was disputed, however, as to whether the regular course was to pay cash or accept bills, and of which alternative the debtor had his option. Upon this turned the question whether the defendants were bound to accept the bill for 46*l.* which the plaintiffs drew, the amount due being, as they alleged, only 43*l.* This action, which was for 46*l.*, was commenced before a three months' bill would have been due if the defendants had accepted it when the the plaintiffs sent it to them. At the time that bill would have been due, the defendants tendered 43*l.*

James, Q. C. and *Murphy* for the plaintiffs.

Quain, Q. C. and *L. Kelly* for the defendants.

It was contended for the defendants that upon the evidence the terms between the parties were, that on the first of each month the balance due on the 20th of the previous month should be paid by three months' bill, or, if the party from whom the balance was due preferred, by cash 2½ discount; that the defendants were willing to accept a bill on the 1st Oct. for the amount which they owed on the 20th of the previous month; that the bill of that date drawn by the plaintiffs was for a sum 3*l.* beyond that which the defendants owed, and the defendants therefore were not bound to accept it; and that they could not be liable to the plaintiffs before a bill properly drawn and accepted would been payable. They relied upon *Mussen* v. *Price*, 4 East. 147, in which it was held that where goods were sold upon a contract, that the vendee was to pay for them in three months by a bill of two months, the contract was for a credit of five months, and therefore that *assumpsit* for goods sold and delivered could not be brought at the end of three months upon the neglect of the vendee to give his bill at two months. It was

(a.) Reported by M. W. McKellar, Esq., Barrister-at-Law.

further contended that the fact of the plaintiff's having claimed the full amount without deducting discount, went to show that they believed the agreement for payment to have been by bill in the first place and not by cash.

For the plaintiffs it was urged that no agreement to take back the coats had been proved, that as the defendants refused to accept the bill drawn by the plaintiffs for the amount due, they were bound to pay cash on the 1st Oct.; and that the terms of settlement were cash, unless the party from whom the balance was due accepted a bill for the amount. The case of *Rugg* v. *Weir*, 16 C. B., N. S., 471, was relied upon; these goods were sold upon the terms "2½ per cent. or three months' bill," which was explained to mean cash at the expiration of the month succeeding the current month, deducting a discount of 2½ per cent.; or, at the buyer's option, a bill at three months from the same period. The buyer having refused to accept a bill at the end of the second month, it was held that the seller might at once sue him for goods sold and delivered, and was not bound to wait the additional three months.

COCKBURN, C.J., in summing up, said the first question for the jury was what arrangement had been entered into for the settlement of the balances. It was clear that the party from whom the balance was due, the buyer of the goods, might pay by cash or bill; but the question was which plan he was bound to adopt if he did not take steps to show his intention of acting upon the other. If the agreement was for a bill with the option of cash if the buyer preferred it, then the defendants were not bound to accept a bill for a larger amount than they owed; and even if the bill was drawn for the correct amount of their debt, the plaintiffs could not sue until three months had elapsed from the date of the bill which the defendants refused to accept. This is the effect of the decision in *Mussen* v. *Price*. On the other hand it was held in *Rugg* v. *Weir*—a decision, the wisdom and policy of which he fully admitted—that if the terms for payment are the other way, viz., cash with option of a bill, the buyer, if he does not accept a bill, is liable to be sued for the cash. It was entirely for the jury to say what they thought of the evidence concerning the alleged agreement to take back the coats.

The jury found the full amount claimed for the plaintiffs, and, in answer to a question put to them, said they considered the payment arranged between the parties was cash, with the option of a bill. They thought there had been no agreement to take back the two coats. Leave was reserved to the defendants to move the court to enter a verdict for them upon the ruling of the judge, and execution was stayed.

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister-at-Law.

Wednesday, July 7, 1869.

THE ORIENT.

Damage—Pleading—Special defence—Costs.

The plaintiffs alleged in a cause of damage that the damage was imputable solely to the defendants and their servants; this allegation was simply traversed in the answer. At the hearing it appeared that a person, acting out of the scope of his authority, was solely to blame for the damage:

Held, that this defence should have been pleaded specifically; and, while admitting the evidence and dismissing the suit, the Court refused costs to defendants.

This was a cause of damage. The plaintiffs were the owners of the brigantine *Georgiana*, which had suffered injuries while beached at Appledore, near Bideford, from the brig *Orient*, which had been moored outside her, and from which chains and hawsers were passed, from bow and stern, to the shore; thereby producing the effect that, when the tide rose, the *Orient* was jammed against the *Georgiana*, causing the latter to strain heavily, and to chafe and grind against the quay on one side and the *Orient* on the other, causing damage. The plaintiffs alleged in the fourth article of the petition that "the damage was imputable solely to the acts of the owners of the *Orient* and their servants." The defendants, in their answer, traversed the facts, and, secondly, pleaded as follows: "The cause of action in the said petition mentioned, and also the damage sought to be recovered for in this cause by the plaintiffs, are respectively the same cause of action and the same damage in respect of which the plaintiffs commenced an action in Her Majesty's Court of Common Pleas, and afterwards and before the institution of this suit obtained judgment therein, in which said judgment the said cause of action became and was merged, and which said judgment was satisfied before the commencement of this suit."

Plaintiffs in their reply admitted the action and judgment therein, but alleged that "the said action was brought for trespass and for wrongful detention of their ship, whereas the present suit is instituted for the recovery of damage inflicted upon the plaintiff's vessel *Georgiana* by the defendant's vessel *Orient*," and secondly, that "the said action instituted by the plaintiffs was not a suit *in rem*, and was of a different nature to, and not between the same parties as this suit."

In the course of the trial it appeared from the evidence given for defendants that the *Orient*, which had no master or crew on board, had been placed in the position in which she did the injury by a person who had no authority from her owners except to act as agent for the sale of the ship. On this fact appearing,

Deane, Q. C. and *Cottingham*, contended that on the above pleadings the defendants could not set up this defence: it should have appeared in a specific plea. The objection was, in fact, a protest, and should have been pleaded as such, and referred to

The Ida, 1 Lush. 6;
The Thetis, 38 L. J., N. S., Adm. 42.

Cohen and *Bullen*, for the defendants, contended that inasmuch as the averment in the petition that "the damage was imputable solely to the owners of the *Orient* or their servants" was traversed in the answer, that the pleadings were sufficient to raise this defence.

An amendment of the pleadings was also suggested by *Cohen*, but subsequently retracted as likely to affect the question of costs. The court reserved judgment until all the evidence had been concluded.

Sir R. J. PHILLIMORE.—This is a case in which the court has no doubt whatever as to the law which is applicable to it; but it raises a point of some importance with respect to the pleadings in this court, which will induce me to make some remarks which otherwise would have been unnecessary. His Lordship then stated the pleadings, and said—In the course of the trial Mr. Yeo was called for the defendants, when it appeared that he was agent for the owners of the *Orient* for the purpose only of the sale and completion of the vessel—that is, the vessel had been sent from Prince Edward's Island in an incomplete state, and he was to sell it if he could unfinished, and if not, when it was finished;

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and he said he put the *Orient* into the position in which she did the damage to the *Georgiana* for the purpose of asserting his right to the foreshore. The counsel for the defendant also put into court a bill of sale, which showed that Mr. Yeo was an agent to sell the ship for a sum not less than 2400*l.* That was the limit and the scope of his agency. The question then arose whether this case could proceed any further, inasmuch as the act of damage really had been done by a person who, in putting the *Orient* in a position to cause the damage, had acted without the scope and beyond the limit of his authority altogether? and two things apppeared to me, first, that I could not refuse either to consider the evidence so taken before me, or the conclusion of law to which that evidence must lead; and, secondly, that the pleadings had not sufficiently raised the first defence intended to be relied upon at the hearing. I then suggested, or I think Mr. Cohen himself suggested, that the answer might be amended, and proposed the following amendment:—"The aforesaid damage was imputable wholly to persons who were not servants of the defendants acting at the time in the service of the defendants, and was not occasioned by any person acting in the service of the defendants." Nothing was said at that time about amending the plea upon condition that the costs were paid; nothing was said about it. When the Admiralty advocate replied, he said that he could not sustain the suit which his clients had instituted after the evidence which had been given before the court, and which shewed that the wrongdoer in this case was not the servant of the owners; and he alleged that if this had been brought to his notice in the regular and proper manner, and at an earlier period, he should have advised his clients to discontinue the suit, and the expense of hearing would not have been incurred. Mr. Cohen thereupon retracted his amendment, and contended that by the general denial he had sufficiently raised this speccific issue, the *onus probandi* of which was upon the plaintiffs. There can be no doubt that under the old rules it would have been necessary, not only to state this part of the case, but any other questions which were likely to arise. Those rules were, I think, very properly altered under the authority of the Privy Council. The 65th rule says: "The modes of pleading hitherto used, as well in causes by act on petition as by plea and proof, are hereby abolished," and then the 67th is: "Every pleading shall be divided into short paragraphs numbered consecutively, which shall be called the articles of the pleadings, and shall contain brief statements of the facts material to the issue." And the 76th provides: "Any petition or other pleading may be altered or amended by consent of proctors, or by permission of the judge." In the case of the *Why Not*, 38 L. J., N. S., Adm. 27. I laid down to a certain extent my opinion with regard to pleadings in these cases, and I said, "the rules of pleading ought to be adapted to the nature of the case which it is their object to bring before the court. They are not to be considered as constituting a game of skill between the advocates, but ought to be so framed as to assist not only the party in the statement of his case, but the court in its investigation of the truth between the litigants. And the pleadings should be such as to apprise the court, and the opponent, of the principal points upon which the party intends to rely, that neither should be taken by surprise. Of course, I cannot put myself in this case into the position of the advocate for the plaintiff; but I can say truly, that, as far as the court is concerned, it was entirely taken by surprise when it received the evidence to which I have adverted. In such a state of things, the court must not reject the evidence, but should apply it to the general averments of denial, and, if necessary, give the other party leave to answer that which is raised so generally in the petition and so specifically by the evidence, and under the special circumstances of this case, I think that defendant was not the agent of the owner for the wrong-doing which caused the collision in question, and I must therefore dismiss the defendants from further observance of justice in this case. It only remains to be considered what it is the duty of the court to do with respect to the costs. I am aware that these proceedings have in substance been already instituted before another court, and that it was quite impossible that the plaintiff could have been ignorant that Mr. Yeo, the person whose evidence was taken, was only an agent for the owners of this vessel, the *Orient*, for the purpose of sale, or may be of completion and then of sale. Nevertheless, I am of opinion that they ought to have had notice of that fact by the pleadings in this cause, and I think I arrive at a fair conclusion when I determine not to reject this evidence, and to dismiss this case, and leave each party to pay his own costs.

In reply to an application of *Cohen*, the Court declined to decide the legal question raised on the record, as the preliminary objection was fatal to the suit, and there was no need of entering upon other questions, but granted leave to *Cohen* to appeal if such leave were necessary.

Dec. 7 and 21, 1869.

THE SAME.

Decree—Amendment.

Any application to amend an error in a decree must be made with the utmost expedition.

Motion to alter a decree five months after it was made dismissed.

This case came again before the court on a motion by *Cohen* to alter the decree, which was drawn up as follows:—

"July 7th, 1869. The judge, having heard counsel on both sides, gave leave to the defendants to amend their answer if they should think fit to do so.

"Counsel for the plaintiffs then consented to the cause being dismissed, and the judge having heard counsel on both sides on the question of costs, dismissed the defendants and their bail from this cause and all further observance of justice therein, but made no order as to the costs of this cause.

"Defendants' proctors, with permission of the judge, protested of a grievance and of appealing, and instantly appealed."

The defendants had appealed from this decree, but before the appeal was heard, and on the 7th day of December, counsel on behalf of the defendants moved the court to alter the decree as follows, namely: The judge, having heard counsel on both sides, ruled that the pleadings did not raise the defence that the collision was occasioned by persons who were not servants of the defendants, but gave leave to the defendants to amend their answer if they should think fit so to do. Counsel for the defendants declined so to do, whereupon counsel for the plaintiff consented to the cause being dismissed; but counsel for the defendants prayed the judge before pronouncing judgment to hear and determine the ground of defence raised by the second article of the answer. The judge, having heard counsel, &c., refused to hear and determine the said ground of defence, and dismissed the defendants and their bail.

Cohen contended that the decree was erroneous, as the defendants did not avail themselves of the permission to amend. On the second plea there was a good defence, and the amendment therefore

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was unnecessary. The decree also had failed to state the judgment as to the insufficiency of the first article of the answer to raise the defence which appeared on the evidence.

Dr. *Deane*, Q. C. for plaintiffs.

Sir R. J. PHILLIMORE.—In this case an application has been made to the court to alter the minute of a decree. The decree was made on the 7th July last; the application to alter it was made on the 7th of this month, December. Before I give my judgment upon the application, I will say a few words upon the general practice of the court as to the entering of decrees, and as to the particular circumstances of this case. It has been the general practice of this court to draw up, with the aid of the proper officers, its own decrees and minutes. If any circumstances of difficulty or peculiarity occur, the registrar has generally shown to the proctors of both parties the minute of the decree which he proposes to enter. He has also, when it appeared to him necessary, consulted the judge. In any case, the decree is entered within a day or two of the delivery of the judgment, and can be seen by either party whom it affects, and if either party object to the wording of the minute, and the matter is not adjusted in the registry, it is competent to either party to make application to the court upon the subject, but it is important to observe that, according to the practice of this court, any such application must be made with the utmost expedition. To borrow the language of Dr. Lushington, in the case of the *Monarch*, Robin. 27, "It must be an error instantly noticed, and brought to the attention of the court with the utmost possible diligence." The practice of the court of Chancery with respect to minutes has been referred to. It has been recently much discussed before the Judicature Commission, of which I am a member, and I am not disposed to alter the practice of this court by adopting that of a court of equity upon this subject. Now I will say a very few words as to the circumstances of the case before me. During the course of the trial a witness was put into the box by the defendant for the purpose, as I understood, of proving the nature of the damage inflicted by the *Orient* upon the *Georgiana*, but he also proved incidentally that he was not the agent of the owner of the *Orient* for the purpose of placing her in the dock, from her improper position in which the damage to the *Georgiana* ensued. It was obvious therefore to the court, and to the counsel for the *Georgiana*, that if the evidence was admissible, the suit of the *Georgiana* against the owners of the *Orient* must fail. A question arose as to whether the pleadings of the defendant sufficiently raised the defence. Upon the whole, I was of opinion that, having regard to the practice of the court (as explained in the recent case of the *Why Not*, Law Rep. 2 Adm. 265) the defence was not properly raised. Though, as I have said, this is a question to be decided according to the practice of this court, I may observe that this practice does not seem to be at variance with the rules of pleading at common law, as laid down in the 16th of the Regulæ Generales of Trinity Term 1853, and the examples there given: (Day's C. P. Acts, p. 432.) I, however, also thought that I ought not to reject the evidence which had actually been given, and gave leave to the defendant to amend his plea. The plea was amended; but afterwards, when it appeared that this amendment would affect the question of costs, it was withdrawn on the ground that the defendant would not have consented to amend if he had understood that to do so would affect the question of costs, and also that he could succeed upon another defence which was properly raised by his plea. Much discussion ensued upon this matter, reported not altogether accurately, but I dare say with as much accuracy as the rapidity with which the conversation was carried on, and a certain amount of confusion which prevailed at the time, would permit, in the notes of the shorthand-writer which have been sent to me. The upshot was that I acted upon the evidence which had been tendered, and which disproved the agency on behalf of the owners of the *Orient* of the person who had placed her in dangerous proximity to the *Georgiana*, and who turned out to be the real wrong-doer. Having come to this conclusion, I thought the time of the court ought not to be occupied by considering the other points raised in the case. I dismissed the suit of the *Georgiana*, but inasmuch as the defence being within the knowledge of the defendant alone, had not been properly raised on the pleadings, and as, if it had been, the suit would, as the counsel for the plaintiff alleged, have been discontinued, I thought it right to make no order as to costs. The minute of the decree was taken down very soon after the judgment, and was, as the registrar informed me, and as appeared from his note, shewn to the proctors of both parties. Some objection to it was taken by the proctor for the defendant, and an alteration was made in it. The matter was not brought to the notice of the court until the 7th Dec. the minute having been entered very soon after the judgment, which was on the 7th July. I am now asked by the defendant's counsel to direct it to be further altered. But having regard not only to the interval of time which has elapsed, but also to the merits of the question, and inasmuch as it appears to me that this minute does, on the whole, accurately record the decree of the court, I must decline to make any order for the alterations of the minute.

Attorney for plaintiff, *Peckham*.

Attorneys for defendants, *Fielder* and *Sunner*.

Nov. 23 and Dec. 6, 1869.

THE EMPIRE OF PEACE.

Bottomry—Bond—Money advanced on personal security—Subsequent bond—Further advances.

Where an agreement was made by F. and Co. with A. and Co. that the latter should purchase for them a cargo of rice in British Burmah, and that all the advances should be secured by the hypothecation of the bills of lading and a fixed amount of 5s. per ton freight before the completion of the contract, and after A. and Co. had made considerable advances, F. and Co. failed; whereupon A. and Co. induced the master of one of F. and Co.'s vessels then loading to execute a bond for the part advances and a further trifling amount. F. and Co. having disputed the validity of the bond:

Held, that the bond was not valid; that the original advances having been made partly upon personal security and partly upon a margin of freight, could not subsequently be secured by a bond; and as to the further advances, they were too trivial to bring the case into the category of bonds partly good and partly bad.

This was a cause of bottomry, instituted by the holder of a bottomry bond against the ship *Empire of Peace*, and against the Merchants' Trading Company of Liverpool (Limited), the present owners of the ship. The bond was dated the 14th June 1866, and was given by the master of the ship to Auschitzky and Co., of Akyab, in British Burmah, for the sum of 540*l.* 1*s.* 7*d.* and 30 per cent. interest. On the same day, and at the same place, another bond was given by the master of the ship to Joseph Charriol, for the sum of 890*l.* and 30 per cent. interest. The latter bond has been discharged; the former bond is the one the validity of which was

argued before the court. It appeared from the evidence that an agreement was made between Messrs. Fernie Brothers, of Liverpool, and Auschitzky and Co., with respect to the navigation of four vessels, one of which was the *Empire of Peace*, belonging to Fernie Brothers, and that that agreement was as follows:—

18, Hackin's Hey, Liverpool,
29th Aug. 1865.

Messrs. Fernie Brothers, Liverpool.

Gentlemen,—We hereby agree to load the ship *Empire of Peace*, of 1540 tons register, and the *Edward Oliver*, 1166 tons register, at the port of Akyab, with full cargoes of Necransie rice, of fair average quality, of the crop of 1866 (with the option to load about one-fourth with Larong rice), at 6s.—say 6s. per cwt. nett, free on board. The ships to commence loading as soon as ready after arrival, provided new rice is being shipped at that time.

In consideration of the above, you undertake to send the following ships to us to be loaded on commission: viz., the *Prince of Wales*, 924 tons register; the *Green Jacket*, 1055 tons register; and the *Scottish Chief*, 1052 tons register, or other vessels of about the same tonnage, all of which ships to be ready to load before the 15th April 1866, at the port of Akyab.

We are to reimburse ourselves for each separate cargo by drafts at six months' sight, drawing for two-thirds of the amount at the time of purchase, and for the remainder on completon of cargo.

Bills of lading to be signed with a freight of 5s. per ton, and are to be attached to the drafts; and should delivery of the rice purchased not be taken before the 15th April 1866, we are to be at liberty to draw for the balance of purchase money. Same to be placed in the Godowns, and specially held for the ship's arrival.

The ships to have the fair average despatch of other vessels loading at Akyab at the same time by other persons.

With respect to this contract Auschitzky said:—

I made a contract with Messrs. Fernie Brothers and Co. in August 1865, for the loading by my Akyab firm of their ship *Empire of Peace* during the season 1866.

To place me in funds for the purchase of these five cargoes, Messrs. Fernie Brothers and Co. offered to furnish me with credit from Barned's Bank, but I declined the proposal, and insisted on having the bills of lading of the cargoes, with a nominal rate of freight, 5s. per ton, hypothecated as security for the value of the cargoes.

I made this contract in person at Liverpool. No agreement whatever was made by me with Messrs. Fernie Brothers and Co. to furnish the ships with funds for ship's disbursements, as we had merely to supply the ships with cargo. The subject was not mentioned. Captain Clark of the *Empire of Peace*, whilst at Akyab, asked me for money for ship's disbursements. Though I was not bound to give any, understanding that he could not get the money elsewhere, and the margin of the freight appearing more than sufficient to fully secure both the contract price of the cargo and ordinary ship's disbursements, I let him have what he required, intending, as I had done with the other vessels, to include the amount in our draft, and thus secure it by the 5s. bill of lading; but later on, when my firm learnt the failure of Messrs. Fernie Brothers and Co., they refused to advance any more, and as they knew no bank would negotiate their drafts on Messrs. Fernie Brothers and Co.—more especially for money advanced without any authority—we called on him to refund what he had received (rs. 4,891-4-9) verbally and by letter on the 9th of June, '66. Captain Clark sent tenders for a loan on bottomry of 14,000 rs. On this we offered, as agents of Joseph Alexander Charriol, to lend that sum on the express condition that he repaid our firm therefrom the rs. 4,891-4-9 already advanced, but it was eventually thus arranged—we accepted a bottomry bond for the equivalent of the rs. 4,891-4-9 (540l. 1s. 7d.), and advanced him rs. 8,060-6 for a bottomry bond accepted by us for J. A. Charriol. The equivalent was 890l. No one else tendered to advance the money; so, unless he had acceded to our terms, he could not have raised it, and the ship could not have proceeded to sea.

The money was not against Captain Clark's or the owner's credit—I mean the first advance of rs. 4,891-4-9—but against the margin of the freight; it was never intended to be otherwise. When I made the contract with Fernie Brothers and Co., vessels were being chartered to load at Akyab and other free ports during the season of 1866 at 3l. 5s. to 3l. 10s.

When I made the contract, I considered that when the cargo should be hypothecated, the margin would cover the value of the cargo without any other credit. The cargo was hypothecated. The cargo cost 6l. 5s., including freight.

Auschitzky also said that Charriol had repaid him for this bond which is in suit, as well as for the other.

Butt, Q.C. and *Clarkson*, for the bondholders, contended that as the money was advanced upon the hypothecation of the cargo, the case did not come within the category of cases where money is advanced on the personal security of the owner. By the *lex loci* there existed for the plaintiffs a lien upon the ship already for advances, but if not on her, certainly on her anchors and surplus stores; there was no reason plaintiffs should waive their rights, and nothing inequitable in their exercising them, it was clear that there were no other means of raising the money except by executing a bond, and as the plaintiffs security had failed there was no breach of faith in requiring a bond.

The Karnak, L. Rep. 2 Adm. 289; 37 L. J., N.S., 41 Adm.;
The Hebe, 2 W. Rob. 146;
The North Star, 1 Lush. 45.

Milward, Q.C., and *Cohen*, contra, contended that when money is advanced on personal security which subsequently fails, unless the money be advanced on an implied contract that a bond will be given, a bond cannot be taken. The bills of lading were in plaintiff's possession when the bond was given; and though they might never get the money realised by them, yet the validity of the bond could not be affected by events taking place after its execution. If the money was advanced upon the margin of freight, then that security still existed unaffected by Fernies' failure, and the security had not failed when the bond was executed.

Dec. 6.—Sir R. PHILLIMORE (having summarised the facts as above).—I may as well dispose of one point made in favour of this bond, namely, that Auschitzky must be considered as the agent of Charriol, and therefore that whatever legal objections apply to the former as a bottomry bondholder do not apply to the latter. Charriol's name, however, does not appear in the bond; it is said that this was because the master insisted on the bond being in the name of Auschitzky; but however this may be, I am of opinion that I must consider Auschitzky as the principal with respect to this bond, and not as the agent to Charriol; it is therefore not necessary that I should consider the case of the *Hebe* (*ubi sup.*), to which I have been referred. It appears that in pursuance of the agreement that has been mentioned, the *Empire of Peace* had been loaded with a cargo of rice by Auschitzky and Co., that they obtained from the master the usual bills of lading at the nominal freight of 5s. per ton before mentioned, that they advanced money for the necessary disbursements of the ship, which disbursements were not included in the bills drawn by them on Messrs. Fernie. It appears also that these bills of exchange, with the bills of lading annexed, were subsequently negotiated by Auschitzky and Co. with a house at Calcutta. Auschitzky left Burmah on the 26th May 1866, and was absent from that place during the whole time when the business of the bottomry bond was transacted. The business was carried on in his absence by Mr. Archard; and his evidence shows that the bills of lading at the nominal freight were to be handed to Auschitzky and Co. as a security for the price of the rice and the disbursements and advances, although he says the amount of disbursements was not included in the bills of exchange drawn on Messrs. Fernie. During the absence of Auschitzky, Messrs. Fernie stopped payment, and the date of the time when this intelligence reached the firm at Akyab appears to have been the 1st June, and according to the evidence of Archard, "the greater part or the whole" of the advances which the bottomry bond was to cover were made before the 6th June, the date of the bond being, as I have said, the 14th. It is said that the evidence shows that some of the advances were made subsequently to the date of the bottomry bond; but if so,

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they were certainly of a very trifling character, and would not be sufficient to bring this bond within the category of those cases in which the bond has been pronounced for as being partly good and partly bad. This was also a point raised, or rather glanced at, in the argument before me. The evidence satisfies me that the advances made by Auschitzky and Co. on this occasion to the master of the *Empire of Peace* were made partly on the personal security of Messrs. Fernie, and partly on what Mr. Auschitzky calls "the margin of the freight" on this cargo; and, being satisfied of this, I am of opinion that, according to the law which regulates contracts of this description, it was not competent to Auschitzky and Co. to convert their security, partly personal and partly on the freight, into the security of a bottomry bond. It is not necessary to enter into any explanation of what that law is. It is well known to us, and has been very fully examined and discussed in my recent judgment in the *Karnak* (*ubi sup.*) It was further contended by the holder of the bottomry bond that, at all events, that instrument was legal, inasmuch as the vessel, or the principal parts of her apparel, were liable to arrest for the advances which had been made; and there were no other means of raising the money, except by bottomrying the ship. I am referred by counsel on either side to *Lloyd* v. *Guibert*, 2 Mar. Law Cas. 285; 33 L. J. 20, 741, in the Exchequer Chamber; to *The Hamburg*, 2 Moo. P. C., N. S., 289; and to *Cammell* v. *Sewell*, 5 H. & N. 728; 29 L. J. 350, Ex. There is certainly not adequate proof before me that by the law of Akyab this vessel could have been arrested. It is said that, in the absence of proof, I am to presume that the English law generally is in force, and that, under the recent Admiralty Court Act, a vessel may be arrested by material men; but I know no authority for carrying that presumption to the extent that not only the common law is in force, but that a particular power recently given by a particular statute to a particular court can be exercised in a country where I have no evidence that any such court exists. And, lastly, there is no authority that I am aware of for the position that a vessel could be arrested in the Court of Admiralty by those who have made advances upon a security other than that of the ship itself, as Auschitzky and Co. have done in this case. I must pronounce against this bond, with costs.

Proctor for plaintiffs, *Rothery*.

Proctors for defendants, *Clarkson, Son, and Greenwell*.

Tuesday, Feb. 1.

(Before Sir R. J. PHILLIMORE.)

THE DART.

Salvage suit—Value—Jurisdiction—Estoppel.

In a salvage suit the defendants entered an absolute appearance. The vessel being arrested, was released on the 11*th Jan., on an undertaking by the proctors of the owners to file an affidavit of value within a week. On the* 15*th they filed an affidavit stating the value of the vessel, freight, and cargo, to be over* 1000*l. On the* 19*th a receiver of wreck made an affidavit that the value was under* 1000*l. On the* 1*st Feb. the defendants applied, upon this affidavit, to dismiss the suit with costs on the ground that the court had no jurisdiction, which in such a case lay with the justices under* 25 *&* 26 *Vict. c.* 63, *s.* 49:

Held that, under the circumstances, the defendants had estopped themselves from objecting to the jurisdiction, and the application dismissed with costs.

Semble, sect. 9 *of* 31 *&* 32 *Vict. c.* 71, *gives the High Court of Admiralty a similar discretion in the case of justices and of the County Court.*

This was an application to dismiss a suit for salvage for want of jurisdiction. The facts were these. On the 5th Jan. a salvage suit was instituted against the *Dart*, her cargo, and freight, the amount claimed being 1000*l.* On the 7th the *Dart* was arrested, but released on the 11th, on the proctors for the owner undertaking to file an affidavit of value within a week. On the 15th the defendants filed an affidavit, in which it was stated that the value of ship, freight, and cargo, was 1090*l.* 6*s.* On the 19th Jan. a receiver of wreck made an affidavit that the value of ship, freight, and cargo, was under 1000*l.* by an amount of 50*l.* An application was now made upon this affidavit to dismiss the suit, as by sect. 49 of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) summary jurisdiction in such cases was conferred upon justices.

Gibson, in support of the application, contended that the defendants were not estopped by their affidavit of the 15th Jan. from showing what was the actual value of the vessel. The valuation of the receiver of wreck was conclusive: (25 & 26 Vict. c. 63, s. 50.) [Sir R. PHILLIMORE.—No; the section merely says that the valuation shall be received in evidence.] In the *Eleanore*, Br. & L. 185., the suit was dismissed, and the court gave costs and damages because the property was under 100*l.*, although an absolute appearance had been entered. He also cited

The Margaret and Jane, 3 Mar. Law Cas. 296.

Cohen, contra, contended that the effect of the 9th section of 31 & 32 Vict. c. 71, was to make the jurisdiction of the justices co-extensive with that of the County Court: (*Beadnell* v. *Beeson*, L. Rep. 3 Q. B. 439; 18 L. T. Rep. N. S. 401.) The court being a court of record, the Admiralty Court Act 1861 remedies all objections to the jurisdiction unless they are taken at once and under protest. Here the appearance was not under protest. If a party to the suit files an affidavit which gives jurisdiction to the court he is estopped from denying the jurisdiction. The defendants ought to have appeared under protest.

Sir R. PHILLIMORE.—I shall decide this point with reference to the particular circumstances of this case, and without considering the very important question whether the 9th section (*a*) of the County Court Admiralty Jurisdiction Act (31 & 32 Vict. c. 71) would not, in construction of law, be held so far to control the 49th and 50th sections of 25 & 26 Vict. c. 63 as to make this question one for the consideration of this court. I think it unnecessary to consider that. It would be a very reasonable construction of the Act that it intended to say that the discretion which the court has to exercise with reference to the County Court would extend also to the jurisdiction of the magistrates.

(*a*) This section runs as follows:—If any person shall take in the High Court of Admiralty of England, or in any Superior Court, proceedings which he might, without agreement, have taken in a County Court, except by order of the judge of the High Court of Admiralty, or of such Superior Court, or of a County Court having admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that admiralty cause is limited by this Act, and also if any person without agreement shall, except by order as aforesaid, take proceedings as to salvage in the High Court of Admiralty, or in any Superior Court, in respect of property saved, the value of which when saved does not exceed 1000*l.*, he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty, or of a Superior Court, before whom the cause is tried or heard, shall certify that it was a proper admiralty cause to be tried in the High Court of Admiralty in England or in a Superior Court.

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[His Lordship referred to the dates of the proceedings, and continued.] On the 1st of this month an application is made to dismiss this suit, and an affidavit made on the 19th Jan. by the receiver of wreck is produced, and according to that affidavit the value of the ship cargo and freight would be under 1000*l.* by about 50*l.* I am of opinion that in this state of circumstances I ought not to accede to the application of the defendants. They have estopped themselves from making the application, and I shall dismiss it with costs.

Proctor for plaintiffs, *Thomas Cooper.*

Proctors for defendants, *Clarkson, Son,* and *Greenwell.*

ARCHES COURT.

Reported by DOUGLAS KINGSFORD, ESQ., Barrister-at-Law.

Jan. 10 *and Feb.* 3.

(Before the Right Hon. SIR ROBERT J. PHILLIMORE, Dean of Arches.)

BISHOP SUMNER *v.* WIX.

Ritualism—Gospel lights—Lighted candles, beside the Communion Table, and on the retable—Incense—Interval between services—Injunctions of Edward VI.

In a proceeding against a clerk, charged with ecclesiastical offences in adding to the rites and ceremonies prescribed by law to be used in church, the following practices were pronounced illegal:—

(1.) *Causing or permitting two lighted candles to be held, one on each side of the priest, when reading the Gospel, such candles not being required for light.*

(2.) *Using lighted candles, resting on the ground by the side of the Communion Table, or placed on the retable, a piece of furniture separate and distinct from, though above, the Communion Table, during the celebration of the Communion, such candles not being required for light.*

(3) *Using incense for censing persons and things, in an interval between two services, which would otherwise have immediately succeeded each other, the use of incense, under the circumstances, appearing intended as subsidiary and preparatory to the latter (the Communion) service.*

The injunctions of Edward VI. refer only to candles on the "high altar," and, therefore, could have no application to the present case.

Those injunctions, though considered of weight in Liddell *v.* Westerton, *Moo. Spec. Rep.* 165, *were entirely rejected in* Martin *v.* Mackonochie, 19 *L. T. Rep. N. S.* 507, *the principle of the two judgments on this point seeming inharmonious.*

The facts of the case and the nature of the charges are sufficiently stated in the judgment.

Dr. *Deane,* Q. C., and Dr. *Tristram* for the promoter.

Arthur Charles for the defendant.

Cur. adv. vult.

Feb. 3:—Sir R. PHILLIMORE.—In this case the office of the judge is promoted by the late Bishop of Winchester against the Rev. Richard Hooker Edward Wix, Vicar of St. Michael and All Angels, Swanmore, in the Isle of Wight. The case comes before this court by letters of request from the diocese of Winchester, and Bishop Sumner having ceased to be bishop of the see of Winchester continues to be the promoter of the suit (see p. 439, *sup.*). The defendant is charged with the ecclesiastical offences of adding to the ceremonies and rites prescribed by the law to be used in church, by the burning of lights and the use of incense. The charges with respect to the burning of lights are contained in the following articles:—"3rd. That the said Richard Hooker Edward Wix, in the church of the said perpetual curacy or vicarage of St. Michael and All Angels, Swanmore, on the following Sundays, to wit, on the 7th Feb., on the 28th March, on the 18th April, and on 23rd May, all in the year 1869, used lighted candles on the Communion Table in the said church, or on a ledge or shelf immediately above the said Communion Table—the said ledge or shelf having the appearance of being affixed to and of forming part of the said Communion Table—during the celebration of the Holy Communion at times when such lighted candles were not required for the purpose of giving light, and permitted and sanctioned such use of lighted candles. 5th. That the said Richard Hooker Edward Wix, in the said church on the following Sundays, to wit, on the 28th March, on the 18th April, and on the 23rd May, all in the year 1869, used lighted candles placed in candlesticks standing on each side of the Communion Table during the celebration of the Holy Communion, at times when such lighted candles were not required for the purpose of giving light, and permitted and sanctioned such use of lighted candles. 7th. That the said Richard Hooker Edward Wix, in the said church, on Sunday the 28th March 1869, caused or permitted two lighted candles to be held, one on each side of the priest when reading the Gospel, such lighted candles not being then required for the purpose of giving light." I will deal with the last article first, because it is admitted on behalf of the promoter that the practice therein complained of has been *de facto* discontinued by Mr. Wix since the service upon him of a monition by the bishop, dated the 3rd April in last year, and before the commencement of this suit; at the same time Mr. Wix contends that the practice is lawful, and the judgment of the court is prayed by the promoter thereupon. I am of opinion that the practice charged in this article is unlawful, as an addition to the rites and ceremonies prescribed by the law. I am glad, therefore, that Mr. Wix obeyed the monition of his ordinary, and must admonish him not to return to the use of this practice. With respect to the charge contained in the third article, Mr. Wix offers the following defence in his responsive plea (3rd article):—He says the charge against him, "Is in part untruly pleaded, for he alleges that on the said days in the said third article mentioned, the said lighted candles were not placed on the Communion Table, or on a shelf immediately above the same as therein alleged, but upon a certain other table called a retable, the said retable standing distinct and separate from and not forming or appearing to form part of, and not being affixed or appearing to be affixed to the said Communion Table." And he denies that the use of such lighted candles is an unlawful addition to or deviation from the forms prescribed by the law. With respect to the charge in the fifth article, the defendant admits the fact to be true as stated, but makes a similar denial with respect to the law. The charges with respect to the unlawful use of incense are contained in the following articles:—"9th. That the said Richard Hooker Edward Wix, in the said church on the following Sundays to wit, on the 7th Feb., on the 28th March, on the 18th April, and on the 23rd May, all in the year 1869, used incense for censing persons and things in and during the celebration of the Holy Communion, or as subsidiary thereto, and permitted and sanctioned such use of incense." The defendant in his responsive plea (Article 9) denies that he on the days in the article mentioned used incense for censing persons and things in and during the celebration of the Holy

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Communion, or as subsidiary thereto, or permitted or sanctioned such use of incense as in the said article alléged. And the defendant further says that he used, and permitted, and sanctioned the use of incense on the days in the said article mentioned, not for censing persons or things nor in or during the celebration of the Holy Communion, nor as subsidiary thereto, but for other and lawful purposes. "11th. That the said Richard Hooker Edward Wix, in the said church on the following Sundays, to wit, on the 7th Feb., on the 28th March, on the 18th April, and on the 23rd May, all in the year 1869, used incense in and during the celebration of the Holy Communion, or as subsidiary thereto, and permitted and sanctioned such use of incense." As to this article, the defendant in his responsive plea (Article 11) denies that he on the days in the said 11th article mentioned used incense in and during the celebration of the Holy Communion, or as subsidiary thereto, or permitted and sanctioned such use of incense. "13th. That the said Richard Hooker Edward Wix, in the said church, on the following Sundays, to wit, on the 7th Feb., on the 28th March, on the 18th April, and on the 23rd May, all in the year 1869, used incense during Divine Service, or as subsidiary thereto, and permitted and sanctioned such use of incense." As to this article, the defendant in his responsive plea (Article 13) denies that he used or permitted or sanctioned the use of incense on the days in the said 13th article mentioned, during Divine Service, or as subsidiary thereto, but he admits that he used incense in a proper and lawful manner on the said days. 15th. That the said Richard Hooker Edward Wix, in the said church, on the following Sundays, to wit, on the 7th Feb., on the 28th March, on the 18th April, and on the 23rd May, all in the year 1869, ceremonially used incense, and permitted and sanctioned such ceremonial use of incense." As to this article, the defendant in his responsive plea (Article 15) denies that he on the days in the said article mentioned used incense ceremonially, or permitted or sanctioned such ceremonial use of incense. It appears from the evidence that what is called the retable is a separate and distinct piece of furniture from the Holy Table; that it is placed behind the Holy Table; and that the ledge or shelf of it, to use the words of the witness, "appears like a mantel-piece;" over the Holy Table; that on this retable stood two large candles and twelve branch candles, and that on each side of the Holy Table there stood a large candlestick which rested on the ground. All these candles were lighted at the time and in the manner which I will now state. And I may remark that the counsel for Mr. Wix admitted very properly that the evidence given by the witness Cooper was substantially correct, and did not cross-examine him. It appears from his evidence that after the third collect for grace had been said, then there was a sermon; after which the remaining prayers were said, concluding with the apostolic benediction. After this the candles were lighted by a chorister; there was a procession by the minister and choir then formed, and they went from the church to the vestry. After which another procession came from the vestry with censers and incense burning, went to the Holy Table, where the priest stirred up the incense, and censed all the things on the retable and Holy Table, while he himself was censed by a boy behind him. After which the censers and incense were carried by a boy into the vestry, accompanied it should seem by one of the priests, another priest remaining at the Holy Table. After the Communion Service was over the censers were again fetched from the vestry; another procession was formed, and the lights were extinguished. There were no lighted candles on the Holy Table itself; there was no incense burning during the time of the celebration of the Eucharist. Between the close of the morning prayers and the beginning of the Communion Service some of the congregation left the church, and other persons came in, and a bell was rung to denote that the Communion Service had begun. These four facts which are proved in the case are much relied upon by the counsel for Mr. Wix as materially differing the present case from that of *Martin* v. *Mackonochie*; so much so as to make this present case one *primæ impressionis*. It has been forcibly contended that the two judgments of *Martin* v. *Mackonochie*, and *Liddell* v. *Westerton* are irreconcilable in principle, and that I ought to follow the doctrine laid down in the former, and not in the latter case. If, indeed, the duty were cast on me of demonstrating that the two decisions were in every respect harmonious as to the principle on which they proceeded, I might, perhaps, though I do not say that I should, find the task a difficult one to execute, more especially with respect to the weight apparently given to the injunctions of Edward VI. in *Liddell* v. *Westerton*, Moore's Special Rep. 165, and their entire rejection in *Martin* v. *Mackonochie*, 19 L. T. Rep. N. S. 507; L. Rep. 2 Priv. Co. 389, when they were relied upon for the purpose of showing that the burning of two candles to represent the true light of the world was not illegal. But I am happy to think that no such duty is imposed upon me in the present case. The lights which were burnt in this case were not upon the Holy Table or "high altar," and therefore are unaffected by the injunctions; and the lighting and the burning of them in the manner and the circumstances proved appears to me to fall under the category of ceremonies. Nor are they, in the language of the Privy Council in *Martin* v. *Mackonochie*, 19 L. T. Rep. N. S. 506; L. Rep. 2 Priv. Co. 387, "inert and unused," but things actively employed as a part of a ceremony, and are therefore illegal according to my own decision in the same case. It is not necessary that I should pass any opinion upon the legality of these things, if they were decorations, and neither "ornamenta" nor ceremonies. It will be remembered that the candles were lit and burning during the whole of the Communion Service. Now, with respect to the use of incense, the principal defence is that it was employed during an interval between two services, and neither belonged to nor was subsidiary to either. I cannot take this view of the state of facts which is proved by the evidence. I think the fair result of that evidence is that incense which was used in the interval between the two services which would otherwise have immediately succeeded each other; almost the same congregation was present at both services and in the interval between them. It is true that after the incense had been removed a bell was rung to signify that the second service was about to begin; but, looking at all the circumstances, I think it would be unreasonable and unjudicial not to conclude that the burning of the incense was intended to be subsidiary and preparatory to the celebration of the Holy Communion. I am bound, therefore, to pronounce that the use of the incense, as well as the lighting and burning of the candles, according to the facts admitted to be proved in this case, were illegal acts, and that Mr. Wix ought to have obeyed altogether, as he did partially, the monitions of his Ordinary, which are set forth in the articles, and I must admonish him to abstain for such practices for the future, and I must condemn him in the costs of this suit.

Proctors for the promoter, *Moore* and *Currey*.

Proctor for the defendant, *Brooks*.

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Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Tuesday, Nov. 30.

(Present, the Right Hon. Lord CHELMSFORD, Sir JAMES W. COLVILE, and Sir JOSEPH NAPIER.)

THE OWNERS OF THE SHIP *Calcutta* (apps.) *v.* THE OWNERS OF THE BARQUE *Emma* (resps.)

THE CALCUTTA.

Collision—Inevitable accident—Vessel partly disabled.

Inevitable accident is where the collision could not possibly have been prevented by proper care and seamanship under the particular circumstances of the case. So that where the defence of inevitable accident is set up on behalf of a vessel primâ facie to blame for a collision, the defence, to succeed, must be supported by proof that everything was done which could and ought to have been done to avoid the collision; and this, though the vessel be in some degree disabled, and so less manageable than she would otherwise have been.

This was an appeal from a decree of the Court of Admiralty in a cause of damage, promoted and brought by Meyer Levy, of Memel, in the kingdom of Prussia, the owner of the barque or vessel *Emma*, and the owners of the cargo lately laden on board her, and the representatives of the master and such of the crew as are now deceased, and others of the said crew (the respondents), against the ship or vessel *Calcutta*, of which the appellants are owners, for the recovery of damages in respect of losses occasioned by a collision between the *Calcutta* and the *Emma*.

The collision occurred about half-past twelve a.m. on the 6th Feb. 1869, about 180 miles to the westward of Scilly.

The *Emma* was a Prussian barque of about 351 tons register, and manned by eleven hands, including her master, and was on a voyage from Cardiff to Barcelona with a cargo of coals.

The *Calcutta*, a ship of 2080 tons register, was manned by a crew of forty-eight hands, all told, and was on a voyage from London to Bombay with a cargo of telegraph wire, and a number of passengers.

The case on behalf of the *Emma* was that she was sailing close-hauled by the wind on the starboard tack, heading S. by E., with the wind S.W. by W., and that she had her proper side lights, namely, a green light on her starboard side and a red light on her port side, duly exhibited and burning brightly; that the wind having increased to a gale, the watch from below were called to shorten sail, and that whilst this was being done the green light of the *Calcutta* was seen on the port bow of the *Emma*, distant from one to two miles; that the *Emma* was kept by the wind on the starboard tack in the expectation that the *Calcutta*, which was on the port tack, would keep out of the way, but that the *Calcutta*, although loudly hailed from the *Emma*, came into collision with the *Emma*, striking her with her (the *Calcutta's*) stem such a violent blow on the port side as to cause her to sink almost immediately.

In the answer of the *Calcutta* it was admitted that the *Emma* was sailing close-hauled by the wind on the starboard tack, but it was alleged, first, that in consequence of the red light of the *Emma* being dim, the *Calcutta* did not receive sufficient warning of her proximity; secondly, that owing to the foretack having been carried away, the *Calcutta* was prevented from paying off and getting out of the way of the *Emma*; and thirdly, that the *Emma* improperly ported her helm.

The cause was heard on the 4th June 1869 before the judge of the court below, assisted by two of the Elder Brethren of the Trinity Corporation.

The witnesses were examined orally in open court.

The learned judge of the court below and the Elder Brethren came to the conclusion—1st. That the *Emma's* red light was a proper light and burning brightly, and that it ought to have been seen in time by the *Calcutta* if she had been keeping a good look-out; 2ndly. That the *Emma* did not improperly port her helm; and 3rdly. That the *Calcutta* could, by taking proper measures, have got out of the way of the *Emma*.

The learned judge of the court below, by his decree, found the *Calcutta* to have been solely to blame for the said collision, and condemned the appellants in the damage proceeded for, and in costs.

Milward, Q. C. and *Cohen* for the appellants.

Dr. *Deane*, Q. C. (Admiralty Advocate) and *Clarkson* for the respondents.

Judgment was delivered by Lord CHELMSFORD.—The only question to be determined upon this appeal is whether the collision was the result of inevitable accident. The *Calcutta* is *primâ facie* to blame for the collision, because it was her duty to keep out of the way of the *Emma*; and not having done, there is *primâ facie* proof of negligence on her part. The *onus*, therefore of showing that she was not to blame is thrown upon the *Calcutta*, and she undertakes to prove that the collision is not imputable to her as blame, but that it was the result of inevitable accident. Inevitable accident is where the collision could not possibly have been prevented by proper care and seamanship under the particular circumstances of the case. The question, therefore, is whether everything was done which could and ought to have been done by the *Calcutta* to avoid the collision. It may probably be taken that the carrying away of the foretack of the *Calcutta* may have contributed remotely to the accident by rendering the *Calcutta* less manageable than she would otherwise have been. There is certainly no evidence whatever to show that the foretack was not in good condition, although the learned judge has said that in his opinion there could not have been so much wind as was represented, and that that fact rendered it improbable that it would have carried away a good foretack, implying therefore that the foretack was not good. No question of this kind was raised upon the pleadings or in the course of the evidence, and therefore it was rather hard upon the appellants to assume this as a fact, for which there was not the slightest proof, and to which their attention was not in any way called. If any evidence had been given of this assumed fact, the appellants might have disproved it, but at all events they would have been afforded an opportunity of doing so. But the question is whether, assuming the *Calcutta* to be in some degree disabled, did she, in the state in which she was, do everything in her power to avoid the collision? It is said that all that was required of her was that she should take reasonable and not extraordinary care. There is great difficulty in defining clearly the meaning of these general words "reasonable" and "extraordinary;" but, in plain language, did the *Calcutta* do all that she ought to have done under the circumstances? In the opinion of the Trinity Masters who assisted the learned judge in the Court of Admiralty, "the course adopted by those on board the *Calcutta* was quite right in porting at the time when it is stated she did, but they thought that her spanker ought to have been brailed up, and her afteryards squared, and this more especially having regard to the fact that her foresail was off, and to the immense

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length of the ship, which rendered it very difficult to get her off the wind; and they were further of opinion that if from the proximity of the two vessels these manœuvres were doubtful, it was clear that the *Calcutta* ought to have put her helm down, and hove in stays." A complaint was made by the counsel for the appellants that it was hard upon them to have these questions determined by the Trinity Masters and the learned judge, without having been suggested in the course of the trial. That it was never made a question whether, when the manœuvre of porting was resorted to, more might not have been done for the purpose of avoiding the collision. But in answer to this complaint, their Lordships feel that it is, after all, no additional fact which is introduced in the judgment of the learned judge, but a mere deduction from and judgment formed upon the facts as they were proved and established before them. Their Lordships also have the advantage of nautical advice and experience, and they are happy to say that in this case the opinion of the assessors very nearly, if not altogether, coincides with that which was given by the Trinity Masters in the court below. The Trinity Masters think that the proper course was for the *Calcutta* to have ported. Upon that subject their Lordships' nautical assessors differ from the Trinity Masters in a slight degree, because they say that it is a most difficult manœuvre to wear a ship of the length and size of the *Calcutta;* that she would have paid-off very slowly, and that the better course would have been for her to have starboarded, which would have brought her head up to the wind, and of course have lessened her way, and probably altogether have prevented the collision. It must be remembered that at this time the *Emma* was almost motionless upon the water, being in the act of reefing; but our assessors think that the *Calcutta* having ported her helm, although the better course would have been to have starboarded, agreeing in this respect with the Court of Admiralty that the spanker ought to have been brailed up and the afteryards squared, and other things done which would probably have rendered that manœuvre successful. Then also the Trinity Masters say that they "are further of opinion that if from the proximity of the two vessels these manœuvres were doubtful, it was clear that the *Calcutta* ought to have starboarded, put her helm down, and hove in stays." Therefore it being perfectly clear that the *Calcutta* having ported her helm, did not do anything in addition to aid that operation, or not having starboarded, as our assessors think would have been the better course, the collision could not have been the result of inevitable accident, which is the defence the *Calcutta* undertakes to establish against the proof of *primâ facie* negligence on her part, by not keeping out of the way of the *Emma*, as she was bound to do. Their Lordships are of opinion that the judgment of the court below is perfectly right. They will, therefore, recommend to Her Majesty to affirm the judgment of the court below, and dismiss the appeal with costs.

Judgment affirmed.

Proctors for the appellants, *Cotterill* and *Sons*.

Proctor for the respondents, *Thomas Cooper*.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Nov. 16 and 17.

(Before the LORD CHANCELLOR (Hatherley) and Lord Justice GIFFARD).

CATLING v. THE GREAT NORTHERN RAILWAY COMPANY.

Contract—Arbitration—Relation of vendor and purchaser—Time for payment of purchase-money—Award long subsequent—Intermediate interest—Possession—Costs of arbitration — Lands Clauses Act 1845, *ss.* 16 *et seq.*

The plaintiff, being lessee of lands for building, opposed a Bill which the defendants were then promoting, and before the Bill passed an agreement was entered into that he should withdraw his opposition on the terms that, if the Bill passed, the defendants should purchase his interest in a portion of the lands, subject to an apportionment of the head rent, should pay to him compensation for damage to his adjoining property, for loss of profit resulting from the taking of the land, and for alteration of drainage; that the purchase should be completed, and the compensations paid with costs within six months of the passing of the Bill. Further, that the sums to be paid should, in case of difference, be referred to a surveyor to be agreed upon "in the usual manner," but that the purchase-money should be ascertained by taking the value of the improved rents which could be made by the plaintiff beyond the ground-rent, subject to deduction in respect of the time which would be occupied in making such improved rents, and the plaintiff was at once to cease from further building. The Bill received the Royal assent on the 28*th June* 1866. *The parties could not agree as to the amount to be paid, and the whole matter was referred to a surveyor, whose award was to be final. He made his award on the* 13*th March* 1868, *and accompanied it by a statutory declaration that he did so under the provisions of the Lands Clauses Act. The defendants at once tendered the amount awarded, but the plaintiff refused it on the ground that he was entitled* (1) *to the costs of the arbitration;* (2) *to interest from the* 28*th Dec.* 1866 *till the tender; and* (3) *to the ground-rent which he had paid antecedently to the date of the award, and he filed his bill for specific performance claiming also payment under these three heads.*

Held (reversing the decision of Malins, V.C.), first, that, as the agreement was made before the special Act passed, the provisions of the Lands Clauses Consolidation Act had no operation; and, as the arbitrator had not dealt with costs in any manner, the plaintiff was not entitled to them.

Secondly, that although the contract was in terms a contract to complete by a stated day, yet as the mode agreed to by both parties of fixing the purchase-money could, by no default of either party, not be acted upon before that day, and as the agreement was altogether silent on the subject of interest, none became payable by the company previously to the date of the award.

And, thirdly, that the position of vendor and purchaser continued till the award fixing the price was made, and therefore that until that date the ground-rent, and all other outgoings in respect of the land, must be borne by the vendor.

Where an agreement for sale provides for completion on a stated day, that circumstance alone does not in this court give the vendor interest from that time, when delay in completion is not attributable to the default of the purchaser.

This was an appeal by the railway company

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against a decision of Malins, V.C., reported in 21 L. T. Rep. N. S. 17, decreeing specific performance by the company of an agreement for purchase of lands of the plaintiff, with interest on the amount of the purchase-money from the 28th Dec. 1866, and with the costs of an arbitration under which the amount of that purchase-money was awarded.

The facts are fully stated in the report referred to, and the contentions of the parties sufficiently appear in the judgments of the Court of Appeal.

Sir *Roundell Palmer*, Q. C., *Cotton*, Q. C., and *Stevens*, supported the appeal.

Waley and *Maidlow*, (with whom was *Glasse*, Q. C.), supported his Honour's decree.

The authorities referred to were:

The Hammersmith Railway Company v *Brand*, 21 L. T. Rep. N. S. 238; 18 W. R. 12;
Milner v. *Gery*, 14 Ves. 400;
Esdaile v. *Stephenson*, 1 S. & St. 122;
Greenwood v. *Churchill*, 8 Beav. 413;
De Visme v. *De Visme*, 1 M. & G. 396;
Martin v. *The Leicester Waterworks Company*, 27 L. J. 433, Ex.;
Holdsworth v. *Wilson*, 32 L. J. 289, Q. B.; 8 L. T. Rep. N. S. 434
Morse v. *Merest*, 6 Madd. 26;
Emery v. *Wase*, 8 Ves. 505;
Lord St. Leonards' V. & P., 14th edit., 627;
Birch v. *Joy*, 3 Ho. L. Cas. 565;
The Lands Clauses Consolidation Act 1845, the 16th and following sections.

Without calling for a reply,

The LORD CHANCELLOR said: This case really stands, as it appears to us, plain upon the contract which has been entered into, including, of course, as I do in the word "contract," the reference to the arbitrator and the award of that arbitrator, which completes the contract. It appears to me plain what the rights of the parties must be on the three points brought before us.

Now the first point brought before us is with reference to the costs of the arbitration. With reference to the costs of the arbitrator, there is nothing specially provided in the agreement of 1866, but it has been ingeniously put and very ably argued by Mr. Waley on that ground that it must be taken in effect as if this was a reference under the Lands Clauses Consolidation Act; that the Lands Clauses Consolidation Act speaks of the course to be followed when land is to be taken otherwise than by agreement. But then, says Mr. Waley, if this agreement had been made after the passing of the Act, instead of being made as it was before the passing of the Act, it comes simply to the case of persons who have chosen one common arbitrator, which they are allowed to do, instead of appointing one on each side, and it would be taken as a case in which the parties had agreed to this extent—to settle it by arbitration, but had not agreed on the price; in other words, that a difference had arisen with reference to price, and that the difference arising as to price should be settled by arbitration, and that then all the consequences would follow, including the costs to be given under the 34th section of the Act.

Now there are several objections to acceding to that line of argument. In the first place, if it were acceded to, and if it were treated as an agreement under the Act, I am afraid it would hardly help him in the existing contest, because what ought to have been done then would have required the arbitrator to make his determination under the 34th clause, and to settle the costs under the 34th clause, and it would not be for this court to settle the costs which are expressly referred to him, and which he is the necessary and proper person to determine, inasmuch as he knows what has taken place before him, and has all the circumstances of the case within his purview.

In the next place, it appears impossible to hold that this question is in the position of an agreement under the Act, because all the clauses are of a totally different character from anything that exists in the circumstances at the date of this agreement as between the company and the persons with whom they agree. The very first clause (I think it is the 16th) is preceded by a sort of preface as to taking land otherwise than by agreement; and it expressly says that none of those powers shall be put in force until a certain amount of money is subscribed, whereas in the case of land taken by agreement the contrary course may prevail. The amount of money necessary to be subscribed before the compulsory powers of the Act are brought into execution is not a sum necessary to be subscribed before the parties enter into the agreement. Therefore, could it possibly be said here that the agreement could be proceeded on by the parties whether or not that limit of amount which is mentioned in the 16th clause had or had not been subscribed by the company?

However, there is another objection which is still more grave, and which goes to the very root of the matter, which is this: that the Lands Clauses Consolidation Act contemplates parties who are authorised by an Act to deal with the subject-matter—namely, the land. It contemplates a course of proceeding between the owners of the land on the one hand and the persons entitled to take the land compulsorily on the other. But these parties, when the agreement was entered into, had no such compulsory powers at all. The whole agreement was framed before the Act was passed and before the compulsory powers were granted. It seems to me, therefore, that in truth you cannot tie the two subjects together, and you cannot possibly treat this agreement, framed as it is, and framed at the period that it was (viz., before the Act passed), as an agreement under the Act.

That being so, the arbitrator, as it appears to me, had no control with reference to the costs, and certainly, if he had not, this court has not, and it could not therefore deal with the costs of the award.

The second point is with reference to allowing interest upon the sum awarded. Now the form of the agreement is this. The agreement is made in April, and it provides that the land should be taken at a valuation as after mentioned, and then follows a provision that there is to be compensation allowed for damage to the adjoining building property, then for the loss of profit consequent on the taking of the land by the railway company, the amount to be ascertained and settled as after mentioned, and then also for the costs of altering the existing mode of drainage. Then the purchase is to be completed. "And the said purchase and compensation moneys and costs shall be paid within six calendar months after the said Bill in any form shall have received the Royal assent." Those six months expired on the 28th Dec. 1866. Then the 3rd clause is: "The value of the property to be purchased as aforesaid by the said company, and the amount of compensation to be paid as aforesaid" ("as aforesaid" means in the same way as compensation for the damage done to the adjoining land, and for loss of profit); "and the cost of the said drainage shall, in case of difference, be referred to a surveyor to be agreed upon between the parties in the usual manner." There was an argument thrown out by Mr. Maidlow in support of the decree that these words, "between the parties in the usual manner," had some reference or other to the Lands Clauses Consolidation Act. How can that be, because the clause says that it is to be a surveyor to be agreed upon

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between the parties "in the usual manner?" "In the usual manner" means simply the usual manner when parties agree to submit to arbitration; and being a reference of the matter to arbitration, it cannot be thrown back to the provisions of the Lands Clauses Consolidation Act, nor do I think anything done by that surveyor could be held to help the matter. Then it is agreed "that the amount to be paid for the said ground shall be ascertained by taking the value thereof at twenty-five years' purchase of the improved rents which could be made by the plaintiff beyond the aforesaid ground rent payable to him, subject, however, to deductions on account of, and for the time occupied in making, such improved rents." Then the 4th clause is merely as to paying certain expenses, which of course has no relation to the general costs of the award; certain expenses are to be paid within three weeks to Mr. Catling's solicitor with reference to the opposition to the Bill, and with reference to this agreement; and then the plaintiff is at once to cease any further buildings on the property. Now then, the question is—the sum not having been ascertained until long after the time that is here mentioned for completion of the agreement (completion being to take place on the 28th Dec. 1866, and the sum to be paid not having been ascertained until March 1868)—is whether or not interest is payable on that sum when it was ascertained in March 1868, it not having up to that time been ascertained in manner provided by the parties. It is proved upon the evidence that there certainly was no default, to put it at the lowest, on the part of the defendants with reference to the fixing of this sum of money. They appear to have called upon Mr. Catling early in the day to send in his claim. He did not send in his claim until somewhat late, I believe. I am not accusing him of any default; he might have had reasons for so doing, but at the same time there was clearly no default on the part of the company, and it was through no default of theirs that the amount had not been ascertained; nor can I take it to be the fault of the arbitrator, because of course the reference required a good deal of investigation, and, it having been made somewhat late in the day, one cannot say that his investigation occupied at all an unreasonable time before he arrived at the amount. Therefore, nobody being to blame, the question is simply reduced to this: regard being had to this agreement and to the reference which is made, and the award which is made, whether or not, now that you have ascertained the amount, there is any ground for this court to say that interest is payable from the 28th Dec. 1866, at a time, that is to say, when no one knew what the price was, and nothing had been ascertained with regard to the amount payable, not simply in respect of price, but with reference to compensation for loss on the one hand, and damage to adjoining property on the other, in addition to the actual price of the land. Now, for that purpose, just look at what the reference is to the arbitrator. There is no special reference made to him which pointed at all to this matter. It is simply a recital of the agreement, which no doubt is recited, although it is not recited in the arbitrator's award. We do not find here any special recital at all with reference to the time at which the agreement was to be completed, but the recital is in this form: it gives the various recitals in those agreements, and then recites that what the company had agreed to pay Mr. Catling for loss of profit was to be ascertained in the manner therein mentioned. It does not say one word about the time at which the matter was to be completed; but it recites "the value of the property to be purchased as aforesaid, and the cost of the said drainage should, in case of difference, be referred to a surveyor," and then it refers to the taking of the price of twenty-five years' purchase, "subject to deduction as aforesaid." And then it recites the passing of the Bill, and then it recites that a difference had arisen as to the matters aforesaid, and that they were agreed to be referred to a surveyor, and "it was witnessed and agreed by the said company and the plaintiff that all matters which, by the said agreement of the 19th April 1866, were, in case of difference, thereby referred to a surveyor, should be and the same were by the agreement now being recited referred to the sole arbitration of me the said John Clutton." Then he recites having made that declaration, which has no bearing at all on the construction, as I said before, of what the written agreement is between the parties, and then he awards and determines "that the sum of 13,490*l.* is the amount to be paid by the said Great Northern Railway Company for the purchase of the estate and interest of the plaintiff (subject to the apportioned ground rent of 100*l.* 4*s.* 9*d.*) of and in the ground referred to in the first recited agreement, and delineated on the plan" and so on. That is as to the price of the ground. He further awards that the sum of 2600*l.* is the amount to be paid by the said company to the plaintiff Catling for the damage to his adjoining building property, and for the loss of profit consequent on or resulting from the taking of the said land by the said company." And he further awards "that the sum of 675*l.* is the amount to be paid by the said company to the plaintiff as the cost of altering the mode of drainage." That is, in fact, the whole of the award. That being so, we do not find that there is any reference at all to the date at which it is said that the agreement is to be completed. We do not find he says that that was the sum which ought at the date of Dec. 1866, being six months after the date of the passing of the Act, to have been paid; but what we find is, that the different amounts which he mentions are all to be paid on a given day. He puts that statement in his award, which is dated, as I say, in March 1868. Now suppose, first of all, that the case arose at law. How is it possible that interest could be claimed under that agreement, completed as it was by that award? It is said that it could be done in this way. This is an agreement for payment on a given day of a certain sum, which is not ascertained at present, or that sum, having been ascertained, is now to be put in the agreement. How, then, could an action be framed for interest in respect of non-payment of that sum when the interest not being stipulated for expressly—and there being no contract about it in the agreement itself—it would have to be recovered in the nature of damages for breach of the agreement, and the breach of the agreement would be the non-payment on the given day of that sum? The answer would be quite plain—that there was no sum ascertained, and no interest could be paid on a given day because no amount had been fixed, and therefore there was no breach at the time when it is alleged that there was a breach of the agreement. There was nothing which these defendants could by any possibility have been called upon to pay; therefore, it seems to me that it would have been hopeless to have attempted to recover that money at law.

Then, is there any equitable ground on which the money could have been recovered? This court has a very fixed rule with reference to persons who are in possession of rents and profits—that they shall not retain both the rents and profits and interest. Therefore if we found that the company were in possession of the land, of course a very different question might have arisen; and feeling the difficulty of that point, it has been attempted to show that, in truth, possession was taken. It is put in this way, that by the fifth article Mr.

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Catling is prohibited from building and therefore he is put out of possession. It is said that he is put out of all useful possession, and therefore it is to be argued that the company were in possession. The last argument which has been addressed to us was, that if Mr. Catling had been allowed to enter into possession he would have been able to raise the houses and to have acquired the improved rent, and therefore would have been in a position to say, now I am to be compensated at once for the difference between the improved rent and the head rent; because the thing is done, you are to make no deduction at all for the time when the thing was supposed to be done because the thing is already done. I confess that is an argnment I was trying to follow; but I cannot follow the argument because that price has nothing to do with the question whether he could or could not build. The price has to be settled upon such terms as the arbitrator will assume, and he will assume it just as well whether he does or does not erect the houses; and the arbitrator will allow twenty-five years' purchase of the improved rent as the difference between the head rent and the increased rent. He will allow twenty-five years' purchase, but he will say, it would take you, the builder, a year or two before you could arrive at a claim in respect of that improved rent, and therefore, if that is so, a deduction is to be made.

Then it is said, if that be the case, he ought not to have made any deduction in his award, inasmuch as that award was not made until 1868, and therefore, when the year 1868 had arrived, if Mr Catling had been in possession, and had been allowed to build, he would have said: the thing is done, and no deduction is to be made, for I will show you that I am entitled to the twenty-five years' purchase at once, inasmuch as the buildings are there, and you can see them. The existence or non-existence of the buildings has no effect upon the argument at all. The argument would be just as good if Mr Catling had been in a position in which he could say to the arbitrator, "Now you are making your award at this time, and if you specify this sum as a sum to be paid to me, and then speak of the deduction that ought to be made because the houses are not erected, you will remember that now two or three years have passed since the date of the agreement, I could have erected all the houses in this time, and I have a right to take the value of the twenty-five years at once." Then the argument is shifted into a different position, and it is said, "No, the arbitrator must be supposed to have done his duty, and it is his duty to value the houses as if the purchase was all going to be completed on that day long since passed; and, it being his duty to value those houses at that day long since passed, and having made the deduction, you must assume that is the thing which is represented in the money which he finds ought to be paid." He has found that 13,000*l.* odd ought to be paid, and we must assume that he took that 13,000*l.* as being the value on the 28th Dec. 1866, when the agreement was to be completed, *minus* the time which it would have taken to build the houses. The answer to that is, that there is nothing on the award to show that he has done anything of the kind, and I cannot see that it was his duty to do so. I cannot see that it was his duty to make the award in any other way than he has done. Certainly the company have had no profit from the land, and have not been in possession. Therefore those principles upon which the court acts, viz., saying that when the parties are in possession of rents and profits they are not to be allowed to claim the payment of interest taking the rents and profits on the one hand, and making no allowance for interest on the other hand, are not called in aid here. Then, if in an agreement for sale it is provided that the sale shall be completed on a given day, is it to be held in this court, from that circumstance alone (as is stated in the passage which has been cited from Lord St. Leonards' book, and relied upon by the plaintiff), that interest should become payable? This court has considered all the circumstances of the case, and has considered whether there has been any default whatever upon the part of the person who is called upon to pay interest, or whether in truth it is inequitable under all the circumstances of the case to direct that interest to be paid; and if there has been any default on the part of the vendor, or if, in absence of any default on either side, unavoidable circumstances have occasioned the non-completion of the contract, so that it would be impossible for the defendant to make that tender of the money which he would have made if he had known what money to tender, it is impossible to say that this court, any more than a court of law, could hold that the defendant was in default in not making that payment which he could not possibly tender, because no one knew the amount that ought to be tendered. I find, therefore, no possible ground on which that interest ought to be paid.

Then comes the last point, which is the payment of the head rent of 100*l.*, the rent during that interval between Dec. 1866 and March 1868, when the award was made. If one is right in the other conclusions, although it seems to be a hard case, I do not see how we can give the plaintiff that rent which is so claimed. The grounds I have proceeded upon hitherto are, that the defendants are in no default in what they did, and that they could not have made the tender, and that they were not in possession, and therefore, during the time they were so out of possession, and under the impossibility of completing the arrangement, because the terms had not been fixed, we must consider each party as remaining, from no fault either on one side or the other, in the position of persons who have not completed the contract, because the agency which they had employed to ascertain the price was an agency which could not ascertain the price within the time which was allowed, and, therefore, each party remaining in his own position during that intermediate time, I see no reason why those persons are to be treated as having made themselves liable to that head rent.

Under those circumstances, it appears to the learned Lord Justice and myself that we are obliged to differ with regret from the conclusions which the Vice-Chancellor has come to, and that all that can be done is to make the common form of decree for specific performance. We put to Mr Cotton the question whether or not the defendants would ask for the costs of the suit, and he, I think, very properly and very reasonably, on the part of the company, has shown forbearance in that respect, for they do not desire to be asked for costs to be paid to them of the contest to compel them to do that which they would have done without suit, and which it is said they offered to do before. They will now make the payment of the money, and the proper contract will be completed without any difficulty.

Lord Justice GIFFARD said.—There are three questions in this case, all of which appear to me, I must confess, to be perfectly clear. The first is as to the costs of the arbitration; the second is as to the interest; and the third is as to the ground-rent which was paid by the vendor antecedently to the date of the award.

Now, with respect to the costs of the arbitration, it is quite impossible that the fact that the arbitrator made a declaration supposing that this was an agreement under the Act, can in any way affect the rights of the parties. The question is, whether the contract either imports into it in terms the Lands

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Clauses Consolidation Act, or whether it was a contract within the meaning of that Act of Parliament. There is not a syllable in the contract which imports into it the effect of the Lands Clauses Consolidation Act. Then, was it a contract within the meaning of that Act of Parliament? The answer to that is this: first of all, that it does not comply with any one of the requisites pointed out in that Act; but secondly, what is quite conclusive is, that it was not a contract with a company which, in respect of these lands at the time of the contract, had any compulsory powers whatever.

Then, as regards interest, it is to be observed, first of all, that the land was producing nothing; and next, that there was neither possession on the part of the company, nor, in fact, right of possession, until after the award was made. And that being so, we have to look simply at what is the legal effect of the contract, and the legal effect of it only. No equitable principle can intervene whatever. The contract was this. True it is it was a contract to pay on a particular day; but then, in order to recover interest at law, you must prove a breach of the contract to pay on that particular day; and it is impossible to make out a breach, when the fact was that what you were to pay was a sum which was to be fixed by the award, and that award was not made until long subsequently to the day on which it was contracted that the payment should be made. There was no breach, and consequently there could be no interest payable, except from the date of the award.

Then, as regards the ground rent, that I think is equally plain. The truth is that the position of vendor and purchaser did not exist until after the amount of purchase-money was fixed. If it had so happened that the amount of the purchase-money had never been fixed, there never would have been the relative position of vendor and purchaser. The fixing of the price was an essential condition to making the plaintiff, on the one hand, the vendor, and to constituting the company, on the other hand, the purchaser; and, that being so, it necessarily follows that the vendor, up to the date when in point of fact the contract between him and the purchaser was a completed and perfect contract, was bound to pay all outgoings, unless he had taken care to put into his contract a distinct stipulation to the contrary, and in this contract there is no such stipulation whatever to the contrary.

Common decree for specific performance, without costs, and payment of the sum awarded, with interest from the date of the award. The deposit to be returned.

Solicitors for the company appealing, *Johnson, Farquhar*, and *Leech*.

Solicitors for the plaintiff, respondent, *Terrell* and *Chamberlain*.

Thursday, Nov. 4, 1869.

(Before the LORD CHANCELLOR (Hatherley) and Lord Justice GIFFARD).

LAING *v.* REED.

Benefit society—Rules—Power of borrowing—Certificate of barrister—Bill to restrain borrowing—Demurrer—6 & 7 Will. 4, c. 32.

The trustees of a benefit building society were by its rules adopted at a meeting, and certified by the barrister appointed for that purpose, empowered to borrow money, which was, however, not to exceed two-thirds of the amount for the time being secured by the mortgages to the society; and they were to be indemnified by the society in the event of their giving their own personal security for such loans. Upon a bill charging that this rule was illegal, and praying an injunction:

Held (reversing the decision of Malins V.C.) that the rule sanctioning such borrowing was not contrary to the 6 & 7 Will. 4, c. 32, and a demurrer to the bill was allowed.

The certificate of the barrister in such a case is not conclusive upon the court, nor would it be in any case where it approved and certified a rule which was either contrary to the general law, or repugnant to the express provisions of the Act of Parliament.

This was an appeal by the defendants against an order of Malins V.C., overruling their demurrer to the plaintiff's bill. The hearing before his Honour is reported in 21 L. T. Rep. N. S. 83, and at that place all necessary statements will be found.

Sir Roundell Palmer, Q. C., *Osborne*, Q. C, and *Chitty* supported the appeal, and referred to
Mullock v. *Jenkins*, 14 Beav. 628;
Armitage v. *Walker*, 2 K. & John 211;
Dewhirst v. *Clarkson*, 3 Ell. & Bl. 206;
Parker v. *Butcher*, L. Rep. 3 Eq. 762;
Kelsall v. *Tayler*, 11 Exch. 513;
6 & 7 Will. 4, c. 32, s. 4;
4 & 5 Will. 4, c. 40, s. 4.

Glasse, Q. C. and *Graham Hastings*, for the plaintiff, cited
Pare v. *Clegg*, 29 Beav. 589; 4 L. T. Rep. N. S. 669;
Grimes v. *Harrison*, 26 Beav. 435;
Reg. v. *Davis*, 13 L. T. Rep. N. S. 629; Weekly Notes, Q. B., Jan. 1866, p. 24;
Re The Kent Benefit Building Society, 1 Dr. & Sm. 417; 4 L. T. Rep. N. S. 610.

Without calling for a reply,

The LORD CHANCELLOR said: We think that the demurrer in this case ought to have been allowed, and we feel it a matter of satisfaction that the learned judge before whom the case originally came has not, in fact, pronounced any decided opinion upon the point which we are about to determine, viz., whether or not the rule in question, and of course the procedure under that rule, be in conformity with the Act of Parliament by which this society is constituted. The learned judge has rather reserved his opinion upon that point, expressing an intimation that, in his judgment, there was considerable doubt as to whether or not it was in excess of the powers conferred by the Act of Parliament; and, that doubt existing, he preferred the course of allowing the suit to proceed, so that an answer might be put in, and that he might be more acquainted with all the facts of the case. But this is a bill which has been filed for the express purpose of obtaining the judgment of the court on the point of law. It appears fairly and properly to have stated all the facts, to have exaggerated nothing, to have simply represented the exact state of the case as it stands, with a view to the decision of the court upon the subject.

What the bill complains of is this. It says, "You, being a building society, bound, of course, by the terms of the Act of Parliament which constitutes such societies, have made a rule that moneys may be borrowed during the continuance of the society by the trustees who undertake its management, and that those moneys may be dealt with as part of the funds of the society," that is, of course, that they may be applied in making advances to those who are desirous of obtaining advances, they giving security upon the buildings which they purchase with such advances. But there is a limit put upon that power, namely, this: you are never at any time to advance more than two-thirds of what is outstanding and actually secured upon the mortgages which have been

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entered into by the members of the society. Now, it is said "that power of borrowing is a power inconsistent with the scope and purview of the Act of Parliament; it is contrary, not to the express language of the Act, but to the inferences which are to be drawn from it, and, that being so, we further inform the court that that power has been acted upon to the extent of 66,000*l.*" That is a very large sum, no doubt, and it is said that there is an annual charge of 3000*l.* a year interest in respect of that sum. But the bill does not state that the moneys so borrowed exceed the limit laid down by the rule.

There is a further charge in the bill, which avers that the moneys have been lent improperly. It is said that the trustees are not authorised to make any such loans. After complaining of that, the bill says that the loans have, in the belief of the plaintiff, been repaid, so that there is nothing more to be said with reference to those loans, unless there should be found a threat to repeat a course which is complained of as illegal. That threat is not averred. It is averred that they intend to proceed under rule 18, and not in the method which is the second branch of the complaint; therefore, I think that that branch of the complaint is properly struck out of the bill. It is not that upon which the bill can be founded as the averments are here made, and all that we have to consider is simply whether or not the 18th rule can be maintained by which this benefit society is enabled to the extent of two-thirds, and no more, of the mortgages which have been given by the members of the society for securing the money as those mortgages may stand at the time of the loans being requested, to borrow from bankers or others a sum of money which is to form part of the funds of the society. I ought to mention also that the bill expressly avers that the moneys so borrowed have been applied to the purposes of the society. It is not averred that there has been any excess in the exercise of the power conferred, if the power is legitimate. That point, of course, is extremely simple. The whole question turns upon whether or not we can find in the Act of Parliament—express words there are not—any provision or any enactment with reference to the object and purview of the society, and of the mode in which they shall conduct their business, such as to render any agreement of the character I have described illegal and improper, as being inconsistent with the provisions of the Act.

The purview of the Act is stated to be this—that any number of persons may form themselves into societies for raising, by monthly or other subscriptions of members, shares not exceeding in value 100*l.* each share, and the subscriptions are not to exceed in the whole 20*s.* per month on each share. They are to raise by those means a stock or fund for the purpose of enabling each member to receive out of the funds of the society the amount or value of his or her share or shares therein, to erect or purchase one or more dwelling house or dwelling houses, &c., or household estate, to be secured by way of mortgage until the amount of the value of his or her estate shall be repaid, and until all fines shall have been paid. Then they have power to constitute rules and regulations for their government, provided they are not repugnant to the express provisions of the Act and the general laws of the realm. They are empowered also to impose fines, penalties, and forfeitures. Then these rules are to be certified in the manner provided with reference to friendly societies, and for that particular purpose we may refer to what has to be done in the case before us. The rule contained in 4 & 5 Will. 4, c. 40 enables the barrister to certify the rules, and he is to certify whether or not they are contrary to the law, and his certificate is to be conclusive and binding.

With regard to the argument in this case, two points have been raised by those who contest the decision of the Vice-Chancellor; the one is, that the rule itself is not *ultra vires*, regard being had to the Act; and the other is, that if there be a doubt upon that subject (as I understand the argument, it can hardly be put higher), the certificate of the barrister, who is competent to determine the legal question, should be adopted by us as conclusive. We cannot adopt any possible view of the certificate of the barrister in the particular case before us which would render it conclusive. It could not be contended, and it hardly was contended, that, if the matter was plainly *ultra vires*, any certificate of the barrister could prevent the court from interfering so as to prevent an abuse of power on the part of persons who have certain privileges conferred upon them by Parliament. If there was such an abuse of power, the certificate of the barrister would have no effect whatever. The words which render him competent to decide upon the legality of the instrument submitted to him clearly must be confined to such grounds as are too narrow to allow the application of his judgment to such a case as that before us. They are confined probably to regulations affecting the interests of the members *inter se.* He has to decide whether there is anything contrary to the law, regard being had to the true construction of the Act of Parliament, in the members themselves entering into engagements which might seem to be such as the majority were not entitled to bind the minority by. Some minor particulars of that description possibly might come before him for his judgment. But it is not necessary to enter more into that part of the case than to say that it could not possibly apply to such a case as we have before us. For if the law prohibited the raising of these sums of money, I apprehend no certificate of the barrister could avail. Now, does the Act of Parliament, in anything that we have read, in fact contravene or forbid any such arrangement as is here made? If the rule had been a rule by which the company were authorised through the medium of its trustees to raise an unlimited sum of money wholly regardless of all these contributions which might be made by its members, that, no doubt, would be contrary to the intent and scope of the Act. The Act states that the members amongst themselves, by their contributions, by their fines, and by any other payments that they may make in furtherance of the objects to be attained under the Act of Parliament, shall form a fund out of which moneys shall be raised. They are raised, first, by weekly contributions of the members; secondly, by fines; and thirdly, by the payments of those who are desirous of acquiring land. If there is only a small amount of money in hand, and there are several persons desirous of having an advance, they may be disposed to pay a high rate of interest, or pay something down in the shape of bonus, and that of course would fall into and form part of the society's funds.

Then comes the question (the society having these funds), are they or are they not to be allowed to manage those funds in such a way as they may think best and most conducive to their own interests? The funds of the society are simply the aggregation of all the payments by the members of the sums of money in respect of their shares, payments of fines, and any other payments that they may be advised to make for the objects of the society, namely, to obtain advances for the purchase of land. Take first the question of investing, instead of borrowing. There is nothing in the Act of Parliament expressly relating to investing, but it is clear that they may invest, because there is a prohibition against investing in a particular mode, namely, in the savings banks. That is just one of the things, I apprehe-

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that are left to them to frame rules about, and the barrister is to certify as to whether the rules that they may make with regard to investment are reasonable and proper. Then if they have power to invest their money, there may be several members desirous of purchasing land, and it might be inconvenient for the society at the moment to dispose of those investments. Their investments might be in the funds, and the funds might be very low; it might be inexpedient to sell out at that time, and the natural course would be to procure the money elsewhere. In the case I have put, the necessity for finding funds would arise at the time when several people were desirous of procuring an advance, and when probably a high rate of interest would be paid. They are at liberty to borrow at 5 per cent., whereas by their own Act of Parliament there is no limit with respect to the usury laws, and they may take any amount of interest—6 or 7 or 8 per cent., from those who may be desirous of procuring an advance to attain the object which the Act contemplates—viz., the purchase of land or the erection of a building, or otherwise as they may be disposed. It is a simple regulation by which they say "We are desirous of making available, in the best possible manner for us all, our contributions of 20*s*. a share, the fines and other payments for the objects of the Act;" and to say that it will injure one set or the other, when the company frames its own rules, is nothing to the purpose. They are the best judges of that. The whole body frames the rules, and each man judges for himself. They carry the rules by a majority, and submit them to the barrister. Each man considers for himself what is most advantageous in dealing with the funds with which they may be provided. The power of dealing with those funds may be regulated by investment on the one hand, and by borrowing on the other, provided always that the borrowing is only to be exercised to the extent originally contemplated in the formation of the company—viz., two-thirds of the amount that may be outstanding upon mortgage, which mortgage is granted under the provisions of the Act. They simply say, "This is a course of procedure in which we are following out the objects of the Act, a procedure by which land may be acquired, a procedure by which mortgages have been given, and to the extent of two-thirds of those mortgages we will avail ourselves of the opportunity of dealing with our own property which the Legislature intended to give us. We will ask nobody to advance a farthing more than the Legislature shall sanction, we will raise upon the security of two-thirds of what the Legislature has so sanctioned sums of money which may enable us, at convenient times, to advance, by means of cash advances procured from our bankers, or otherwise, the sum of money which is desired of us without having to dispose of our investments in a disadvantageous manner." It might, in truth, so happen, that an overdraught at the bankers might be the mode of doing it. There might be 300*l*. or 400*l*. wanted, and there might be only 200*l*. or 300*l* in hand (of course in such a society as this the figures would be larger), and the difference might be met by over-drawing the account at the bankers. Would anybody say that that would be an irregular course, provided always that the borrowing did not exceed the proper amount? It seems to me, therefore, that if the Vice-Chancellor had given his mind fully to the construction of the Act, which he expressly avoided doing, because he says he would rather have fuller information before coming to a conclusion strictly upon the Act of Parliament, he would in all probability have come to the same conclusion as ourselves, viz., that the rule complained of is not in itself in excess of the power; and therefore there is nothing in the bill before us which can raise any reasonable ground of relief against these defendants. Neither, as I conceive, was it intended that the case should go any further than the bill represents, for I think that the bill represents all the facts for the purpose of obtaining the decision of the court. Upon that point of law our decision is adverse to the plaintiff. The demurrer ought to be allowed, and the usual consequences follow. There will be no costs of appeal.

Lord Justice GIFFARD said.—I think this is a case which ought clearly to be decided on demurrer, and for this reason, that the whole case in the bill raises one simple question as to the effect of a particular rule. There is no allegation in the bill that the 66,000*l*. exceeds the amount which might be raised under the articles, nor is there an allegation that the amount has been raised otherwise than for the purposes of the society. I quite agree with the Vice-Chancellor that the certificate is not conclusive where the rule is either contrary to the general law, or repugnant to the express provisions of the Act, and I take it that the rule would have been repugnant to the express provisions of the Act if it had been a rule which had made the society a thing different from that which is specified in the Act, and meant by the Act; if, for instance, it had made the society an insurance society, or a discount society, or a bank, then I think it would have been repugnant to the Act, and the certificate would not be conclusive. But what we really have to inquire on the present occasion is this: first of all, is there any special provision in the Act forbidding this borrowing. The answer is, no, there is no such provision. Then, secondly, is or is not this provision a provision providing for a method of conducting business, or is it a provision for making the society a thing different from a benefit building society? In my opinion it is not a provision for making the society a thing different from a building society, but it is a rule laying down a mode of conducting the business of the society as the members may think fit. That being so, I think the demurrer should be allowed.

Solicitors for the defendants appealing, *Shum* and *Crossman*.

Solicitor for the plaintiff, *John Tucker*.

Dec. 20, 21, *and* 22, 1869, *and Jan.* 12, 1870.

(Before the LORD CHANCELLOR and Lord Justice GIFFARD.)

Re THE FAMILY ENDOWMENT, &c. SOCIETY.

Unregistered Company—Amalgamation before Companies Act 1862—*Jurisdiction—Winding-up—Contract—Novation of debt.*

The F. Society, formed in 1835, *agreed in* 1861 *to transfer its business and assets to the A. Company, which undertook all its liabilities. From that time the F. Society had no place of business, and no directors or secretary, except in so far as the private Act of Parliament regulating its affairs provided that the persons last memorialised as filling such offices, should, until the memorialising of their successors, continue liable to all proceedings as if they had not ceased to be such officers. In pursuance of the amalgamation, and in conformity with other provisions of the Act, the society was duly dissolved and discontinued business, and it was never registered under the Companies' Act* 1862:

Held (affirming the decision of James, V.C.), that, notwithstanding these circumstances, the society was within the purview of the Companies' Act 1862, *the very object of which was to provide an efficacious mode*

of winding-up the affairs of joint-stock companies; and, therefore, although the amalgamation had taken place before that Act, a winding-up order was made on the petition of an unsatisfied creditor.

An unregistered company is to be deemed to have been registered at its principal place of business.

Such a company comes within the purview of the Act of 1862, so long as anything remains to be done for the winding-up of its affairs, either as regards the members inter se, or as regards the creditors.

The petitioner bought of the society two annuities, and had paid to them before the amalgamation the whole of the purchase-money by the instalments agreed on. He became aware of the amalgamation, and received for several years payments of the annuities from the A. Company, to whom he gave receipts:

Held, that nothing short of a new contract between him and the A. Company would amount to an extinguishment of his rights against the F. Society; and, as no such new contract had ever been made, the petitioner was entitled to a winding-up order against the latter, when, by reason of the insolvency of the former, the payments of his annuities had ceased.

This was an appeal by certain shareholders of the Family Endowment Life Assurance and Annuity Society against an order of James, V.C., the hearing before whom is reported in 21 L. T. Rep. N. S. 485. There, and in the judgments which follow, all necessary facts are stated.

Sir *Roundell Palmer*, Q. C., *Higgins*, and *Bethell*, supported the appeal.

Fry, Q. C. and *Westlake* were for the petitioner; and

Kekewich for some of the latest directors of the Endowment Society, upon whom, by leave of the court, the petition had been served.

In addition to the authorities mentioned in the previous report, the following were referred to:

Benson v. *Hadfield*, 4 Hare, 32;
Thompson v. *Percival*, 5 B. & Ad. 925;
Evans v. *Coventry*, 5 De G. M. & G. 911.

Sir *Roundell Palmer*, Q. C. having replied,

Their Lordships reserved judgment until the 12th Jan., when

The LORD CHANCELLOR said: The petition of appeal in this case is presented by a contributory of the society against an order of James, V.C., made on the petition of General Pott, by which the Vice-Chancellor ordered the society to be wound-up, and gave certain directions as to costs. The appellant alleges that the order is erroneous on two grounds. First, that the society is not within the purview of the Companies' Act 1862; secondly, that if this be not so, yet General Pott is not entitled to apply for a winding-up order, on the ground that, although he was originally a creditor of the society, he has ceased to be so, and has accepted the Albert Life Assurance Company as his debtors in lieu of the society. The facts are as follows: The society was formed, pursuant to the provisions of a special Act of Parliament which received the Royal assent in May 1836, by which the society could sue and be sued in the name of any director, or of their chairman or secretary, and persons suing them were authorised to join any proprietor as a defendant. Judgments also obtained against a director, or the chairman or secretary, might be enforced by execution issued against any proprietor in manner therein provided. A memorial was to be enrolled in Chancery from time to time, containing the names of the officers and proprietors, and the persons whose names should have been last enrolled were to continue liable to actions and suits notwithstanding their having ceased to fill the office or position of director, chairman, secretary, or proprietor. A deed of settlement of the society was executed, dated Jan. 1837. The clauses of this deed which have a special bearing on the present controversy are the second, by which the proprietors *inter se* are to be liable only to the extent of their unpaid calls on shares; the third, which defines the objects of the society, one of which was to grant deferred annuities; the 38th, by which power is given to dissolve the society by a resolution of two successive meetings, to be passed as therein mentioned; the 75th, by which the directors are empowered to make and vary laws and regulations, but not so as to vary or limit the responsibility of the shareholders on their respective shares as between themselves; and the 122nd, which it is important to refer to more fully. [His Lordship here read the 122nd clause of the society's deed, the whole of which will be found at p. 486 of the earlier report.]

The society thus constituted entered into a contract with General Pott, dated 12th March 1849, by which, in consideration of monthly payments to be made by him for a term ending 22nd Jan. 1861, the society engaged to pay him an annuity of 1000 rupees, commencing on the 26th Aug., 1861, or the 26th Feb., 1862, according as he should then be in India or in England, with a proviso that the capital or other the stocks, funds, and securities of the company remaining (at the time of any claim or demand made) unapplied and undisposed of, in pursuance of the provisions of the deed of settlement, should alone be liable to make good the demand. On the 11th June, 1850, a similar contract was entered into between the society and the General, whereby, in consideration of payments to be made by him ceasing before the commencement of the annuity, another annuity of 1000 rupees was granted, commencing on the 1st Dec. 1857, or the 1st June 1858, and charged in like manner alone upon the capital and assets of the society. Early in 1861 arrangements seem to have been contemplated for closing the business of the society, and transferring its assets and liabilities to another company, then called the Albert and Medical Life Assurance Company, and articles of agreement were executed on the 5th Feb. 1861, by the directors of the society on the one part and the directors of the Albert Company on the other, whereby, subject to the approval of extraordinary general meetings of the proprietors of the society, it was agreed for the consideration therein mentioned, that, as from the 1st Jan. 1861, the business of the society should be deemed to have been transferred to and vested in the company. All the property, credits, securities, and effects of the society were, as from the same date, to become the property of the company, and to be transferred to them, and all the debts, engagements, and liabilities of the society, and all claims against them, were to be wholly paid and performed by the company, who were at all times to indemnify the society, its officers and shareholders, in respect thereof. The two parties further agreed to use their best endeavours to procure policy-holders of the society to exchange their policies for those of the company. The books of the society were to be handed over to the company, and the company were authorised to use the names of the directors of the society when necessary. The proprietors of the society held meetings in March 1861, pursuant to their deed, at which they agreed to dissolve their society, and to hand over their assets to the Albert Company for the consideration mentioned in the agreement of February, and upon the terms men-

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tioned in that agreement. The proprietors of the company seem in like manner to have acquiesced in the arrangement, and from the time of the agreement the Albert Company transacted at the offices of their company all the business formerly carried on by the society, and intermingled the business transferred to them with their own business, at the same time changing their title of Albert and Medical Life Assurance Company to that of the Albert Medical and Family Endowment Life Assurance Company. The Endowment Society appears from the period of dissolution in 1861 not to have entered into any new business, nor to have retained any active staff, and the only memorial containing the names of directors, enrolled pursuant to their special Act, seems to have been enrolled on the 17th Aug. 1836. The place where the society carried on its business up to the dissolution is stated in the petition of General Pott to have been pulled down, and they seem to have had no place of business after the beginning of 1861.

This is the proper place at which to pause with reference to the first question, as to whether or not the society is within the purview of the Companies Act 1862. It is contended that the 8th part of the Act of 1862 is inapplicable to any company in such a position as that in which the Endowment Society was placed at the passing of the Act; and that the society had been dissolved in March 1861, more than one year before the passing of the Act; that it had ceased to carry on business, and that by the agreement with the Albert Company, which it is said that the directors of the Endowment Society were fully authorised to enter into, the society had parted with its assets, that the shareholders of the society had been paid all that they would be entitled to under the agreement, and that the payment of the creditors had also been provided for by the agreement. In support of this view it was further argued that the very terms of the 199th section of the Act point to companies still carrying on business, by defining the jurisdiction of the court with reference to the position of the place of business of the company within the United Kingdom, whereas the society had, at the passing of the Act, no place of business whatever. I think that these arguments cannot prevail. The society was originally a society or company of more than seven members, carrying on business in the United Kingdom at a definite place of business, and was not a registered company under the Act of 1862. Let us suppose that it had been properly dissolved a week or two before the passing of that Act of Parliament, but had still to wind-up its affairs in the usual manner. The obligations of such a company would necessarily from their very nature require time for their complete fulfilment. The object of the Act of 1862 was to give to joint-stock companies and to those dealing with them an efficacious mode of winding-up their affairs, and dissolution is the very condition of a company which is first set forth in section 199, as properly calling for the intervention of the court. The contract of partnership is no doubt put an end to as regards the future by dissolution, but the rights of the parties *inter se*, and the rights of third parties as against them, have after dissolution yet to be adjusted, and for that purpose all the provisions of the original contract must be applied. All well drawn deeds of settlement make provision for that purpose, and the present deed of the Endowment Society is not an exception. The 122nd section of that deed properly directs that all the powers of the directors shall continue for the complete winding-up of the concern. The creditors of the concern, in the case which I have put of dissolution immediately before the Act, could have proceeded against the society in bankruptcy, or could by action against the officers obtain judgment, to be enforced under the special Act of 1836, as regards the proprietors, to the extent of the unpaid calls. The shareholders would, but for the Act of 1862, have been compelled in case of dispute to seek relief in Chancery for the adjustment of their rights. Can it be said that this state of things was not one for which the statute of 1862 intended to provide a more adequate remedy without creating a new right? I think not. Ought the circumstance, then, of the assignment of the assets, and of the place of business, to the Albert Company, and the assumption by that company of the liabilities of the society, to make any difference in the construction of the Act as to its applicability to the society? The creditors are not parties to the agreement between the society and the company, and in the consideration of the question of the applicability of the Act I ought to assume that they have not acquiesced in the provisions of that agreement. The Act was intended, as I hold, if this agreement had not existed, for the benefit of such creditors, and a transaction behind their backs cannot deprive them of that benefit. With reference to the directions contained in the 199th section as to the jurisdiction of the court, which is to be ascertained by "the principal place of business of the company in the United Kingdom," it is obvious that in the case of companies which cease after the passing of the Act to carry on business (mentioned in the sub-section of sect. 199) the place where it was, before such cessor, carried on must be intended, and the same construction would be proper, therefore, in the case of a business which had ceased before the Act, but which had at that time not been wound-up. I cannot doubt, therefore, that the society in question was within the purview of the Act so long as there remained anything to be done with reference to winding-up its affairs, either as regards the parties *inter se*, or as regards the creditors of the society. Of course, if all the rights of the proprietors and creditors had been ascertained satisfactorily, the Act would have had no room for application in the case of such a company. But that is not the case here.

The second question on this appeal is whether Gen. Pott is in effect to be deemed to be a creditor of the Endowment Society. That he was originally such a creditor under the two contracts of 1849 and 1850 is not disputed, but it is said that he must be taken to have accepted the Albert Company as his debtors in substitution for the society, who, to the extent of their assets, including calls payable under their deed of settlement, were his original debtors. He admits in his evidence that he was aware of the society having made an arrangement with the Albert, by which, as he expresses it, he thought "they and the Albert were one;" and I think that is the strongest expression that is made use of by way of admission in his evidence. He does not recollect receiving the circular which is said, but not proved, to have been sent round to all the policy-holders; but I do not think it would have made any material difference if he had done so, for reasons not necessary to enter into more fully. He admits attending at the office of the Albert Company for payment of his annuity from Aug. 1862 down to June 1869, shortly before the stoppage of the Albert, and certain receipts and certificates are put in evidence which are of importance on this part of the case. The Albert Company in making payments to the grantees of annuities required a certificate of the grantee's existence and identity, and the certificates were in this or a similar form: "I hereby certify that Col. S. Pott, described in an annuity grant of the Albert Medical and Family Endowment Life Assurance Company as of Meltrose, and whose signature is affixed below, is now living at" (such and such a place). This is signed in each case by the General. The directions accompanying this certificate are as

follows: "The annuity cannot be paid unless the following rules are strictly observed: 1. A certificate in the above form must be obtained from the officiating minister of the parish, a justice of the peace, or one of the company's agents, on the day or some day after the annuity becomes due; 2. All the blank spaces as in the above form must be filled up accurately, and the certificate must be free from any erasure or alteration, or otherwise it will not be accepted as sufficient authority for paying the annuity; 3. The annuity will be paid at the office on presentation of the certificate and receipt by some respectable party or through a banker." I read that to show that these forms, which were insisted on by the company, and which the General submitted to comply with, were the rules in the shape in which they are here put, but at the same time we must look at what the certificate itself purports to be. It is a certificate with respect to a person who is named in a certain instrument, and that certain instrument is the original istrument granted by the Family Endowment Society, and no other. The first receipt of Aug. 1862 runs thus: "Received of the Albert Medical and Family Endowment Company the sum of 500 rupees, being the amount of half-yearly payment of an annuity No. 2, due to me on the 26th Aug. 1862." In the certificate of Aug. 1864, the General is mentioned "as described in a grant of the Albert Life Assurance Company," and some, but not all, the subsequent receipts mention the money to be received of "The Albert Life Assurance Company," changing the name; omitting the word "Endowment." Now, the question is whether, under all these circumstances, the General accepted the total change of contract necessary to substitute the company for the society as his debtors. The question is one of fact, and, on that account, although I have carefully read the cases which were referred to in argument, it seems to me unnecessary to make more allusion to them—it being a case which must be determined upon the special facts which are before the court. It was justly, I think, observed by the learned Vice-Chancellor in his judgment, as it had previously been observed by other judges, that very slight evidence is sufficient in the course of dealing between a customer and a firm, subject to change by the retirement of old partners and the introduction of new, to show that the customer continuing his dealings accepts the new firm as his debtors in lieu of the old firm, though even then it is necessary that knowledge of the change in the firm should be brought home to the creditor. The cases which have occurred on the subject are usually cases of business of an ordinary character, where a new partner simply unites with others in carrying on a business in a settled course as it went on before, and either invoices or pass-books, as the case may be, passing between the customer and the continuing firm afford the usual evidence of the change of firm. But that which has here to be proved is that a creditor having an instrument upon which he can rely as creating a right of suit against all the assets of the society with which he deals, including all the unpaid calls for which the proprietors are liable, has abandoned that definite claim for a claim upon the assets of another company with which he has no direct contract, including the liability (if any) of the shareholders in that other company for calls. The general has never been asked to enter into any fresh contract, by which such substitution might have been effected beyond all doubt. He has paid nothing to the new company, for all the payments on his part had been made before the arrangement between the company and the society. He has given receipts for payments of his annuity, which are expressed in the first receipt to be for payments ie by the Albert Medical and Family Endowment Society on annuity No. 2, and in the first and following certificates signed by him he is referred to as described "in an annuity grant of the Albert Medical and Family Endowment Life Assurance Company." He must, therefore, be taken as founding his claim on this grant, and to have given his receipt in respect of it. No other grant can be produced than that made originally by the society. Why should he be led to suppose in thus acting that the new company from whom he received the money had treated this grant as one binding on all their own proper shareholders, and that they were not acting as agents for the society, the original grantors, making the payments out of the assets of the original concern, which, in truth, by the terms of that grant, formed the proper fund for that purpose? There would be nothing necessarily inconsistent with the union of the society and the company (the fact of which union the General admits he knew) that the company should keep the assets of the society distinct from their own, and should, as agents of the society, make out of such assets all the payments to which they were liable, and which might otherwise be provided for with regard to creditors, whatever the arrangement migl t be as to the balance, with which, of course, the creditors would have nothing to do. The General could not have sued the Albert shareholders, as he might, under the special Act, have sued and obtained judgment against the shareholders of the society to the extent of their calls, and he cannot be affected by the provisions of the deed between the companies to which he was no party, and of which provisions no knowledge can be imputed to him. It was said he might have obtained an injunction to prevent a transfer of the assets. But why should he do so, if he was satisfied with the liability of the proprietors for their calls? The union of two companies, formed originally under separate deeds, by which the proprietors respectively stipulate for a limited liability—viz, a liability to the extent of the assets and the calls due from themselves—is a very different thing from the admission of a new partner into an old-established firm, with all the usual consequences of such an admission; and the abandonment by a creditor of a written definite contract with one company for an unwritten engagement by the new company, to be arrived at through the medium of very special arrangements between the two companies, is a matter requiring far more cogent and precise proof than that of the assumption by a continuing customer of the liability of the firm with which he continues his dealing, in lieu of that of its predecessor. Here the Albert Company, who, by the stipulations of its agreement, might have made provision for substituting a new contract, continued to make payments and to take receipts on the footing of the original contract. It would much shake public confidence in dealing with insurance companies, and therefore be greatly to the detriment of such companies, no less than to that of their customers, if the court were to hold that a person having the security of the assets of one company should be deemed to have discharged those assets, and to have accepted the liability of another company, merely because the second company, possessing the assets of the first, pays to the creditor his growing annuity on the footing of his grant. Something more is required, as it seems to me, to bring home to the annuitant a knowledge that by such payment, which might well be made out of the transferred assets, the new company intends to enter into a new contract with him for payment of his annuity out of a totally different fund. I have assumed that all the proceedings between the society and the company were warranted by their respective deeds, and there is no necessity for me to raise any doubt upon that

subject, for my decision is independent of that question; but one cannot help observing the great difference that exists between an ordinary succession in a partnership and a transaction of this nature. In order to prove the acquiescence of a creditor to the change of his debtor, he must be assumed to have satisfied himself that the substitution could legitimately be made—an assumption which is in the highest degree improbable. On the other hand, nothing could be more easy than for the new company, if it so intended, to have obtained a clear recognition of their contract by the General, or his equally clear rejection of it. I am of opinion, therefore, that the judgment of the Vice-Chancellor is correct, and that the appeal must be dismissed with costs to be paid by the appellants to General Pott.

Lord Justice GIFFARD said:—Two questions were argued and have to be decided in this case; one, whether the Family Endowment Society is within the operation of the Winding-up Act of 1862; the other, whether General Pott has continued or ceased to be a creditor of the society. It was argued that the Family Endowment Society was not within the operation of the Act of 1862, because it was an unregistered company; because it could not have been wound-up under any Act which existed previously to its dissolution, though liable to be made bankrupt—not a practical or effective remedy—and because it ceased to carry on business or have any place of business, and was dissolved and amalgamated, as it is termed, with the Albert Company, before Nov. 1862. In answer to the facts so alleged in argument it was said, and truly said, that a creditor of the society could and can sue under the society's private Act of Parliament, which gives remedies against its directors and shareholders, and that, amongst other Acts repealed by the Act of 1862, is that under which the society might have been made bankrupt, and observations were made on the Winding-up Act. The 205th and 207th sections of the Winding-up Act of 1862 are the repealing sections. The 2nd section of the Act enacts that the Act is not to come into operation until the 2nd Nov. 1862. The Act reciting that it is expedient that the laws relative to the incorporation, regulation, and winding-up of trading companies, and other associations, should be consolidated and amended, was passed on that foot ing and for that purpose, and the 199th section is as follows:—"Subject, as hereunder mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under this Act, and hereinafter included under the term 'unregistered company,' may be wound-up under this Act, and all the provisions of this Act with respect to winding-up shall apply to such company, with the following exceptions and additions:—An unregistered company shall, for the purposes of determining the court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate, or, if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business." Then, the circumstances under which an unregistered company may be wound-up are as follows—that is to say, whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs; whenever the company is unable to pay its debts; whenever the company is of opinion that it is just and equitable that the company should be wound-up. It is to be observed that the Act is a remedial Act; that it gives new remedies in respect of old existing rights, and that, as regards creditors generally, it takes away some of their remedies and gives them others and more effective ones. If, therefore, there be a society or association not registered under the Act consisting of more than seven members, and the petitioner is a creditor for more than 50*l.*, and the company, in the terms of the Act, "is dissolved, or has ceased to carry on business," there seems no reason why the creditor should not have his remedy under this Act, unless by its terms he is plainly excluded. That there is such a society or association in existence I can have no doubt; for whatever resolutions the shareholders may have passed *inter se* with reference to a dissolution, they have and had no power to extinguish, and could not and cannot extinguish, the society or association, or their liabilities as shareholders, as against any unsatisfied creditor. A society or association which is in a sense dissolved is expressly liable under the section. The only argument on the actual terms of the 199th section really was on the use of the present tense, and particularly the word "is." One finds a frequent repetition of this word—not, however, for the purpose of fixing any particular time at which the business must be or has been carried on, but for the purpose of fixing the domicile of the company, and I feel no difficulty in holding the meaning of the first part of the section to be, that an unregistered company shall be deemed to have been registered at its principal place or places of business. Where the dissolution of a company is referred to, "is" plainly means "has been," and I am further of opinion that the Albert Office might well, under the circumstances, be deemed to be the office of the society. There are, therefore, no grounds for holding that the Family Endowment Society is not within the operation of the Companies Act 1862.

The next question may be disposed of as readily as the first. General Pott paid the Endowment Society, before its dissolution or amalgamation, certain sums of money, in respect of, and in consideration for, which two annuities were granted to him. He neither paid any sum of money to, nor received any grant from, the Albert Company, nor was there any written contract of any kind between him and that company, or any communication from the company to him, or from him to the company, of any contract between him and them. The contracts between General Pott and the Endowment Society are contained in two written documents, each signed by three directors of the society, and each in the particulars material to this case substantially to the same effect.

The heading is as follows: "Empowered by Special Act of Parliament. The Family Endowment Life Assurance and Annuity Society. Indian branch," and then the amount of the annuity is stated. There is then a recital that "Stephen Pott hath proposed to contract with the Family Endowment Society for the purchase of an annuity of company's rupees 1,000, to commence at such time, to continue payable during such period, and to be paid in such manner as hereinafter stated; and hath delivered into the office of the said society a statement in writing dated the 26th Feb. 1849, containing the terms, and stating the facts and circumstances upon, and in reference to, which the said contract is proposed to be effected, and which statement he thereby agreed should be the basis of the contract with the said society;" and then it is witnessed that it is thereby declared on behalf of the said society by the three directors whose names are thereunto subscribed, that, in consideration of the sum paid, certain annual payments should be made at the times therein mentioned. Then there is a proviso that "in case any untrue or fraudulent allegation should be contained in the said statement so delivered into the office of the said society as

aforesaid, then the contract should be void, and all moneys paid thereunder should be forfeited to the said society." There was a further proviso that the contract and the annuity thereby assured should be subject to the considerations thereupon indorsed, and a further proviso that the subscribed capital of 500,000*l.*, and other the stocks, funds, securities, and property of the said society, remaining at the time of any claim or demand made, unapplied and undisposed of in pursuance of the provisions and authorities contained in the said deed or deeds of settlement, should alone be liable to answer and make good all claims and demands upon the said society, and that no director or other proprietor of the said society, his heirs, executors, or administrators should, by reason of any contract, or of the whole of the contracts taken together, which any director had signed, or might sign, be in anywise individually subject or liable to any such claims or demands beyond the amount of the unpaid part of his share or shares in the said subscribed capital of 500,000*l.*; and it is provided, lastly, that the undersigned directors, or any of them, their heirs, executors, or administrators, should not demur for want of parties to any bill which might be filed against them in any court of equity respecting any claim upon that contract, nor take any formal or technical objection whereby a fair and just investigation of the merits of any question arising upon the validity of such claim might be prevented, or in any manner obstructed; and then the proviso is to be without prejudice to the limited responsibilities of the directors and proprietors of the society, established by the last proviso. It is needless to remark that this contract is of a special nature.

The dissolution of the Endowment Society and its amalgamation with the Albert Company took place early in 1861. General Pott was cross-examined. He admitted that he learnt of the dissolution of the Endowment Society from the newspapers; that he talked of the amalgamation with his friends; and that he applied to the Albert Society and received payment of his annuity from them, but not, he says, in pursuance of any written direction from the Albert.

The receipts given to the Albert are in evidence. The first of them is for the amount due on the 26th Aug. 1862, and they continue down to June 1869. They were accompanied with certificates. The receipts purport to be given to the Albert, or the directors of the Albert, in consideration of payment made by the Albert, or the directors of the Albert. One of the certificates is in the following form: "To the directors of the Albert Medical and Family Endowment Life Assurance Company.—I hereby certify that General S. Pott, described in an annuity grant of the Albert Medical and Family Endowment Life Assurance as of Melrose, and whose signature is affixed below, is now living at Melrose." One of the receipts is in this form: "Received of the directors of the Albert, &c., Company the sum of 50*l.*, being half year's annuity on the life of Stephen Pott, due on the 26th Feb. 1863, under the company's annuity policy grant No. 2." I take these as samples. They are receipts and certificates having reference to the subsisting grants; no new grant to, or contract with, General Pott is suggested. The terms of the arrangement between the Endowment Society and the Albert were not disclosed to General Pott; no assent to any new contract was asked for. The assets and share capital of the Endowment Society were made liable by the grants of annuities to General Pott, and could, as against General Pott, be dealt with only as being so liable. Nothing short of a new contract between him and the Albert in discharge of his rights against the Endowment Society could amount to an extinguishment of these rights. There was, it is true, direct contract as between the Endowment Society and the Albert, and the fifth term of the contract is this:—"All premiums and other sums of money after the 1st Jan. 1861, paid, or payable upon, or in respect of, policies of assurance, or upon, or in respect of endowments, grants, or engagements of the society, in force on that day, shall belong to, and be the property of the company, and all risks, engagements, and liabilities upon, or in respect of, all such policies, endowments, grants, or engagements, and also all charges and expenses connected therewith, shall be borne, and paid and satisfied by and out of the funds of the company." But General Pott was no party to this contract. And the sixth term is this:—"The society and the company shall respectively use their best endeavours to procure the several persons holding or entitled to policies, endowments, grants, deeds of covenant, or other engagements of the society, or of the said Empire Assurance Company, to accept in exchange or in renewal policies, endowments, grants, deeds of covenant, or engagements of the company; and the company will, at their own expense, on the application of the persons interested therein, respectively grant, execute, and deliver such substituted or renewed policies, endowments, grants, deeds of covenant or engagements to the several persons willing to accept the same." Either the society or the company might have taken action on this sixth term, but as regards General Pott neither of them did so. The actual contract between the society and the company might well have been very different to what it was. It was not incumbent on General Pott to make inquiries as to the terms of arrangement between the society and the company, nor can a knowledge of them be imputed to him. The arrangement might well have been, and in the absence of assents from General Pott to the contrary, ought to have been, that the assets and capital of the society should remain liable under the annuity grant. It was incumbent on those who desired that the old contracts should be superseded by a new one, to make proposals to that effect, or take steps for that purpose; but they forbore or neglected to do so. The whole question is one of fact, as is clear from the authorities, and on the facts I am of opinion that General Pott remained and continues to be a creditor of the Endowment Society, and never agreed to become a creditor of the Albert.

In the course of the argument the 122nd clause of the Endowment Society's deed of settlement was referred to. There were also suggestions that an action ought to be brought, and that there are equitable reasons why a winding-up order should not have been made. The 122nd clause assists the respondent rather than the appellants. General Pott's debt is clearly due from the society. He has entered into no new contract. He has done nothing to disentitle him to his plain rights, and there is every reason why a winding-up order should have been made. The appeal must, therefore, be dismissed with costs.

On the application of Sir *Roundell Palmer*, Q.C., their Lordships allowed to the appellants ten days to consider whether any arrangement could be made for paying the debt due to General Pott before drawing up the order.

Solicitors for the appellants, *Maynard* and *Co.*

Solicitors for the other parties, *Clayton* and *Sons*; *Freshfields*; *Lewis*, *Munns*, and *Co.*

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ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Saturday, Jan. 22.

Re HATTATT'S WILL.

Appointment of new trustees—Husband of lady interested in trust fund—Undertaking.

The husband of a lady having a life interest in a trust-fund, appointed one of two new trustees of the fund on his giving an undertaking that, in the event of his at any time becoming sole trustee, he would at once take all necessary steps for the appointment of some person to be his co-trustee.

This was a petition under the Trustee Acts for the appointment of new trustees of the will of one Hattatt. Of the two persons proposed to be appointed, one was the husband of a lady who had a life interest in the trust fund.

Speed appeared in support of the petition.

Lord ROMILLY, after expressing some doubt as to the desirability of appointing the husband of a lady interested in the fund, said that he would make the order on the husband giving an undertaking that, in the event of his at any time becoming sole trustee, he would at once take all necessary steps for the appointment of some person to be his co-trustee.

Solicitors: *Taylor, Hoare*, and *Taylor*.

Saturday, Jan. 29.

Re WINTLE.

Evidence—Date of birth—Registrar's certificate—6 & 7 Will. 4, c. 86, s. 38.

Where a birth is not registered till some days after the date of the birth, the registrar's certificate that the child was born on a certain day previous to the date of registration, is not evidence of the child having been born on such previous day.

This was a petition for payment of a fund in court to a person who became entitled to it on attaining the age of twenty-one. The registrar's certificate that the person entitled was born on the 23rd Jan. 1849, but that the birth was not registered till the 13th Feb. 1849, was the only evidence produced of the person having attained twenty-one.

Phear, in support of the petition, contended that the registrar's certificate was evidence of the date of the birth, by the 38th section of 6 & 7 Will. 4, c. 86, which provides that the Registrar-General shall cause to be made a seal of the said register office, and the Registrar-General shall cause to be sealed or stamped therewith all certified copies of entries given in the said office; and all certified copies of entries purporting to be sealed or stamped with the seal of the said register office, shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office shall be of any force or effect, which is not sealed or stamped as aforesaid.

Hance appeared for the trustees.

Lord ROMILLY.—The registrar's certificate is only evidence that the child was living on the 13th Feb. 1849, and not that it was born on any previous day. I can, therefore, make no order on the petition until the 13th Feb. next, unless further evidence of the date of the petitioner's birth is produced.

Solicitor, *C. Blake*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Jan. 20 and 21.

Re BELL'S ESTATE; FOSTER v. BELL.

Practice—Committal of receiver for contempt—Attachment—Cons. Ord. xxxv., r. 23.

A receiver who disregarded a four days' order for payment of a balance certified to be due from him, committed for contempt.

This was a motion for an order to commit a receiver for contempt, under these circumstances.

On the 6th Aug. 1869, the chief clerk having certified that a balance of 1138*l.* was due from the receiver in the cause, an order was made that he should pay the same into court on or before the 27th Aug. 1869. No payment having been made by the receiver in pursuance of this order, the defendant on the 17th Dec. obtained the usual four days' order against him. This order was also disregarded, and the defendant then applied under the 29th of the Consolidated Orders to the record and writ clerk's office for an attachment. The clerk of record and writs however objected to issue an attachment, as being contrary to modern practice, but advised the defendant to apply to the court for an order to commit. Hence this motion.

George Williamson in support of the motion.

W. W. Cooper, for the receiver, submitted that the proper course was to obtain an attachment. He referred to

Daniell's Chanc. Pract. 1591, note (*x*), 4th edit;
Morgan's Chanc. Pract. 552;
Cons. Ord. xxxv. r. 23;
Whitehead v. *Lynes*, 34 Beav. 161; 12 L. T. Rep. N. S. 332.

The VICE-CHANCELLOR directed the motion to stand over until the following day, that it might be ascertained whether it was the practice to move to commit, or to proceed by way of attachment.

Jan. 21.—The VICE-CHANCELLOR, having communicated with the record and writ clerk, made an order to commit the receiver.

Solicitors for the defendant, *Williamson, Hill*, and *Co.*

Solicitors for the receiver, *Scott* and *Co.*

Thursday, Jan. 27.

BOURTON v. WILLIAMS.

Mortgagor and mortgagee—Payment of mortgage money into court under 7 Geo. 2, c. 20—Order of discharge necessary for release of mortgagor.

Payment by a mortgagor of the mortgage money into court, under 7 Geo. 2, c. 20, does not operate as a release of the debt without an order of discharge from the court.

A married woman prior to her marriage advanced 200l. on a mortgage security. The marriage settlement did not include the 200l. After the marriage the husband and wife separated, and shortly afterwards the husband brought an action in his own and his wife's name against the mortgagor to recover the 200l. The wife refused to consent to the action and claimed the money, and thereupon the mortgagor paid it into court under 7 Geo. 2, c. 20. Subsequently, by an arrangement between the husband and the mortgagor (to which the wife was not a party), the money was taken out of court and one half of it paid to the husband, and the other half, after deducting 17l. for certain costs, was handed to the mortgagor to be paid to the wife on her reconveying

the mortgaged property; the wife, however, refused to accept less than 100l. or to execute a reconveyance.

The husband predeceased the wife; and on the death of the wife, soon afterwards, a suit was instituted by her legal personal representatives against the mortgagor for payment of the mortgage debt or so much of it as might be due, and in default for foreclosure:

Held, that the plaintiffs were entitled to a decree for the payment of the 100l., with interest at 5l. per cent. from the death of the husband.

This was a suit transferred to this court from the County Court of Oxfordshire. The facts were as follows:—

In 1858 the defendant Williams mortgaged certain freehold property to Alice Mathews (widow) to secure 200*l.* In Jan. 1860 Mrs. Mathews married James Carr, when a settlement was executed, which did not in terms include the 200*l.* In March 1860 Mr. and Mrs. Carr separated, and never afterwards lived together as husband and wife. Soon after the separation Mr. Carr brought an action in his own and his wife's name to recover the 200*l.* from Williams. The action, however, was not brought with Mrs. Carr's consent, and she gave Williams notice to that effect, and stated that the 200*l.* ought to have been included in the settlement, and that she would be no party to any reconveyance of the mortgaged property if Williams paid the money to her husband.

Under these circumstances Williams obtained a judge's order under 7 Geo. 2, c. 20, s. 1, that the money should be paid into court; that a reconveyance should be executed by Mr. and Mrs. Carr; that thereupon, but not before, the money should be paid out of court to them, and that if such reconveyance was not executed, the money should remain in court. Accordingly, on the 3rd July 1860, the 200*l.* was paid into court by Williams, but the order was in no other respect complied with.

Subsequently Carr and Williams, by a private arrangement, to which Mrs. Carr was not a party, took the 200*l.* out of court. Carr received the whole of it, but by agreement 100*l.* was handed over to Williams, to be held by him for Mrs. Carr, and to be paid by him to her on her executing the reconveyance. At the same time Mrs. Carr executed what purported to be a transfer of the mortgage, but which was in fact inoperative, to a Mr. Holmes, who had lent Williams the 200*l.* to pay into court, and delivered to Holmes the deeds relating to the property.

Before the 100*l.* was handed over to Williams for Mrs. Carr, Carr deducted from it 17*l.*, which he paid to his solicitor as costs for preparing the marriage settlement. The 83*l.* was then offered to Mrs. Carr as half of the mortgage money; but she refused to accept it, or to execute any reconveyance of the property until she was paid 100*l.* Thereupon the 83*l.* was paid to Mr. Holmes.

Mr. Holmes died in 1863, leaving his widow and executrix in possession of the title-deeds. Mrs. Holmes (who was one of the defendants) never disputed that she held the 83*l.*, less certain costs, as trustee for Mrs. Carr, but the latter always refused to take less than 100*l.*

Mr. Carr died in June 1866. Mrs. Carr died in July 1866, having by her will appointed the plaintiffs in this suit her executors, and devised to them her estates held on mortgage.

The plaint in the suit prayed for an order for payment by Williams and Mrs. Holmes, or one of them, to the plaintiffs, as representatives of Mrs. Carr, of the 200*l.*, or so much of it as might be due in respect of the mortgage debt, and in default of payment for the usual foreclosure decree.

Dickinson, Q. C. and *Phear*, for the plaintiffs, contended that there had been no effectual discharge of the debt. The order of the court necessary for the release of the debtor, had never been obtained; and the money had been disposed of under an arrangement to which Mrs. Carr was no party. The plaintiffs, therefore, as Mrs. Carr's representatives, were clearly entitled to the relief prayed. See

Ryland v. *Smith*, 1 My. & Cr. 53:
Burnham v. *Bennett*, 2 Col. C. C. 254;
Hanson v. *Miller*, 14 Sim. 22.

Fischer (with him *Bristowe*, Q. C.) for the defendants, submitted that the payment of the money into court, under the statute, was a satisfaction of the mortgage-debt, which now, therefore, had no existence; and that the plaintiffs had no claim in respect of it, as against the defendants or either of them.

The VICE-CHANCELLOR.—It is quite clear that the payment of the mortgage-money into court, under the 7 Geo. 2, c. 20, was a satisfaction of the debt, so far as regards the actual payment into court, but it was not in itself a release or discharge of the debtor without a further order of the same court to that effect. No such order has been made. The mortgagor, after paying the money into court, might have opposed the payment of it out of court until he had received a full discharge from his debt; but he took a different course, and consented to a complicated arrangement by which, so far as the plaintiffs' rights are concerned, they are not affected at all, being no parties to it. The money never reached the hands of Mrs. Carr, and the legal estate is vested in her representatives. It is impossible to say that she or the plaintiffs in her right have not a lien on the property to the extent of 100*l.*, and the plaintiffs therefore are not bound to reconvey the estate until that sum has been paid. It is a mistake to suppose that the attorney of Mr. Carr had any right to deduct 17*l.* for costs out of Mrs. Carr's moiety, as these costs ought to have been paid by her husband. The defendants' case has failed, and there will be a decree against them for payment of the 100*l.* and the costs of the suit; including the costs of the County Court. On payment of the money there must be a reconveyance of the estate by the plaintiffs to Mrs. Holmes, or as she shall direct, and the defendants must pay interest at 5 per cent. on the amount from the date of the death of Mr. Carr. The decree will be subject to the right of Williams to redeem Mrs. Holmes.

Solicitors for the plaintiffs *Charles Mallam* (for *T.* and *G. Mallam*, Oxford).

Solicitors for the defendant, *Singleton* and *Tattershall* (for *J. N. Clayton*, Oxford).

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., and HON. ROBERT BUTLER, Barristers-at-Law

Thursday, Dec. 9, 1869.

TRAPPES *v.* MEREDITH.

Bankruptcy—Annulment—Forfeiture.

An annuity out of a fund which was subject to life interest was appointed by will to A., with a proviso for cesser if he should become bankrupt.

After the death of the testatrix, but before the death of the tenant for life, A. was adjudged bankrupt. After the death of the tenant for life, but before the first payment of the annuity became due, the bankruptcy was annulled:

Held, that the annuity was not forfeited.

Mrs. Graham having a power of appointment

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over certain property subject to the life interest of her mother, Mrs. Payne, therein, by her will, dated the 16th Feb. 1863, appointed it to trustees upon the following trust (amongst others), to pay to her husband, the defendant, H. C. T. Graham, an annuity of 100*l.* during his life, to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months after the decease of the survivor of her and her mother. And she declared that, subject to the trusts thereinbefore declared, the trustees should stand possessed of the trust premises and the income thereof, or so much thereof as should remain after answering the aforesaid purposes, in trust for such person or persons as her sister, Mrs. Trappes, should appoint; and in default of appointment, in trust to pay the income to Mrs. Trappes for life for her separate use, and after her decease in trust for the children of Mrs. Trappes.

The will then went on as follows:

Provided always, and I hereby declare, that if my said husband shall become bankrupt, or shall assign, charge, or encumber, or attempt or affect to assign, charge, or encumber, the said annuity of 100*l.* hereinbefore given to him, or do or suffer any act whereby the same annuity or any part thereof would, if belonging absolutely to him, become vested in any other person or persons, then and in such case the said annuity shall not be payable, or shall cease to be payable, as the case may require, in the same manner as if my said husband were dead.

By a codicil to her will dated the 24th May 1864, the annuity was increased to an annuity of 150*l.*, payable at the same time and in the same manner, and subject to the same provisoes as to cesser, as the annuity of 100*l.* given by her will.

Mrs. Graham died on the 21st June 1864. Mrs. Payne, the tenant for life, died on the 4th April 1868.

On the 16th Jan. 1868 the defendant Mr. Graham was adjudged a bankrupt on his own petition. But by an order of the Court of Bankruptcy dated the 21st July 1868 the adjudication was annulled.

The children of Mrs. Trappes were the plaintiffs in the present suit, and the bill prayed (*inter alia*) for a declaration that the annuity in favour of Mr. Graham ceased on his bankruptcy.

The trustees of Mrs. Graham's will stated in their answer that they had been informed and believed that on the 7th May 1861 Mr. Graham was upon his own petition adjudged a bankrupt under a Scotch sequestration, and that on the 29th August 1868 he was discharged of all debts and liabilities contracted by him or for which he was liable at the date of the sequestration (7th May 1861). But there was no mention of any Scotch sequestration in the bill.

Willcock, Q. C. and *W. H. Townsend* appeared for the plaintiffs.

Bristowe, Q. C. and *C. C. Barker* for the trustees.

Kay, Q. C. and *Bradford*, for the defendant Graham, contended that he was entitled to the annuity.

De Gex, Q. C. and *C. Pontifex*, for parties interested in remainder, contended that the annulment did not act retrospectively. The annuity was forfeited. The following cases were cited:

White v. *Chitty*, 13 L. T. Rep. N. S. 750; L. Rep. 1 Eq. 372;
Lloyd v. *Lloyd*, L. Rep. 2 Eq. 722;
Cox v. *Fonblanque*, L. Rep. 6 Eq. 482;
Smallcombe v. *Olivier*, 13 M. & W. 77;
Manning v. *Chambers*, 1 De G. & S. 282;
Seymour v. *Lucas*, 1 Dr. & Sm. 177;
Ex parte Leaverland, 1 Atk. 145;
Allen v. *Coster*, 1 Beav. 274.

The VICE-CHANCELLOR.—I do not say a word about the Scotch sequestration, because I know nothing about that. But with regard to the case before me upon the effect of bankruptcy obtained on the annuitant's own petition, and annulled on the annuitant's own application, and with the consent of his creditors, I quite agree with Mr. De Gex that it is not right or becoming of the court to be hair-splitting with cases, or to endeavour to find minute points of difference between this case and the adjudged cases, and I mean to decide this case according to what I think the good sense and honesty of the cases requires me to do. Taking the whole of the cases together—the cases which establish forfeiture and those which establish that there was no forfeiture—all proceed upon this broad principle, that the general intent of a gift of this kind is that it is to be for the personal enjoyment of the legatee, and that if that personal enjoyment is not to be had by reason of bankruptcy, alienation, or any other act or omission by which the property would be vested in any person or persons, then the forfeiture takes effect, but if not, not. Now I apprehend in this case that the question to be tried is what was the position of things at the time in which the first payment of this annuity had become payable. This annuity, would not have become payable until the 4th April, 1869. The tenant for life died on the 4th April, 1868. At that time the annuitant was a bankrupt, adjudged bankrupt on his own petition; and if that state of things had continued then, although the words were words of futurity, the cases would have applied. It would have been said you are a bankrupt—you cannot receive this annuity; the right to receive it is vested in somebody else, and your right is gone. But I suppose it was the very fact of the tenant for life's death that induced the annuitant to be active. He finds the adjudication to be a very serious matter for him, and he sets himself to get rid of it. He does get rid of it absolutely as between the assignees and himself, and his creditors; and before any payment whatever had become due—before any part of the annuity is payable—he has ceased to be in that condition, which condition alone would be the cause of forfeiture. That being so, I am of opinion that the annulment of the bankruptcy in this case has this effect. Wood, V.C. in those cases mentioned it. You take the adjudication and the annulment together, and the result is this can be done without any prejudice to or affecting any of the rights which have arisen from the acts of the assignee; and that being so, the whole thing is to be restored to the state in which it was at the time of the adjudication of bankruptcy. The man had therefore ceased to be a bankrupt within the meaning of this provision, and the forfeiture clause is not operative.

A discussion then arose as to the Scotch sequestration, and his Honour, after remarking that what he had said would be considered a determination upon the question of the English bankruptcy, ordered the cause to stand over, with liberty to amend and adduce evidence as to the alleged sequestration.

Solicitors for the plaintiff, *R. Southee*.

Solicitors for the defendants, *Rooks*, *Kenrick*, and *Harston*; and *Meredith* and *Co.*

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Tuesday, Feb. 8.

BAYLEY v. MILES.

Practice—Special case—Parties out of jurisdiction.

The court directed a special case to be set down for hearing, on the application of the executrix, the first tenant for life and the trustees being defendants; the persons interested in remainder, who were absent in New Zealand, being omitted as parties.

This was a special case, presented with a view of obtaining the opinion of the court on the construction of a will, as to whether a certain fund was specifically bequeathed or passed as residue.

The plaintiff in the special case was the widow and executrix of the testator, and claimed the fund as specific legatee; and the defendants in the case were the trustees of the residue and the first tenant for life of the residue. The other tenants for life, and the persons entitled in remainder to the residue, were in New Zealand, and were not made parties to the case.

An application was now made for leave to set down the special case for hearing, without bringing the parties out of the jurisdiction before the court.

G. J. F. Cooke appeared in support of the application, and referred to
13 & 14 Vict. c. 35;
15 & 16 Vict. c. 86, s. 51.

T. H. Haddan, who appeared for the trustees, did not oppose the application.

The VICE-CHANCELLOR ordered the case to be set down for hearing without making the absent persons parties to the case.

Solicitors: *Young, Maples, Teesdale*, and *Nelson*, agents for *Isaac Cook* and *Sons*, Bristol.

HENSHAW v. ANGELL.

Practice—Motion to vary chief clerk's certificate—Cons. Ord. xxxv. r. 52.

The service of notice of motion to vary the chief clerk's certificate is not an application within the meaning of Cons. Ord. xxxv. r. 52.

This was a motion to vary the chief clerk's certificate.

Under Cons. Ord. xxxv., r. 52, the time within which an application may be made, by summons or motion, to discharge or vary any certificate which has been signed and adopted by the judge in chambers, shall be eight clear days after the filing of such certificate. The certificate having been approved by the Vice-Chancellor was filed on the 12th Jan. Notice of motion to vary the certificate was served on the 19th Jan. for the 31st which was a seal day, the 20th being also a seal day.

A. G. Langley, in support of the motion, cited the case of *Wycherley* v. *Barnard*, Joh. 41; 28 L. J. 562, in which case Vice-Chancellor Wood (the present Lord Chancellor), considered that the words of the order were satisfied by an application for a summons being made before the expiration of eight days, and that the summons, having been obtained within that time, although not returnable until afterwards, was sufficient to suspend the confirmation of the certificate until the summons was disposed of.

N. Lindley, for the plaintiff, objected that the motion was not in time, and cited *Cross* v *Maltby*, 8 W. R. 646, where the court gave leave to move on a day not a seal day to save the eight days.

The VICE-CHANCELLOR observed that the applying for and issuing of a summons from a judge's chambers might be regarded as an application, which the service of notice of motion could not, he therefore made no order on the motion as not being in time.

Solicitors for the plaintiff, *Tatham* and *Son*.

Solicitor for the defendant, *Angell*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Wednesday, Jan. 12.

JONES v. HILL.

Bankruptcy—Pleading—Form of plea where order of discharge is not obtained till after action brought—C. L. P. A. 1852, *s.* 68—*B. A.* 1861 (24 & 25 *Vict. c.* 134) *ss.* 161, 164, 170.

Where a bankrupt does not obtain his order of discharge till after action brought, though he has been adjudicated a bankrupt before action brought, the defence must be pleaded as one arising after the commencement of the action, in accordance with sect. 68 *of the C. L. P. A.* 1852; *and the form of plea directed by sect.* 161 *of the B. A.* 1861 *is not applicable to such a case.*

The word "thereafter" in sect. 161 *of the B. A.* 1861 *means after the taking effect of the order of discharge.*

Harris *v.* James, 9 *East*, 82, *commented on and distinguished.*

Declaration on a bill of exchange dated the 28th July 1868, at three months, accepted by the defendant and indorsed to the North and South Wales Banking Company, whose registered public officer was the plaintiff.

Plea (dated 15th Dec. 1868) that before the commencement of the suit the defendant became bankrupt within the true intent and meaning of the statute in force concerning bankrupts, and that the causes of action in the declaration mentioned accrued to the plaintiff before the defendant so became bankrupt.

Issue thereon.

At the trial, which took place before Brett J. at the Liverpool Spring Assizes 1869, it appeared that the defendant had been adjudicated a bankrupt on the 3rd Sept. 1868, the bill becoming due on the 28th Oct. 1868. The writ in the action issued on the 11th Nov. 1868, and the defendant did not obtain his order of discharge till the 27th Nov. 1868. The declaration was delivered on the 2nd Dec. and the plea of the defendant's bankruptcy was delivered on the 15th Dec. The order of discharge bore date the 28th Dec. 1868. The above facts having been proved, the learned judge directed the verdict to be entered for the plaintiff, on the ground that the plea was not proved, and declined to amend the plea except on payment of the plaintiff's costs, but gave the defendant leave to move to enter the verdict for him should the court be of opinion that the plea had been proved.

Hodgson, having obtained a rule *nisi* calling on the plaintiff to show cause why the verdict should not be entered for the defendant,

R. G. Williams now showed cause against the rule. The defendant's plea was not proved as pleaded, seeing that he did not obtain his order of discharge till after action brought. The form of plea given in sect. 161 of the B. A. 1861 (24 & 25

Vict. c. 134) is not appropriate to such a case as the present. That section provides that "the order of discharge shall, upon taking effect, discharge the bankrupt from all debts, claims, or demands proveable under his bankruptcy save as herein otherwise provided; and if, thereafter, he shall be arrested, or any action shall be brought against him for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this Act and the special matter in evidence; and the order of discharge shall be sufficient evidence of the bankruptcy and the proceedings precedent to the order of discharge." It will be contended, on the other side, that the word "thereafter" in this section means after the adjudication of bankruptcy, but it is submitted it can only mean after the taking effect of the order of discharge. [HANNEN, J.—If it referred to the bankruptcy, and not to the order of discharge, the bankrupt would be entitled to be discharged from custody, though he had not obtained his order of discharge.] That absurd consequence would undoubtedly follow. The general understanding has certainly been that the form of plea given in the above section is only applicable to cases where the order of discharge has been obtained before the commencement of the action. Thus, in Bullen and Leake's Precedents, p. 507 (3rd edit.), it is laid down that "the general form of plea of the defendant's bankruptcy is given only in actions brought against the bankrupt after obtaining his order of discharge. The order, however, discharges the bankrupt from all debts and claims proveable under the bankruptcy. If the action is commenced before the order of discharge is obtained, the order, when obtained, may be pleaded as above; or if after plea pleaded, it must be pleaded *puis darrein continuance*." In the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106) this was made to appear distinctly. Sect. 205 of that statute enacts "that any bankrupt who shall, after his certificate shall have been allowed, be arrested or have any action brought against him for any debt, claim, or demand proveable under his bankruptcy, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this Act and the special matter in evidence." There can be no doubt that the words of that section do not apply to the case of an action brought before the certificate was allowed; and the Act of 1861 merely substitutes for the certificate the order of discharge, leaving the effect of the section in other respects the same. If the contention of the other side were correct, it would follow that although there was no defence to the action at its commencement, and the plaintiff was therefore justified in bringing it; still the order of discharge subsequently obtained would relate back, and have the effect of making the plaintiff pay the defendant's costs. [MELLOR, J.—And it might well seem that at the time of the commencement of the action the defendant might never get his order of discharge.] The reason why the words "after his certificate shall have been allowed" in sect. 205 of the Act of 1849, or similar words, are not repeated in the Act of 1861, is probably that the provisions as to the non-liability of the bankrupt upon any promise to pay any debt discharged by the certificate, and as to his freedom from arrest and defence to action are contained in two separate sections in the former Act, and therefore it was necessary to repeat the words in each section, whilst in the Act of 1861 they are both contained in the same section. If, then, the defence relied on by the defendant is one which arose after the commencement of the action, it should have been pleaded as such; for sect. 168 of the Common Law Procedure Act 1852 provides that "any defence arising after the commencement of the action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action." Though the defendant obtained his order of discharge on Nov. 27, the order of discharge bore date Dec. 28; therefore the defendant was not in a position to plead it when the plea was delivered on Dec. 15; and the offer having been made to the defendant by the learned judge who presided at the trial to amend on payment of the plaintiff's costs, which was refused by the defendant, it is submitted that the defendant ought not now to be allowed to amend on any terms.

Hodgson, in support of the rule.—The plea is merely a formal one, stating that the plaintiff became bankrupt and that the cause of action accrued before the commencement of the action, which is true. Such a formal plea could not mislead anyone, what was intended by it being obvious, namely, that the defendant was released from the debt by means of the order of discharge. If the plea had been pleaded in the other form, the plaintiff would, by rr. 22 & 23 of Trinity Term 1853, be at liberty to confess the plea, and thereupon be entitled to the costs of the cause up to the time of pleading the plea, which in justice and right he would not be entitled to. On the matter of the date of the order of discharge, *Ex parte Bell*, 32 L. J. 50, Bank.; 8 L. T. Rep. N. S. 370, is an authority in the defendant's favour. There it was held that the words "order of discharge" denote two different things—(1) the order made by the court on the application of the bankrupt, and which is made and pronounced by the commissioner subject to appeal, and is recorded in the proceedings; and (2) that further document or certificate which is formally drawn up and handed over to the bankrupt after the time allowed for appealing has elapsed. Lord Westbury C. said, "The order of discharge takes effect from the time when it is granted by the commissioner; and that being the particular day when it is recorded, it is said with propriety that it shall take effect 'immediately from its date;' but inasmuch as a time is allowed during which it is competent to any party interested to apply to the court to review the order, when it may be annulled, suspended, or recalled, that condition is fulfilled by stating that it shall 'take effect' subject to that power of appeal; that is to say, the order of discharge shall take effect from the time when it is pronounced, provided it be not annulled, suspended, or recalled within the time allowed." And again, "It is impossible to hold that the order of discharge spoken of in the 161st section can be the order of discharge which is afterwards to be delivered to the bankrupt, because it is said that 'the order of discharge shall upon taking effect discharge the bankrupt,' &c. These words 'upon taking effect' were inserted to provide for the possibility of the order being suspended; because if the order be suspended by the commissioner the order can take effect only from the end of the period of suspension." Moreover, it was incumbent on the defendant in the present case to plead his order of discharge, otherwise he could not obtain the benefit of it or resist an execution: (*Rossi* v. *Bailey*, 19 L. T. Rep. N. S. 130; 37 L. J. 204, Q. B.) [COCKBURN, C. J.—This point need not be further argued. The court feels itself bound in this matter by the decision of the Lord Chancellor in *Ex parte Bell*.] The order of discharge was obtained on the 27th Nov., and all such matters are made known to the world by advertise-

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ment in the *Gazette.* Notwithstanding that, the plaintiff proceeds and delivers his declaration on the 2nd Dec.; the plaintiff has thus brought upon himself whatever hardship the plea inflicts, by delivering his declaration after he must have known that the defendant had obtained his order of discharge. The plaintiff might have appealed to the court for leave to discontinue, instead of joining issue on the plea; and it is laid down in Archbold's Practice, p. 1485, that "the terms upon which a party is allowed to discontinue are in the discretion of the court." [COCKBURN, C. J.—The whole strength of your argument consists in this, that though the plea relates not to the order of discharge but to the bankruptcy generally, yet it is perfectly well understood in the profession to relate to the order of discharge having been obtained, and therefore that when the plea was delivered to the plaintiff he should have known about it.] It is stated in Chitty on Contracts, p. 774 (7th edit.), that "if the order of discharge were obtained after declaration, but before plea, it would be sufficient to rely upon the general plea given by the statute without pleading the bankruptcy specially; that is without setting forth all the proceedings. And it would seem that since the 15 & 16 Vict. c. 76, ss. 51, 52, this form of plea will be sufficient, even where both the bankruptcy and the order of discharge are after action brought." [COCKBURN, C. J.—But it goes on: "but in such a case the plea should be pleaded *puis darrein continuance.*"] But that is where both the bankruptcy and the order of discharge are after the commencement of the action; but in the present case the bankruptcy was before and only the order of discharge after the commencement of the action. It would be a great injustice to compel the defendant to pay the plaintiff's costs under the circumstances of this case; the adjudication of bankruptcy strips the defendant of all his property, and it would produce the most pernicious consequences to allow each creditor liberty to commence an action against him, to which he has no defence before obtaining his order of discharge, and to sign judgment and arrest him. In *Simpson* v. *Maravita*, 20 L. T. Rep. N.S. 275, where the defendant was adjudicated bankrupt by the Irish Court of Bankruptcy on Nov. 20, 1868, and the certificate was signed on Jan. 12, 1869, but detained in court for a month in order that any creditor might appeal against its being granted, it was held that the certificate operated from the date of its execution, notwithstanding its detention in court for a month subsequently, and that the certificate operated as a discharge from arrest for the costs of the action as well as for the amount of the debt, on the ground that the costs were accessory to the principal. [HANNEN, J.—It may be that you are discharged from the costs, but the question is whether you must not plead "according to the fact," as required by sect. 68 of the Common Law Procedure Act 1852. The plaintiff's hypothesis at the time he commences the action is that you will never get your order of discharge.] The defence really arose before action brought, though not perfected till afterwards. In *Harris* v. *James*, 9 East, 82, it was held that the certificate of a bankrupt allowed, after filing of the plaintiff's bill, and before plea pleaded, was evidence to support the general plea in bar given by the stat. 5 Geo. 2, c. 30, s. 7, that before the exhibiting the plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt. "It was contended on the part of the plaintiff," said Lord Ellenborough, C. J., in delivering judgment, "that the matter of the defendant's discharge having arisen after the filing of the plaintiff's bill, should have been pleaded as a plea after the last continuance. To which it was, on the part of the defendant answered, that if even the matter of the discharge grew by the allowance of the certificate, and was not merely to be proved in evidence by it; yet that even so, and if the allowance of the certificate were specially pleaded, it could not be pleaded in terms as a plea after the last continuance, inasmuch as no continuance had in fact intervened between the time of the bill filed and of the plea pleaded. It was further argued, on the part of the plaintiff, that this plea, and the general bar arising out of it, was only given by the statute in favour of persons conforming to the direction of the statute, who should "afterwards" (*i.e.*, after they had so conformed), "be arrested, prosecuted, or impleaded, for any debt due before such time as he, she, or they might become bankrupt," and it was contended that the word "afterwards," by reference to the antecedent matter, applied only to cases in which the action was commenced after the bankrupt had already conformed, and obtained his certificate in proof of such his conformity. But it appears to us, on reference to the different provisions of the Act, to have been the object of it that every bankrupt who had obtained his certificate of conformity, and which had been duly allowed, should be thereupon (*i.e.*, upon pleading such plea and producing such his certificate) discharged from all his debts due or owing at the time that he did become bankrupt, for which he should have been impleaded after his bankruptcy; and that the discharge given him was meant to be a bar to all remedy by suit against him, commenced after his bankruptcy for debts due antecedent to his bankruptcy. . . . Another argument in favour of the defendant arises from the 13th section providing only for the relief of the bankrupt whose certificate shall be obtained after judgment; so that a bankrupt who shall obtain his certificate after action brought and before judgment, would have no advantage of such certificate if the construction contended for by the plaintiff's counsel were to prevail. But we cannot suppose that it was the intention of the Legislature that the certificate of a bankrupt should prevent his creditor recovering against him if his certificate were obtained before the commencement of the action, or having personal execution against him if obtained after the judgment; and that he should still remain liable to his debts if he obtained his certificate after the commencement of the action and before judgment." This reasoning is strictly applicable to the circumstances of the present case. [COCKBURN, C. J.—But does it meet the provisions of sect. 68 of the Common Law Procedure Act 1852?] The defence is the whole proceedings in bankruptcy, culminating in the order of discharge.

R. G. Williams, in reply.—The language of 5 Geo. 2, c. 30, s. 7, on which the case of *Harrison* v. *James* was decided, differs from that of the subsequent Acts. Sect. 126 of 6 Geo. 4, c. 16 enacts "that any bankrupt who shall after his certificate shall have been allowed be arrested or have any action brought against him, &c., shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt," &c. This may be said to repeal the decision in *Harris* v. *James*, and the language of the other Bankruptcy Acts which succeeded is of a similar character.

COCKBURN, C. J.—I think this rule must be discharged. If the language of the statute which we are now considering, and that of the statutes immediately preceding it, had been the same as that of the statute of Geo. 2, I should have felt myself bound to follow the decision of Lord Ellenborough in the case of *Harris* v. *James* which has been cited,

saying at the same time that the judgment involves reasoning of a rather subtle character. However, notwithstanding that, I should have followed in the footsteps of my learned predecessor. If the Legislature had intended that the mere fact of adjudication of bankruptcy should have the effect of stopping all actions against the bankrupt, nothing could be more easy than for the Legislature to say so; and, looking at the matter only with reference to principle and policy, I regret that the Legislature has not thought proper to say so, for I think it most improper that actions should be maintained whilst proceedings in bankruptcy are pending, and it is probable that the bankrupt will get his order of discharge. During that time I think all proceedings, except those under the bankruptcy, should be suspended; for otherwise, in all probability, money is thrown away in useless expenses, and the estate of the bankrupt is lessened. But the Legislature has not thought fit to enact that. The language of the statute of Geo. 2 was certainly ambiguous, but I think that the language of the statutes relating to bankruptcy which have followed it are anything but ambiguous; for when the language is that the order of discharge "shall upon taking effect discharge the bankrupt from all debts, claims, or demands provable under the bankruptcy," I understand the meaning of the Legislature to be that it is the order of discharge and not the antecedent proceedings in bankruptcy which is to have that effect. And this is rendered clearer by the words which follow: "and if *thereafter* he shall be arrested, or any action shall be brought against him for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this Act and the special matter in evidence, and the order of discharge shall be sufficient evidence of the bankruptcy and the proceedings precedent to the order of discharge." I do not see how it is possible to doubt that by these words is meant that the immunity from legal proceedings is to arise from and out of the order of discharge, and does not attach to any of the proceedings anterior to the order of discharge, which are important only in so far as they lead to the order of discharge out of which the defence must arise. It seems to me, therefore, that the defence in the present case was a matter arising after action brought. I am the more confirmed in this view from the observations made by my brother Hannen in the progress of the argument, that this plea in the particular form in which it has been pleaded would be equally applicable to the case of an action brought before adjudication of bankruptcy where the adjudication was eventually followed by an order of discharge. To leave it in doubt to which of the two cases this plea was intended to refer was to produce the very evil which the 68th section of the Common Law Procedure Act 1852, was intended to prevent. In order to get rid of such formal pleas as the one in question, that section was made positive in its terms, and insists on the necessity in pleading of giving effect to the distinction between grounds of defence which arise before and those which arise after the commencement of the action. I think, for the reasons which I have given, that the defence relied on in the present case was matter arising after the commencement of the action, seeing that the simple adjudication would not be an answer to the action, but must be followed by the order of discharge, and Mr. Hodgson, having refused to amend on the terms proposed, must abide by the consequences. I think the plaintiff ought to have his costs, but he must not have his debt twice over. All we can do is to allow the plaintiff to issue execution for his costs; or perhaps a better way would be to allow the defendant to amend his plea and make it a good one on payment of the plaintiff's costs.

MELLOR, J.—I have come to the same conclusion. I entertained considerable doubt on the subject during the argument, and I should feel bound by the decision in *Harris* v. *James*, to which Mr. Hodgson referred, if I did not think that we were relieved from the effect of that decision by the subsequent legislation on the subject. Looking at the context of the 161st section of the Bankruptcy Act 1861, which has reference to the order of discharge and the mode of obtaining it, and then reading the section itself which provides that "the order of discharge shall, upon taking effect, discharge the bankrupt from all debts, claims, or demands provable under his bankruptcy," and then subsequently enacts that "if *thereafter* he shall be arrested, or any action shall be brought against him for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, &c.," I come to the conclusion that the contention of Mr. Williams is well founded. If it had not been for the other sections which throw light upon the meaning of this, I might have felt myself bound by the reasoning of Lord Ellenborough; but looking at the words of this section, following as it does sections which have reference to the mode of obtaining the order of discharge, the effect of it is, I think, as my Lord has stated it. The following sections also, the 162nd and 163rd, relate to the order of discharge, the former relating to the release of the bankrupt when arrested after the order of discharge takes effect, the latter to the effect of the order in the case of partners of the bankrupt. Then the 164th section enacts that "after the order of discharge takes effect, the bankrupt shall not be liable to pay or satisfy any debt, claim, or demand provable under the bankruptcy, or any part thereof, on any contract, promise, or agreement, verbal or written, made after adjudication; and if he be sued on any such contract, promise, or agreement, he may plead in general that the cause of action accrued pending proceeedings in bankruptcy, and may give this Act and the special matter in evidence." When we look at all these sections together, it seems to me that we are relieved from the effect of the decision of Lord Ellenborough in *Harris* v. *James*, under the statute of Geo. 2, and that we are at liberty to construe the words of the 161st section of the Act of 1861, according to their natural meaning, and effect. That being so, the 68th section of the Common Law Procedure Act 1852 provides very distinctly with reference to pleading of this kind, that "any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action." It appears, therefore, to me, that the plea pleaded to this declaration was not the right plea to raise the defence, and was not pleaded in such a manner that the plaintiff could have properly met it; and I have come to the same conclusion as my Lord, that the defendant should be allowed to amend the plea on the terms of paying the plaintiff's costs.

HANNEN, J.—I am of the same opinion; and I arrive at the conclusion in this way. I consider the 68th section of the Common Law Procedure Act 1852 to be explicit and applicable to a plea of this kind. It enacts that a defence arising after the commencement of an action shall be pleaded according to the fact, and that any plea, which does not

state whether the defence therein set up arose before or after action, shall be deemed to be a plea of matter arising before action. The question might arise, What is the defence in the present case? If the defence be that the defendant became *simpliciter* a bankrupt, that is a defence which arose before action; but if bankruptcy *simpliciter* is not a defence to the action, but depends on whether the order of discharge is obtained, then since the order of discharge was not obtained till after the action was commenced, the defence relied on is one arising after action brought. This being so, the plea pleaded left it open to the plaintiff to say—"Since the defendant does not say that his defence arose after the commencement of the action, I suppose it arose before the action was commenced, and if he means to say that, I traverse the allegation, and will put him to proof of the fact." I do not think this view of the case is affected by the arguments as to liability to costs on the one side or the other; because if Mr. Hodgson is right in his view, as to which I say nothing, that the order of discharge operates as a discharge from the costs of the action as well as from the debt itself, then it would follow that if the defendant had pleaded according to the fact that the defence arose after action brought, namely, by his having become bankrupt and obtained his order of discharge, he would not be liable to pay the costs up to that time which under other circumstances he would be liable to pay. Whether that would be so or not, I arrive at the conclusion that the 68th section of the Common Law Procedure Act 1852 was intended to apply to cases of this kind, and to pleas which may be like formulæ simply, as Mr. Hodgson says this is, as well as to other pleas; and I think it was the duty of the defendant to make it clear by his plea, whether that which he relies on for an answer to the action arose before or after the action was commenced against him.

Defendant to be allowed to amend plea on payment of plaintiff's costs.

Attorneys for the plaintiff, *Duncan, Squarey,* and *Co.*, Liverpool.

Attorney for the defendant, *Stackpoole.*

Friday, Jan. 28.

MARSHALL *v.* MARTIN.

Costs—Slanderous words—Effect of certificate of judge—21 Jac. 1, *c.* 21, *s.* 6; 3 *&* 4 *Vict. c.* 24, *s.* 2; 30 *&* 31 *Vict. c.* 142, *s.* 5.

Sect. 5 *of the County Courts Act* 1867 (30 *&* 31 *Vict. c.* 142), *which enacts that a plaintiff, who in an action of tort recovers less than* 10*l.*, *shall not be entitled to any costs of suit "unless the judge certify on the record that there was sufficient reason for bringing such action in the Superior Court, or unless the court or a judge at chambers shall by rule or order allow such costs," does not by implication repeal the enactment of the* 21 *Jac.* 1, *c.* 16, *s.* 6, *which provides that in actions for slanderous words, if the plaintiff recovers less than* 40*s. damages, he shall only recover the same amount of costs. Therefore,*

Where the plaintiff in an action for slanderous words recovered only 1*s. damages, though the judge who tried the action certified that the slanderous words were wilful and malicious, and also that there was sufficient reason for bringing the action in the Superior Court, it was*

Held, that neither the court nor a judge at chambers had power to give the plaintiff more costs than damages.

In this case, which was action for certain words slanderous *per se* spoken by the defendant of the plaintiff, imputing felony to him, the jury returned a verdict for the plaintiff, with one shilling damages. The learned judge who presided at the trial certified that the grievance in respect of which the action was brought was wilful and malicious, in accordance with 3 & 4 Vict. c. 24, s. 2; and also certified on the record that there was sufficient reason for bringing the action in the Superior Court, in accordance with 30 & 31 Vict. c. 142, s. 5. The master accordingly taxed the plaintiff his costs.

Hill, Q. C., obtained a rule *nisi* calling on the plaintiff to show cause why this allowance should not be set aside.

Sect. 6 of the 21 Jac. 1, c. 16, enacted:

That in all actions upon the case for slanderous words, to be tried or prosecuted by any person or persons in any of the courts of record at Westminster, or in any court whatsoever that hath power to hold plea of the same, after the end of this present session of Parliament, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under 40s., then the plaintiff or plaintiffs in such action shall have and recover only so much costs or damages so given or assessed amount unto, without any further increase of the same; any law, statute, custom, or usage to the contrary in anywise notwithstanding.

3 & 4 Vict. c. 24, s. 2, provides—

That if the plaintiff in any action of trespass, or of trespass on the case brought, or to be brought, in any of Her Majesty's courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance in respect of which the action was brought, or that the grievance or trespass was wilful and malicious.

30 & 31 Vict. c. 142, s. 5, enacts that—

If in any action commenced after the passing of this Act in any of Her Majesty's Superior Courts of Record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the court or a judge at chambers shall by rule or order allow such costs.

Matthews, Q. C. now showed cause against the rule.—The judge who presided at the trial has given every form of certificate he could in favour of the plaintiff, and the court should hold the plaintiff entitled to his costs, unless the enactment in sect. 6 of the 21 Jac. 1, c. 16, precludes the court from doing so, which, it is submitted, it does not. It was no doubt held in *Evans* v. *Rees,* 9 C. B., N. S., 391, that the enactment in the stat. of James I. which provides that in actions for slanderous words, if the plaintiff recovers less than 40*s.* damages, he shall only recover the same amount of costs, was not repealed by the 3 & 4 Vict. c. 24; but the same thing does not apply to the Act 30 & 31 Vict. c. 142, s. 5. The language of this latter section is very large, and seems to have been intended to give the court or a judge at chambers a general power to allow the plaintiff his costs where it seems to them proper that he should get them. The section, in providing that the plaintiff should not be entitled to any "costs of suit" unless the judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the court or a judge at chambers shall by rule or order allow "such costs," appears to contemplate the exercise of a general discretion to allow the plaintiff his full "costs of suit" when he is considered deserving of them. [LUSH, J.—The 5th section of the 30 & 31 Vict. c. 142 does not

repeal the enactment of Jac. 1. The whole of this section is negative; it does not say what costs the plaintiff shall get if the judge certifies, but leaves that to be determined by the general law on the subject already existing.] The words "or unless the court or a judge at chambers shall by rule or order allow such costs" are quite new; they are not found in previous Acts, and it is submitted that these words give the court power to dispense in its discretion with the operation of the provision in the Act of Jac. 1. In *Gray* v. *West*, 20 L. T. Rep. N. S. 222, this court distinguished between the power given by this section to the judge who presides at the trial, and the power given to the court or a judge at chambers, "The judge at the trial," said the court in their judgment, "is empowered to certify on a single point, namely, whether there was sufficient reason for bringing the action in the Superior Court. The power given to the court or a judge at chambers is generally to allow the plaintiff his costs. . . . It appears to us that the certificate was intended to have the same meaning and application in the section now before us as a similar certificate had under 13 & 14 Vict. c. 61, s. 12; and if this be so, it seems to give rise to much doubt whether sect. 5 of the late Act was really intended to have any application to cases in which the County Court had no jurisdiction. If, however, it was intended to apply to such cases, the general authority given to the court or a judge to allow the plaintiff his costs, would, at all events, enable them to do so in cases of this nature, where it appeared proper to make such allowance." *Sampson* v. *Mackay*, 20 L. T. Rep. N. S. 807, was also referred to. [COCKBURN, C. J.—If the Legislature meant to repeal the statute of James, it would have done so explicitly. MELLOR, J.—It surely was never intended to give this court or a judge power to overrule the Act of James; and the County Courts Act of 1867 was certainly not intended to encourage the bringing of actions of slander.]

Heywood (with whom was *S. Hill*, Q. C.) in support of the rule was not called on.

COCKBURN, C. J.—I think we need not call on the other side in this case, and that the rule must be made absolute. I am of opinion that all that was intended by the latter part of sect. 5 of the County Courts Acts 1867 (30 & 31 Vict. c. 142), was to put the court in a position to review the decision on the subject of costs, which the judge at Nisi Prius may have arrived at. But I do not think that the section was intended to repeal, or that it has the effect of repealing the enactment contained in section 6 of the statute of Jac. 1, with reference to the amount of costs to be obtained by the plaintiff in such cases as this. I am not prepared to say that the case of *Evans* v. *Rees* (*ubi. sup.*), which has been cited, was not rightly decided, though it seems rather strong to say that Lord Denman's Act was intended to apply only to cases where the statute of Jac. 1 was not incidentally or by implication repealed. It seems hardly worth while that the Legislature should intervene for the simple purpose of depriving the plaintiff of his costs where they do not exceed thirty-nine shillings. However that interpretation has been put upon the Act. The words "costs of suit," in sect. 5 of the Act of 1867 are substantially the same as the words contained in the other enactments; and we cannot hold that by any words of that section the statute of Jas. 1 is impliedly repealed.

MELLOR, J.—I am of the same opinion. I take the effect of the 5th section of the County Courts Act 1867 to be that, if the plaintiff recovers more than forty shillings damages, he may become entitled to his full costs if the judge who tries the case certifies on the record that there was sufficient reason for bringing the action in the Superior Court, or if the court or a judge at chambers shall, by rule or order, allow such costs. But, to entitle him to get his full costs in this manner, he must not recover less than forty shillings; if he does recover less, then neither the court or judge has power to allow him his costs.

LUSH, J.—I am of the same opinion. The 5th section of the Act of 1867 is a disabling one, depriving of costs where they might previously have been obtained without a certificate of a judge or a rule or order of the court or judge at chambers. If he gets either of these, he is then in the same position as he would have been if the Act had not passed, but in no better.

Rule absolute.

Attorneys for plaintiff, *Makinson* and *Carpenter*, for *Spilsbury*, Stafford.

Attorney for defendant, *W. Thistlethwaite.*

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Monday, Jan. 17.

EYTON v. JONES AND OTHERS.

Ejectment—Licence to assign—Forfeiture.

The predecessor in title of the plaintiff let about thirty three acres of land to one Bradburn, who covenanted amongst other things, that he, his executors, administrators, or assigns, or any of them, should not during the term demise, let, assign, make over, or part with the possession of the said lands (except to the extent of three acres therein described), without the licence and consent in writing of the lessor, his heirs or assigns. There was a proviso in the lease for re-entry upon breach of a covenant. After the passing of the 22 & 23 Vict. c. 35, the lessor gave Bradburn a licence in writing to assign, transfer, and set over the premises to the defendant Jones, his executors, administrators, and assigns, upon condition that Jones would not at any time assign or transfer the premises without the consent of the lessor, his heirs or assigns. Jones assigned the three excepted acres to another defendant, Edge, for the remainder of the term, and let the rest of the premises by the year to another defendant, Jones; this Jones let the thirty acres to Edge by the year. There was no other licence by the lessor but that mentioned:

Held, in an action of ejectment to which the defendant Edge alone appeared and defended only as to the excepted three acres, that the words of the licence did not justify the letting of the thirty acres without a further licence; and that this breach of covenant created a forfeiture of the whole of the premises let under the original lease.

This was an action of ejectment brought to recover certain lands in the county of Salop. The cause came on to be tried by Keating, J., at the Spring Assizes 1868, held in and for the county of Salop, when, by consent of the parties, and without evidence, a verdict was entered for the plaintiff, subject to the opinion of the court upon the following case:—

The writ in this action was dated the 19th June 1867, and the premises claimed therein consisted of two pieces of arable land in the parish of Shiffnal and county of Salop, containing in all 33a. 2r. 35p., more or less, and a line of rails or siding belonging thereto laid down by the Shrewsbury and Birmingham Railway Company. The defendant John Jones appeared, and by a notice in writing to the plaintiff and his attorneys, dated the 27th July 1867, duly

signed and attested, confessed the action as to the whole of the property sought to be recovered. The defendants, James Edge, John Edge, and Joseph Edge, appeared, and by a notice in writing dated the 18th July 1867, limited their defence to a part of the lands claimed, namely, to about three acres thereof lying contiguous to the Shrewsbury and Birmingham Railway and a wharf or siding there.

The land claimed in the writ belonged to the late Robert Aglionby Slaney, Esq., and he, being seised of it in fee by an indenture dated the 27th April 1850, demised the whole of that land to William Bradburn for a term of 99 years from the 25th March 1850, at a yearly rent of 33*l.* The lease was executed by the lessor and lessee. It described the premises as two pieces of arable land, containing by estimation 33a. 2r. 35p., more or less, together with the use of the line of rails, or siding, belonging thereto, recently formed and laid down by the Shrewsbury and Birmingham Railway Company for the purpose of forming a wharf thereon for the use of the said Robert A. Slaney.

This lease contained a covenant by the lessee to expend 400*l.* during the first year of his term in erecting two substantial cottages, a warehouse, and other buildings, upon some part of the premises thereby demised, contiguous to the said siding.

This lease also contained the following covenant:

That he, the said William Bradburn, his executors, administrators, or assigns, or any of them, shall not nor will at any time during the said term hereby granted, demise, let, assign, make over or part with the possession of the said lands and premises hereby demised (except to the extent of three acres immediately adjoining the said line of railway and the said wharf or siding), without the licence or consent in writing of the said Robert Aglionby Slaney, his heirs or assigns, under his or their hand or hands for that purpose had and obtained.

The lease also contained a proviso that it should be lawful for the said Robert Aglionby Slaney, his heirs or assigns, at any time during the continuance of the term thereby granted, to determine and make void the same on giving six months' notice to the said William Bradburn, and upon payment to the said William Bradburn, his executors, administrators, or assigns, of the value of the lessee's interest in the said premises. In case of difference as to the value of the tenant's interest, the same to be referred to two arbitrators or their umpire.

The lease also contained the following proviso:

That if the said William Bradburn, his executors, administrators, or assigns shall at any time during the said term hereby granted, erect and build upon the said demised premises, or any part thereof, any dwelling-houses or buildings other than and except the said two cottages, warehouse, and buildings hereby covenanted to be built within one year from the commencement of the said term, of which said original buildings a map shall be made and certified by Mr. Richard Garbett, or other the agent for the time being of the said Robert Aglionby Slaney, then and in such case the said Robert Aglionby Slaney, his heirs and assigns, shall and will at the end of the said term hereby granted, well and truly pay unto the said William Bradburn, his executors, administrators, or assigns, two thirds of the then value of such additional houses and other buildings so to be erected as aforesaid, and in case the heirs or assigns of the said Robert Aglionby Slaney shall decline to purchase the same in manner as aforesaid, then the executors, administrators, or assigns of the said William Bradburn shall be at liberty to take down and remove such houses and buildings, on paying unto the heirs and assigns of the said Robert Aglionby Slaney one third of the then value of the same, such value in either case if the said parties shall differ thereabouts, to be ascertained by arbitration in the manner hereinbefore directed.

The lease also contained a proviso empowering the lessor, his heirs and assigns, in the event of a breach of any of the covenants to re-enter upon the demised premises, and to repossess the same as in his or their former estate, and to put out the lessee, his executors, administrators, and assigns.

The three acres mentioned in the above covenant against underletting are the three acres in respect of which the defendants, James Edge, John Edge, nd Joseph Edge defend this action.

The said William Bradburn entered upon the demised premises, and held the same under the said lease up to the year 1859, paying the rent to Mr. Slaney.

Bradburn had erected on the said three acres three dwelling houses, and also workshops, stables, and other buildings at a considerable cost, and he carried on in the said buildings the business of a bone and manure manufacturer, which was considered a nuisance both by Mr. Slaney and by the defendant John Jones, who was an adjoining landowner. The defendant Jones thereupon negotiated for an assignment to himself of Bradburn's lease, and this assignment was agreed upon, subject to the payment to Bradburn by defendant Jones of such a sum as should be fixed by an arbitrator; and the arbitrator awarded the sum of 2082*l.* to be paid by Jones to Bradburn, and which was duly paid.

On the 26th Aug. 1859 the following licence was given by the said Mr. Slaney for this assignment:

Whereas I, the undersigned, Robert Aglionby Slaney, of Walford Manor, in the county of Salop, Esquire, by an indenture bearing date on or about the 27th April 1850, demised and leased unto William Bradburn, then of Tong Park, in the parish of Tong, in the said county, farmer, all those two pieces of arable land adjoining each other, and called or known by the respective names of Far Lechmere and Bully Hill Field (as therein described), together with the appurtenances thereto belonging (except as in the said indenture is mentioned to be excepted), to hold the same (except as aforesaid) unto the said William Bradburn, his executors, administrators, and assigns, from the 25th March then last past for the term of ninety-nine years then next ensuing, under the yearly rent of 33*l.*, payable as therein mentioned, and under diver covenants, conditions, and agreements therein contained on the tenant's or lessee's part to be observed and performed, amongst which is a covenant by the said William Bradburn, that he the said William Bradburn, his executors, administrators, or assigns, or any of them should not nor would at any time during the said term thereby granted, demise, let, assign, make over, or part with the possession of the said lands and premises thereby demised, or any part thereof, (except to the extent of three acres immediately adjoining the said line of railway and the said wharf or siding) without licence and consent in writing of me, the said Robert Aglionby Slaney, my heirs or assigns, under my or their hands or hand for that purpose first had and obtained. And whereas sundry messuages or dwelling-houses and other buildings have since been erected by the said William Bradburn upon the said leasehold premises, or on some part or parts thereof. Now I, the said Robert Aglionby Slaney, do hereby give unto the said William Bradburn full power, licence, and authority, by any deed or deeds, to assign, transfer, and set over the said leasehold premises, with all erections and buildings thereon, and other appurtenances, for all or any part of the residue of the said term of ninety-nine years unto John Jones, of Ruckley, in the said county of Salop, Esquire, his executors, administrators, and assigns, upon condition, nevertheless, that he, the said John Jones, his executors or administrators, do not at any time hereafter assign or transfer the said premises, or any part thereof, to any person or persons whomsoever without the licence or consent of me, the said Robert Aglionby Slaney, my heirs or assigns, in writing first had and obtained, and so as the rent by the said lease reserved and made payable be well and truly paid pursuant to the true intent and meaning thereof, and so as the covenants, provisos, conditions, exceptions, and agreements in the said lease contained, on the tenant's or lessee's part to be observed and performed, be well and truly observed and performed, and not in anywise broken or infringed. In witness whereof I, the said Robert Aglionby Slaney, have hereunto set my hand this 26th Aug. 1859.

(Signed) ROBERT A. SLANEY.

Witness, David Hughes, butler to R. A. Slaney, Walford, Shropshire.

This licence was given after the passing of the 22 & 23 Vict. c. 35.

On the 29th Sept. 1859, pursuant to the above licence, the said William Bradburn duly assigned to the defendant, John Jones, by an indenture, executed by both Bradburn and Jones, the residue of the term created by the said indenture of lease of the 27th April 1850, subject to the payment of the rent and the performance of the covenants therein. The defendant Jones entered upon the whole of the demised premises under the above assignment, and held possession of them until the year 1866, paying

to the lessor and his representatives the rent reserved in the lease of the 27th April 1850.

The said Robert Aglionby Slaney died on the 19th May 1862, seised of the reversion immediately expectant on the said term of ninety-nine years. By his will he duly devised the lands included in the lease unto and to the use of Robert Burton and the Rev. Charles Orlando Kenyon for a term of 500 years, with remainder unto and to the use of William Henry Slaney and the plaintiff, their heirs and assigns.

The bequest of the said term of 500 years was duly revoked by a codicil to this will executed by the said Robert Aglionby Slaney. The said William Henry Slaney died on the 26th Dec. 1862, leaving the plaintiff surviving him.

By an indenture dated 17th Nov. 1866, the said John Jones, in consideration of 500*l.* then paid to him, assigned to the defendants, John Edge and Joseph Edge, the said three acres before-mentioned, to hold the same to them, their executors, administrators, and assigns for the remainder of the term created by the said lease of the 27th April 1850. This assignment was made to John Edge and Joseph Edge, in trust for James Edge who is their father, and for the purpose of enabling him to carry on in the buildings erected on the said three acres, the business of a wire rope and chain manufacturer. In pursuance of this assignment the said defendants, John Edge and Joseph Edge entered upon the said three acres of land, and have since retained the possession thereof on behalf of the said James Edge, and the said John Jones has parted with such possession.

On the 1st Dec. 1866 the said defendant, John Jones, by an agreement of that date, between him of the first part, and Daniel Jones, son of the said John Jones, of the other part, demised and let to the said Daniel Jones about thirty acres of land, being the remainder of the 33a. 2r. 35p. included in the said lease of the 27th April 1850, for the term of one year from the 29th Sept. 1866, and so on from year to year, subject to the payment of the yearly rent of 30*l.* 10*s.* from the said Daniel Jones to the said John Jones, and to the payment of all taxes by the said Daniel Jones; the tenancy of the said Daniel Jones to be determinable by either party giving six months' notice to quit, expiring on the 25th March in any year of the said tenancy.

By virtue of this demise, the said Daniel Jones entered upon the demised premises included in this demise, and had the possession thereof from the said John Jones, who parted with the possession thereof from that time forward.

On the 3rd Dec. 1866, by an agreement in writing, between the said Daniel Jones of the one part and the defendant James Edge of the other part, the said Daniel Jones demised and let the said thirty acres of land hereinbefore mentioned, to the said James Edge for the term of one year from the 29th Sept. 1866, so on from year to year subject to the payment to the said Daniel Jones by the said James Edge of a yearly rent of 46*l.*, and to the payment of all taxes by the said James Edge. This tenancy was also determinable by either party giving six months' notice to quit, expiring on the 25th March in any year of the tenancy.

In pursuance and by virtue of this demise the said James Edge entered upon the said remainder of the said 33a. 2r. 35p. of land, and has since retained the possession and occupation thereof, and the defendant John Jones has parted with such possession. No licence or consent was had or given for the said assignment by John Jones to John Edge and Joseph Edge, or for the said demise and letting by John Jones to Daniel Jones, or by Daniel Jones to James Edge, or for the occupation and possession of the premises so assigned and let respectively by the said John Edge and Joseph Edge, or by the said Daniel Jones or the said James Edge, or for the said John Jones parting with the possession of any of the said lands.

On the 6th June 1867 possession of the lands claimed by the writ was demanded by the plaintiff of all the defendants, who were severally required to quit and deliver up possession thereof. This demand not having been complied with as to any part of the lands claimed, this action was brought by the plaintiff.

The defendant John Jones has paid to the plaintiff the rent reserved by the said lease of the 27th April 1850 up to the 25th March 1866; but no rent which has accrued due since that day has been received by the plaintiff, but the amount thereof has been duly tendered to his agent and receiver of his rents.

The question for the opinion of the court was whether the plaintiff is entitled to recover the premises to which the said defendants, James Edge, John Edge, and Joseph Edge have confined their defence.

If the court should be of opinion in the affirmative, the verdict for the plaintiff is to stand, and judgment is to be entered for the plaintiff, with costs of suit. If the court should be of opinion in the negative, the verdict for the plaintiff is to be set aside, and a verdict and judgment is to be entered for such of the defendants, James Edge, John Edge, and Joseph Edge, as the court shall think fit, with costs of defence.

Plaintiff's points of argument: First, the covenant against letting, assigning, or parting with the premises bound the assigns of the lessee Bradburn. Secondly, the licence granted by Mr. Slaney for the assignment by Bradburn to Jones could not control or vary the terms of that covenant. Thirdly, the demises by John Jones to Daniel Jones, and by Daniel Jones to James Edge, were breaches of the covenant against letting, assigning, or parting with the demised premises, and worked a forfeiture of the whole original leasehold interest. Fourthly, those demises, and the assignment by John Jones to John Edge and Joseph Edge are also contrary to the terms of the licence granted by Mr. Slaney for the assignment by Mr. Bradburn to John Jones. Fifthly, the plaintiff is entitled to recover the premises to which James Edge, John Edge, and Joseph Edge have confined their defence.

Defendants' points: First, the three acres in question in this action are expressly exempted from the condition in the lease against assignment without consent. Secondly, the consent stated in the case qualifies the said condition in the lease, and limits it to a future assignment or transfer. Thirdly, before the passing of 22 & 23 Vict. c. 35, such licence would have operated as a total waiver of the said condition, but being given after the passing of that statute, it operates according to its terms as a waiver or alteration of the condition as to future demises, lettings, makings over or parting with possession not amounting to an assignment or transfer. Fourthly, the matters mentioned in the latter part of the case do not amount to an assignment or transfer within the meaning of the said licence. Fifthly, that the plaintiff is not entitled to recover the premises in question upon the facts stated in the case.

Matthews, Q. C. for plaintiff.—The decision in *Dumpor's case*, 1 Sm. L. C. 30, that one licence put an end to a covenant not to assign without licence, was overruled by 22 & 23 Vict. c. 35, ss. 1, 2, 3; and 23 & 24 Vict. c. 38, s. 6. It has been long decided that a covenant not to assign runs with the land;

Winter v. *Dumerque*, 12 Jur. N. S. 56, in C. P., confirmed in Ex. Ch. 726.;

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Anon, Dyer, 152a ;
Williams v. *Earle*, L. Rep. 3 Q. B. 739 ; 19 L. T. Rep. N. S. 238.

The question arises whether this licence did anything to vary the lease under the 1st section of the Act 22 & 23 Vict. c. 35. There is nothing in the words themselves to do so, and moreover, as the licence is not under seal, it cannot, even if the words were clearly intended to do so, alter a covenant in the original lease. If the breach of covenant be established, the right of entry will apply to the whole of the premises which were the subject of the original lease. "Entry for a condition defeats the estate to which the condition was annexed to all intents :"

Com. Dig. "Condition" O, 6 ;
Shep. Touch. 155.

Gray, Q. C. (with him *J. O. Griffits*) for defendants. Clearly the lessee of the three acres was at liberty to do whatever he pleased as to letting the premises he leased without the consent of the lessor. How can the lease of the thirty acres affect the tenure of the lessee of the three acres? Under circumstances of this kind the rent can be apportioned, as appears from

Stevenson v. *Lambard*, 2 East, 575 ;
Doe dem. Vaughan v. *Meyler*, 2 M. & S. 276 ;
Woodfall's Landlord and Tenant, p. 362.

The exception of the three acres from the necessity for the lessor's licence is recited in the licence to Bradburn, therefore the licence is a confirmation of the exception of those acres from the lessor's right of re-entry. As to the licence itself, the statutes cited only do away with the effect of *Dumpor's* case when it does not otherwise appear by the licence. Here, although the lease is recited, and the words of the covenant are expressly stated in the licence, there is nothing in the condition of the licence to prevent the lessee from underletting. The case does not find that there has been any assignment or transfer of the lease ; and therefore there has been no breach of the covenant in the original lease as qualified by the licence.

Matthews, in reply, cited Viner's Abridgment "Condition," Pd. 18 : "Every limitation or consideration ought to defeat the entire estate, and not to defeat part and leave part not defeated, and it cannot make an estate to cease *quoad unam personam*, and not *quoad alteram*" : (*Finch's case*, 6 Co. Rep. 40.)

BOVILL, C. J.—The first question is, what is the effect of the original lease as to the covenant against assignment and the proviso thereto. The words are, "That he, the said Wm. Bradburn, his executors, administrators, or assigns, or any of them, shall not nor will at any time during the said term hereby granted, demise, let, assign, make over, or part with the possession of the said lands and premises hereby demised (except to the extent of three acres immediately adjoining the said line of railway and the said wharf or siding), without the licence and consent in writing of the said R. A. Slaney, his heirs or assigns, under his or their hand or hands, for that purpose first had and obtained." The lease created one entire interest in and provided for one entire rent of the whole premises ; there is a proviso for re-entry upon the breach of any covenant. Great hardship is often occasioned to under lessees by forfeiture on the breach of a covenant in which they are not concerned, but it is the same in all cases, and the consequence must follow according to the law unless some special provision is made for the under-lessee's benefit ; for instance, a forfeiture often takes place under building leases by reason of breaches for which the person who suffers is by no means responsible. Here the lessee of the three acres cannot complain because he is turned out of possession in accordance with the terms of his lease. As to the effect of the licence, it is true that according to *Dumpor's* case the first licence to assign would have terminated the condition not to assign without licence, but by sect. 1 of 22 & 23 Vict. c. 35 every such licence shall, unless otherwise expressed, extend only to the permission actually given ; but not to prevent any proceedings for any subsequent breach unless otherwise specified in such licence. Therefore, if not otherwise determined by the licence, the covenants in the lease continue to be binding upon the defendants. In order that the defendants should not be bound by the covenants in the lease, it must so appear by express terms in the licence. It is said here, however, that it sufficiently appears from the lease and the licence that the assignee was at liberty to underlet the premises. Certainly there are no express terms to that effect in the licence, and I say that such an intention does not appear by any reasonable inference. The covenant was "not to demise, let, assign, make over, or part with the possession of the land ;" and the condition of the licence was "not at any time thereafter to assign or transfer the said premises, or any part thereof, to any person or persons whomsoever without the licence or consent of the lessor." There is nothing inconsistent in the two ; and it also appears subsequently in the licence that all the covenants in the lease are to be observed. I am at a loss to understand how these words can possibly be construed as a licence to underlet. This was, then, clearly a breach of covenant, and the plaintiff's power of re-entry, therefore, comes into operation.

M. SMITH, J.—I am of the same opinion. The plaintiff's right to thirty acres is admitted by the defendants ; they do not deny that the condition of re-entry entitles the plaintiff to re-enter as to them ; but it is contended that the provision does not extend to the three acres excepted from the covenant not to assign without licence. I understand the ground of contention to be that the particular breach of the covenant in this case does not create a forfeiture of the three acres in question. Mr. Gray says that under this particular form of covenant the defendants who have appeared are not concerned. It seems to me, however, that the exception does not take the three acres out of the original term, and that a forfeiture created by a breach of any covenant would involve the three acres as well as the thirty. The forfeiture here is caused by the clause providing power of re-entry upon the breach of any covenant contained in the lease ; the covenant upon which a breach is complained is not to assign or underlet, except three acres. What is there to prevent the operation of this particular covenant? The lessor must certainly have a right to re-enter the whole of the property upon a breach of the covenant. Mr. Gray then contends that by the terms of the licence Jones was at liberty to underlet without further consent of the lessor. I cannot read the licence in that way. It is merely a licence to Bradburn to assign, transfer, and set over the premises to Jones. The condition, which is added, that Jones should not assign or transfer without licence, may have been unnecessary, but so far from construing it as a permission to underlet, as Mr. Gray does, I should be inclined to think it meant rather to be a confirmation of the old covenant, although the words of that covenant are not to "demise, let, assign, make over, or part with the possession of" the premises. The omission in the condition of the licence of the words "demise, let, make over, or part with the possession of," cannot mean to limit the original covenant to assigning only. This being so, the original covenant must be observed and a forfeiture has

been created. I think, therefore, with every endeavour to prevent a forfeiture on such a ground, we are bound to give judgment for the plaintiff.

BRETT, J.—I should be glad to decide in favour of the defendants, for I think that either this is an ejectment without sufficient reason, or an attempt to evade the trial of an indictment for nuisance. The covenant in the original lease is not to let without licence; this is expressed to relate to thirty acres only, but that does not confine the right of re-entry to the thirty acres on the breach of the condition as to the thirty acres. I think, too, the lease and licence construed as a whole do not give the tenant liberty to underlet, but expressly forbid it.

Judgment for plaintiff.

Attorneys for plaintiffs, *Francis* and *Bosanquet*.

Attorney for defendants, *W. Potts*, for *Potts* and *Son*, Broseley.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law

Nov. 17, 1869, *and Jan.* 29, 1870.

BOLTON *v.* BOLTON.

Will—Indefinite devise—Absence of words of limitation—Charge on property devised—Effect of words "property and estate"—Enlargemement of life estate into a fee—Construction—Rules of.

A testator having two sons, G., who was married and had no children, and W., who was married and had five children, by his will dated 7th Jan. 1834, *devised (the words of gift used being "give, bequeath, and demise") to his son G. a dwelling-house and certain lands, without any words of limitation. He also gave to G. (using the same words of gift) "all the furniture, &c., upon the said premises, and all the farming implements, &c., for his full use and enjoyment, and also all the stock, &c., upon this my estate, he my said son G. paying* out of this my personal property and estate, *the sum of* 100*l.*, *and a second sum of* 100*l. to be paid by my son W. hereinafter mentioned, as a joint payment, I entail upon my two sons, G. and W., equally." The testator then directed that if G. should die before his wife, then she "should have the enjoyment of all the above-mentioned property and estate for the term of her natural life." And then follow these words: "After whose decease I give, bequeath, and demise all the before-mentioned* property and estate *to my five grandchildren, R., G., W., E., and A., lawful children begotten of my son W., equal share and share alike of the said* property and estate," *with benefit of survivorship amongst them as therein mentioned. He then devised (using the same words of gift) other lands to his son W., without any words of limitation, and with the following directions: "He my said son W.* paying thereout 100*l.*, *and another* 100*l. paid by my son G. before mentioned, a joint payment I entail upon my two sons equally; that is, that they pay* 100*l. each* out of my personal property and estate *bequeathed to them separately. This my* said property and estate *I give and bequeath to my two sons G. and W., they* paying thereout 100*l. each as above expressed in this my will."*

Held, by the Court of Exchequer (Kelly, C. B. and Channell, Pigott, and Cleasby, BB.), that, under the terms of the above will, G. and his wife took life estates in succession, and that the grandchildren took vested estates, as tenants in common in fee, in remainder expectant upon the determination of such life estates.

The rule that an indefinite devise may be enlarged into a fee, where there is a devise over on certain conditions, is not applicable in a case where the devise over is to another person for life, and the only condition is that that other person survives the first devisee; and more especially where there is a devise, after the death of that other person, of the whole estate in fee. Nor, in such a case, does the rule for enlarging the devise into an estate in fee, by reason of the direction of payment out of the property, apply.

The effect of the words "property and estate" to confer a fee may always be construed by the context, and where, in the early part of a will, there is a devise of lands, by their proper description, to persons in succession, the use of those words, in a subsequent part of the will, cannot destroy the devise in sucesssion, and convert the first devise into a devise in fee: (Willis *v.* Lucas, 1 *P. Wms.* 472; Doe d. Burdett *v.* Wrighte, 2 *B. & Ald.* 710).

This was an action of ejectment commenced on Dec. 30, 1868, by writ directed to the tenants in possession, and all other persons entitled to defend the possession of one undivided equal third part—the whole into three equal parts, to be divided—of and in all that messuage, tenement, or dwelling-house, with the barns, stable, and outbuildings thereto belonging, and also all those three pieces of land, or closes, called Home Close, Hill Leas, and Great Close, containing 25 acres or thereabouts, and also all those two newly-erected cottages or tenements standing and being adjacent to the above-described messuage, &c., all which said hereditaments and premises are situated in the parish of Yelvertoft, in the county of Northampton, to the possession whereof the plaintiff claims to have been on and since 21st Nov. 1865, entitled. Judgment was signed herein in default of appearance, and on 9th Jan. 1869, George Bolton, by leave of a judge, appeared to the said writ, and defended, as landlord of the said tenants, for the whole of the said undivided third part of the said premises; and on 19th Feb. 1869, his death, since his appearing to the said writ, was suggested by the plaintiff; and the present defendant, Matilda Bolton, the legal representative of the said George Bolton, appeared to the said writ, and defended for the whole of the said undivided third part, &c.

The cause came on for trial before Bovill, C.J., at the last Spring Assizes (1869) for the county of Northampton, when a verdict was found for the plaintiff, subject to the opinion of the Court of Exchequer upon the following

CASE.

1. George Bolton, the plaintiff's late grandfather, deceased, duly made his last will and testament in writing, dated the 7th Jan. 1834, by which will he gave and devised as follows:

First, at my decease *I give, bequeath, and demise to my son George Bolton all my premises, containing dwelling-house, farm, stables, and outbuildings, situate in the parish of Yelvertoft in the county of Northampton.* I also give, bequeath, and demise to my said Son George Bolton all the furniture, linen, and utensils of every kind that shall be upon these my premises at my decease, situate in the parish of Yelvertoft aforesaid. I further give, bequeath, and demise to the said my son George Bolton all the farming implements and utensils of every description for his full use and enjoyment. I also give, bequeath, and demise to the said my son George Bolton all those three pieces of land or closes called and known by the several names of the Home Close, the Hill Leas, and the Great Close, situate in the parish of Yelvertoft in the county of Northampton, and being contiguous to and joining these my premises aforesaid, and now in my own occupation. I also give, bequeath, and demise to my said son George Bolton all the stock that shall be upon this my estate, and whether it shall be of sheep, cattle, or horses, *he my said son George Bolton paying out of this my personal property and estate the sum of* 100*l.*, and a second sum of 100*l.* to be paid by my son William Bolton hereinafter mentioned, as a joint payment I entail upon my two sons, George and William Bolton, equally. And my further will is that, should it please God to call from this life my son George Bolton before his lawful wife, Elizabeth Bolton, that she, the said Elizabeth Bolton, shall have the full use and enjoyment of *all the above, my property and*

estate for the term of her natural life; that is, that she retain, hold, and keep possession of the said premises, furniture, linen, stock, and all those three closes of land called and known by the several names of The Home Close, The Hill Leas and the Great Close, situate, &c., and containing, &c., *after whose decease I give, bequeath, and demise all the before-mentioned property and estate* to my five grandchildren, Robert, George, William, Elizabeth, and Anne Bolton, lawful children, begotten of my son, William Bolton, *equal share and share alike of the said property and estate*; but should any one or more of the said my grandchildren die before such of my property and estate becomes valid or vacant, then shall the surviving children take equal shares of such deceased child or children's share of the said property and estate. Also I give, bequeath, and demise to my son, William Bolton, all those three closes or pieces of land known by the several names of the Rawnspole, Stone Pits, and Crick Mere, except a part of the Crick Mere, containing about three acres, which is now sown with wheat, which my son George Bolton is to have the privilege of getting; therefore my son William Bolton shall not enter upon that said three acres till the crop be cleared off the ground (which last close or piece of land the Union Canal runs through), situate in the parish of Yelvertoft aforesaid, the whole containing twenty-five acres or thereabouts; he, my said son William Bolton, *paying thereout* 100*l.*, and another 100*l.* paid by my son George Bolton before-mentioned, a joint payment I entail upon my two sons equally; that is, *that they pay* 100*l. each out of my personal property and estate*, bequeathed to them separately. This my said *property and estate* I give and bequeath to my two sons George and William Bolton, *they paying thereout* 100*l.* each as above expressed in this my will. And lastly I do hereby nominate, constitute, and appoint my two sons, George Bolton and William Bolton, as executors of this my last will and testament contained in two sheets of paper.

2. The said testator's execution of the said will was attested by four persons, one of whom was the said testator's said son George Bolton, named in the said will.

3. The said testator died in the year 1834, and his said will was proved by his sons and executors, the said George and William Bolton, in the Archdeaconry Court of Northampton, on the 19th July 1834, and the said sums of 100*l.* each were, in the residuary account, stated to be cash charged on the real estate devised to George Bolton and William Bolton.

4. The said testator left the said George Bolton, his eldest son and heir-at-law, him surviving.

5. The said testator was, at the date of his said will, and thence up to and at his decease, seised, or well entitled in fee simple, of or to the closes and hereditaments in the said will mentioned.

6. The said testator was, at the date of his said will and of his death, indebted in a sum of 200*l.*, which debt was paid, in equal shares, by his said two sons. He left little personal property not specifically bequeathed by his said will.

7. The said testator's son, the said George Bolton, was, before the 7th Jan. 1834, married to Elizabeth, his wife, and they both survived the said testator.

The said testator's son George Bolton, after the death of the said testator, enjoyed during his life the said hereditaments so devised to him as aforesaid, and he survived his said wife Elizabeth Bolton, who died in the year 1836; and he died on the 20th Nov. 1865, without having had any children, and having devised all his real estate to his nephew George Bolton, the son of the said William Bolton, and one of the five grandchildren named in the before-mentioned will. A share of the hereditaments so devised by the will of 1834 to the said testator's eldest son George, and enjoyed by him during his life as aforesaid, is now the subject of this action of ejectment.

8. Robt. Bolton and Anne Bolton, mentioned in the will as two of the five grandchildren of the said testator respectively, died in the lifetime of the said testator's son, George Bolton.

9. The plaintiff, Wm. Bolton, is the said testator's grandson of that name, and is mentioned as one of the five grandchildren of the testator in his said will. The defendant is the widow and representative of the deceased grandson George Bolton, the devisee of his uncle George Bolton, the eldest son of the testator of the will of 1834.

10. The court is to be at liberty to draw any inference upon any facts which, in the opinion of the court, a jury ought to have drawn or found. Also to amend the writ and any subsequent proceedings as the court may think fit.

The question for the opinion of the court is whether the plaintiff is entitled to recover any or what share of the lands and premises in the writ of ejectment mentioned.

If the court shall be of opinion that the plaintiff is so entitled to recover, &c., then the verdict entered for the plaintiff shall stand for such share as the court shall think fit.

But if the court shall be of opinion that the plaintiff has not established his case, then the verdict entered for him shall be set aside, and instead thereof a verdict be entered for the defendant.

The plaintiff's points for argument: First. By the will a life estate in the hereditaments in question was given to George Bolton the son; with remainder to his wife Elizabeth for life, with remainders to the grandchildren as tenants in common in fee, subject as to the original (but not as to any accruing) shares of those dying in the lifetime of the tenants for life, or of the survivor of them, to be devested in favour of the survivors. Secondly. The devises to George and his wife failed by reason of George having attested the will. Thirdly. The consequence was that the estate vested in George, as heir-at-law, until the determination of the life estate on the death of George the survivor. Fourthly. Two of the grandchildren having died during the lifetime of George, the remaining three became entitled in fee, and the plaintiff as one of them entitled to recover one undivided third part.

The defendant's points for argument: First. The will under which plaintiff claims is void. Secondly. If not, it was void so far as the bequest to George the attesting witness and his wife; and if so, the devise to the grandchildren, being contingent upon her surviving, there was consequently an intestacy as to that part which vested in George as heir. Thirdly. If the will be valid there is a clear intention shown to give George the fee simple. Fourthly. The charge of 100*l.* created thereby gave such fee by implication. Fifthly. If the will be valid but the devise to George void, the grandchildren's remainder, being accelerated, vested in possession either on the death of testator or of Elizabeth, wife of George, and that such interest is in either case barred by the statute. Sixthly. There being no words of inheritance in the devise to the grandchildren, their respective estates vested on decease in the heir-at-law. Seventhly. The limitation over, in the event of the death of any grandchild, extends only to original and not to accruing shares, and therefore the plaintiff is in any case only entitled to his one-fifth share, the fourth of that of Ann Bolton, and the third of that of Robert Bolton, who died as in the eighth paragraph of this case stated. Eighthly. No disclaimer by the tenants in possession of the plaintiff's title appearing, the plaintiff cannot recover in this action.

Keane, Q. C. (with him was *A. Wills*) for the plaintiffs. Assuming even, as is contended on the other side to be the case, that under the 25 Geo. 2, c. 6, s. 1, the devise to the eldest son George is void, by reason of his being a supernumerary and superfluous attesting witness to the will, the question would be to whom meantime would the property go? It is contended on the part of the plaintiff that it would vest meantime in George as heir-at-law of his father, until the happening of the event—namely, the death of the survivor of George Bolton and his wife Elizabeth, on which the gifts

over to the testator's grandchildren then surviving would take effect, and there would be no acceleration of the grandchildren's estate and interest. The devise to George Bolton was a devise for life only, and is not enlarged into a fee by the charge to pay 100*l.*, for that is expressly directed to be paid by him out of the "*personal* property and estate" specifically bequeathed to him. Moreover the words of gift used, "give, bequeath, and demise," are not the language by which an estate in fee is given or would pass. The wife's estate was not to arise until her husband's death, and he survived her. Two of the grandchildren died in George's lifetime, and consequently, at his death, the three surviving grandchildren, of whom the plaintiff is one, became entitled to the property under the testator's will, under which they took vested estates in remainder expectant upon the determination of the previous life estates in George and Elizabeth Bolton. He cited and referred to

Doe dem. Child and wife v. *Wright and others*, 8 T. R. 64;
Denn ex dim. Gaskin v. *Gaskin*, 2 Cowp. 657;
Bolton v. *Bolton*, 17 L. T. Rep. N. S. 556 (before Stuart, V.C.)

Manisty, Q. C., (with whom was *C. G. Merewether*), for the defendant, *contra*. Before the Wills Act 1 Vict. c. 26, when this will was executed, where an estate was given to a person without words of limitation, but with a direction to pay debts, or with the payment of a sum of money charged on it, what would otherwise have been construed as an estate for life, was by such direction or charge enlarged into a fee. The amount is immaterial if, as in this case, there is an express direction to pay the money out of *the estate*. The words are "he paying out of this my personal property *and estate* the sum of 100*l.*," and again, "this, my real property *and estate*, I give and bequeath to my two sons, they paying thereout 100*l.* each as above expressed," &c. In construing a will, the court will take notice of the testator's intention, having regard to the state of the family. He, having two different properties and two sons, he gave one estate to the eldest, and the other to the younger son, but having probably an idea that the eldest son might die without issue (as the fact indeed turned out to be) he willed that if that should happen, leaving the wife, then the property which he intended to go to his eldest son in fee should go to his widow for her life, and at her death to the children of his younger son in fee. That would be a very reasonable will under the circumstances. But it could never be the testator's intention that, if his eldest son George survived his wife, and should happen to have a son by a second wife, that such son should be disinherited, and take nothing; yet that would be the result of the construction contended for by the plaintiff. There can be no doubt that William, the younger son, took an estate in fee in the property demised to him for there is a direction to pay 100*l.* out of *the estate*, and the devise to the eldest son is identical in terms —"he paying out of my personal property *and estate*;" and estate means real property: 2 Jarm. on Wills, 248, 3rd edit. [CLEASBY, B.—That may be admitted. But if, by implication or expressly by other parts of the will, it appears clear that the devise be for life or for an estate tail, then the rule would not apply.] The shifting the estate from the elder to the younger branch is strong to show that it was an executory devise to the grandchildren, grafted on the devise in fee to George. It is as though the testator had said, "Property A I give to George, and property B to William, and if George dies before his wife, without issue then I give A to William's children. [KELLY, C. B.—Is not the presumption of the fee being devised to George rebutted by the giving a life estate afterwards to another person? CLEASBY, B.—Your argument is, that what follows the devise to George is an executory devise and not a remainder?] Just so. [CLEASBY, B.—But is it not a well-settled rule, without exception, that where a devise is capable, according to the state of the objects at the death of the testator, of taking effect as a remainder, it shall not be construed to be an executory devise? (His Lordship here quoted Jarman on Wills, 9th edit. 820.)] The Lords Justices (W. Page Wood and Selwyn) when this very case was before them on appeal from Stuart, V. C., expressed an opinion against the plaintiff's construction of this will: (See *Bolton* v. *Bolton*, 19 L. T. Rep. N. S. 298.) But, secondly, the limitation in favour of the grandchildren, and the right of entry, vested on the death of the wife in 1836, and the Statute of Limitations was applicable, and a bar to the action, the remainder being accelerated by the death of George's wife in 1836.

Keane, Q. C., in reply, referred to
1 Jarman on Wills, 820.

Cur. adv. vult.

Jan. 27.—Their Lordships having taken time to consider, the following written judgment of the court (Kelly, C. B., and Channell, Pigott, and Cleasby, BB.) was now delivered by

CLEASBY, B.—The only question in this case is, what estate, if any, the claimant Wm. Bolton, took under the will of George Bolton, his grandfather. The particular share to which the claimant would become entitled, by reason of the death of a brother or sister, also named in the will, was disposed of in the course of the argument, and the only question is as to the proper construction of the will. It appears that the testator had two sons, George and William. At the time of the making of the will, which was before the 1st Jan. 1838, when the Wills Act (1 Vict. c. 26) came into operation, the son George was married, and had no children; William also was then married, and had five children. By his will, the testator devised (the words used being "give, bequeath, and *demise*") certain premises (houses, buildings, and closes of land) particularly described in the said will, to his son George, without any words of limitation. He then directs that, should it please God to call from this life his son George, before his wife Elizabeth Bolton, that she should have the full use and enjoyment of all the above (his the testator's) property and estate for the term of her natural life; and then follow these words, "after whose decease I give bequeath and demise all the before-mentioned property and estate to my five grandchildren, Robert, George, William, Elizabeth, and Anne Bolton, lawful children begotten of my son William Bolton, equal share and share alike of the said property and estate," with some benefit of survivorship between them as therein mentioned. He then devises (using the same before-mentioned words of gift) three closes of land to his son William, with the following directions: "He my said son William Bolton paying thereout 100*l.*, and another 100*l.* paid by my son George Bolton before mentioned, a joint payment I entail upon my two sons equally, that is, that they pay 100*l.* each out of my personal property and estate bequeathed to them separately. This, my said property and estate, I give and bequeath to my two sons George and William Bolton, they paying thereout 100*l.* each as above expressed in this my will." The testator then appointed his said two sons, George and William, the executors of his said will. In an earlier part of the will the testator had bequeathed, by the same words of gift, certain personal property to George, and directed him to pay the sum of 100*l.* out of it. In construing this will, it is necessary to bear in

mind that it bears date previously to the 1st Jan. 1838, and therefore that the Wills Act of 1 Vict. c. 26, does not apply to it, and therefore that the old rule remains in full force, that a devise of messuages and lands (not using the word *estate*, or anything equivalent to it) to a person, without words of limitation, confers an estate for life only: (see 2 Jarman on Wills, 3rd edit. chap. 33. p. 247), and that to depart from it would (as Mr. Jarman observes) shake the title to many estates which are still held, and will long continue to be held, under such wills. It is plain, therefore, that, under the terms of the devise to George, an estate for life passed. This was hardly indeed disputed, but it was contended, first, that there was here such a conditional devise as, according to a well-established rule, enlarged what would otherwise have been an estate for life only into a fee; and, secondly, that there was such a direction for the devisee George to pay the sum of 100*l.* out of the estate as, by another well-known rule, had the same effect. As regards the first ground, nothing is clearer than that an indefinite devise may be enlarged into a fee, where there is a devise over upon certain conditions, as, for instance, where there is a demise to A., and in case A. should die under twenty-one years of age, then to B. in fee; in that case it is considered absurd to suppose that the case of A. happening to live beyond the age of twenty-one years is unprovided for by the testator; and it is therefore implied that he did provide for it in the only manner which can be suggested—namely, by giving the fee in that event to A. There are various other instances of the same construction prevailing, all which are collected in 2 Jarman on Wills, 3rd edit., chap. 38, sect. 3, p. 251. But the reasoning and the rule are wholly inapplicable to such a case as the present, where the devise was to another person for life, and the only condition is that that other person survives the first devisee, which in fact only expresses the necessary condition to the devise over taking effect, and leaves it still an estate for life in remainder; and more especially when there is a devise, after the death of that other person, of the whole estate in fee; for the devise to the grandchildren carries the fee, being a devise of "all the property and estate." An attempt was indeed made (not very properly) to induce the court to give a particular effect to the words introduced in the devise to the wife, by stating that she was in a failing state of health, unlikely to live, and therefore all that the testator intended to provide for was the particular case of her surviving her husband, and that the testator could not have intended, as was argued, to disinherit his eldest son's children, in case he had married again, and had had children. The answer was, first, that the construction of a will cannot depend upon the probability, which the testator might or might not suppose there was, of a devisee losing his wife and marrying again and having a family by his second wife; and, secondly, that there is not upon the case the least foundation for the statement of fact relied on. On the contrary, it does appear that the devisee's wife died, and that he remained a widower for the rest of his life, nearly thirty years; so that we are asked to collect, or rather to assume, that the testator contemplated that something would take place which in fact never did take place at all. It appears, from the facts stated in the case and upon the will, that the testator provided for all the members of his family existing at the time, and there is no reason whatever for supposing that he contemplated that there were any others to be provided for. The second ground relied upon was that the devise to "though in itself amounting to no more than an estate for life, was nevertheless en- an estate in fee by reason of his being directed to pay the sum of 100*l.* out of it. The general rule is well established, that where there is a devise of land to a man with no words of limitation, yet, if he is directed to pay a sum of money out of it, his estate is enlarged into an estate in fee; and the court, in construing this will, do not enter into the consideration of the smallness of the amount. And, therefore, in the present case, if there had only been the devise to George, and afterwards the direction to pay the 100*l.*, this, notwithstanding that he is in the first instance directed to pay it out of the *personal* estate bequeathed to him, and notwithstanding the obscure and incoherent language of the latter part of the will, might have had the effect of enlarging George's estate into an estate in fee. But the examination of the earlier part of the will has shown that the testator gives the property to George, and after his death to Elizabeth his wife (in case she survives him), and after her death absolutely to the grandchildren in fee. This is the same as giving to George, expressly and in words, an estate for life, and the rule for enlarging a devise of an estate for life to an estate in fee, by reason of the direction of a payment to be made out of the property, undoubtedly does not apply where there is an express estate for life devised (*Willis* v. *Lucas*, 1 P. Wms. 472; *Doe d. Burdett* v. *Wrighte*, 2 B. & A. 710). Another argument urged by the defendant remains to be noticed. It was said that though the words of the devise to George taken by themselves would only give an estate for life, yet, as in the subsequent part of the will the testator speaks of the "property and *estate* given to my said son George," that this had the same effect as if the words "property and *estate*" had occurred in the actual devise itself of the property, and so that the fee would pass. The clear answer to that is, that the effect of the words "property and estate" to confer an estate in fee, may always be construed by the context; and in the present case, there being, in the early part of the will, a devise of the lands by their proper description to persons in succession, the use of the words "property and estate," in a subsequent part of the will, cannot destroy the devise in succession, and convert the first devise into a devise in fee. It appears to us, therefore, that, by the will, the grandchildren took vested estates, as tenants in common in remainder, expectant upon the determination of life estates in George and his wife, and that the claimant, as one of such grandchildren, is entitled to recover his one-fifth share, and also what in addition has accrued to him by survivorship.

Judgment for the plaintiff.

Attorneys for the plaintiff, *Iliffe, Russell,* and *Iliffe*, 2, Bedford-row, W.C.; agents for *Edmund Harris*, Rugby.

Attorneys for the defendant, *Skilbeck*, and *Griffith*, 34, Bedford-row, W.C.; agents for *Watson, Son,* and *Baxter*, Luttlerworth.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 29.

(Before COCKBURN, C.J., BYLES and KEATING, JJ., and PIGOTT and CLEASBY, BB.)

REG. *v.* JOHN MARSHALL.

Embezzlement—Clerk or servant—Commission.

The prisoner was employed by a coal merchant under an agreement "that he was to receive 1s. per ton procuration fee payable out of the first payment, 4 per cent. for collecting, and 3d. on the last payment. Collections to be paid on Friday evening before 5 p.m. or

Saturday before 2 p.m." He received no salary, was not obliged to be at the office except on Friday or Saturday to account for what money he had received. He was at liberty to go where he pleased for orders:

Held, that the prisoner was not a clerk or servant within the statute relating to embezzlement.

Case reserved for the determination of the Court for the Consideration of Crown Cases Reserved by the assistant-judge at the Middlesex Sessions.

John Marshall was tried before me at the Middlesex Sessions holden on the 15th Nov. 1869, on an indictment which charged him with having feloniously embezzled several sums of money the property of George Tooley, by whom it was alleged he was employed as a clerk and servant.

The prisoner was employed by the prosecutor under an agreement dated 19th Aug. 1868, of which the following is a copy:

19th Aug. 1868.

To Mr. John Marshall, Wells-buildings, Oxford-street.

Terms of employment—Re John Marshall—1s. per ton procuration fee payable out of the first payment, 4 per cent. for collecting, and 3d. on the last payment. Collections to be paid in Friday evening before 5 p.m., or Saturday before 2 p.m. Cash orders 1s. 6d. per ton. G. Tooley.

At the trial three witnesses were called on behalf of the prosecution, who respectively proved that they had paid certain sums of money to the prisoner for and on account of goods supplied to them by the prosecutor, George Tooley, the orders for the said goods having been obtained by the prisoner.

In his examination in chief the prosecutor proved the above memorandum of agreement between the prisoner and himself and further proved that the prisoner had not accounted to him for either of the three several sums of money which had been paid to him as above stated.

In cross-examination by Mr. Collins, who appeared for the prisoner, the prosecutor gave the following evidence:

I paid the prisoner commission, but no salary. He was not obliged to be at my office at any particular time, excepting on Friday or Saturday, to account for what money he had received for me. I did not give the prisoner directions to go to any particular place for orders. He went where he pleased.

Upon this evidence I thought the prisoner was acting as a clerk and servant, and that the mode of remunerating him was immaterial; but my attention being called to the case of *Reg.* v. *Bowers*, L. Rep. 1 Cr. Cas. Res. 41; 10 Cox C. C. 250; 35 L. J. 206, M. C., I agreed to reserve the question.

I thereupon directed the jury to find the prisoner guilty, but respited the judgment until the opinion of the Court for the Consideration of Crown Cases Reserved should be pronounced upon the legal objection taken by the prisoner's counsel.

The question for the opinion of this honourable court is, whether the prisoner, under the circumstances herein stated, was a clerk or servant, so as to be liable to be convicted of the crime of embezzlement.

If the court should be of opinion that the prisoner was not a clerk or servant within the meaning of the statute, the conviction is to be reversed. If otherwise, the conviction is to be upheld. In the mean time the prisoner has been liberated on bail.

Wm. H. Bodkin, Assistant Judge,
Middlesex Sessions.

Collins for the prisoner.—The conviction cannot be sustained for the prisoner was not a clerk or servant, but an agent only. In *Reg.* v. *Walker*, 27 L. J. 207, M. C.; 8 Cox C. C. 1, Bramwell, B. said, "It seems to me that the difference between the relations of master and servant and of principal and agent is this: a principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done." In the present case the prosecutor had no power to compel the prisoner to go out for orders. So again in *Reg.* v. *May*, 8 Cox C. C. 421, where the prisoner who was employed on the terms that for all business he did he would be allowed a commission, was held not to be a clerk or servant. [Cockburn, C. J.—Can this case be distinguished from *Reg.* v. *Bowers*, which is in point.]

Metcalfe (*M. Williams* with him) for the prosecution.—It is stated in the case that the prisoner was employed by the prosecutor; that is evidence of the relationship of master and servant.

Cockburn, C. J.—That is too vague. The prosecutor had no power to say to the prisoner, "go out and get orders," but the agreement only amounts to this, "You shall be my agent to get me orders if you can, and if you do you shall have such a commission."

Cleasby, B.—The prisoner was not even bound to go and receive the money for the orders he got.

Byles, J.—In what part of the agreement is the obligation to serve to be found?

Cockburn, C. J.—The case is clearly within *Reg.* v. *Bowers*, and the conviction must be quashed.

Conviction quashed.

COURT OF ADMIRALTY.

Reported by Henry F. Purcell, Esq., Barrister-at-Law.

[Erratum.—At p. 765, at line 29, col. 2, a cypher dropped out. It should read "1000l.," not "100l."]

Jan. 18 *and* 25.

The Aztecs.

Salvage—Unperformed agreement—The Undaunted *followed—The* Edward Hawkins *commented upon.*

Where salvors enter into an agrement to take a disabled vessel into harbour for a specified sum, and do all in their power to perform their engagement; but, in consequence of an adverse change of wind, fail to fulfil it, they are nevertheless entitled to salvage reward.

This was an appeal from a decree of the judge of the City of London Court, dismissing the suit of the plaintiffs in a cause of salvage. The facts and arguments of counsel are fully stated in the judgment.

Dr. *Deane*, Q. C. and *Edwyn Jones* appeared for the plaintiffs.

Butt, Q. C. and *Webster* for the defendants.

The following cases were cited:
The Undaunted, 1 Lush. 90;
The E. U., 1 Spinks. 63;
The Bomarsund, 1 Lush. 77;
The Edward Hawkins, 1 Lush. 516.

Sir R. J. Phillimore.—This is an appeal from the City of London Court in a cause of salvage. As far as I can gather from the proceedings, the salvors were nonsuited in the court below, principally, if not entirely, because the assessors of the court were of opinion that the barque to which the alleged service was rendered was in no danger when the principal salvor boarded her, though it appears that the objection that the services of the salvors were unsuccessful was also taken on behalf of the owners. It is certainly a mistake as to the law of salvage to suppose that in order to constitute a salvage service a vessel must be in actual danger at the time when the services are rendered to her. The danger may be probable or imminent, which may warrant the court,

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according to the varying circumstances of each case, in awarding a salvage remuneration. The facts of this case certainly bring it within this rule, and I was not surprised, therefore, that the counsel whose duty it was to sustain the judgment of the court below relied upon another and a different ground of defence. The facts of the case are shortly these: On the 28th Oct. last, between four and five o'clock in the morning, the wind being N.W., blowing at this time heavily according to the salvors, and a moderate breeze according to the owners, a smack, the *Queen Victoria*, of thirty tons, with a crew of five men, went out from Harwich, and on nearing the Gunfleet Sand found a vessel called the *Aztecs* riding at anchor in the Swim, between the Sunk and the Gunfleet Light; they were hailed by the captain; three of the salvors got into a boat and went on board, leaving two men on board the smack. It appears that on the 25th Oct. the *Aztecs*, which had just left Sunderland for a distant voyage, came into collision with a brig of Whitby, which had carried away her mizenmast, mizen-boom, maintopmast, and main-topsail yard, and smashed her wheel to pieces; but that at the time the salvors came on board almost all the wreck had been cleared away, and some steering apparatus had been rigged up; the captain resolved to put into the nearest port for repairs; on account of the weather, he had not been able to attempt the Humber; and, after encountering severe gales on the 26th and 27th, had come to an anchor in the place which I have mentioned, early in the morning of the 28th. He had rather more than his full crew on board, but the men had been extremely hard-worked, two or three of them were sick, and their berths were so wet that they could not sleep in them. The captain says in answer to the question, "You were rather exhausted yourself?" "I think I was. I never had my clothes off from Sunderland to Gravesend, and had not a bed to lie down upon, but still I was on deck all the time." The salvors were employed partly in removing some of the remaining wreck, partly in going aloft, and appear to have generally assisted the crew. The captain of the *Aztecs* was desirous of being taken into Harwich, and the following agreement was drawn up between the parties:—"Hook, off Gunfleet, Oct. 27, 1869.—It is this day mutually agreed between S. Varey, master of the *Aztecs*, and William Young on the other part, that he take the said bark *Aztecs* into Harwich harbour, and place her in a proper berth to repair damage, and find steam to take her in, this 27th Oct., weather permitting, for the sum of 30*l.*" Upon this agreement the case of the respondents before me was almost exclusively rested. Every effort was made by the salvors to get the vessel into Harwich, and there is no doubt these efforts would have been successful but for a sudden change of the wind to N.E., which it is admitted rendered the arrival at Harwich impossible. The salvors brought back the vessel to an anchorage not far from that in which they had originally found her. The weather became very tempestuous, and it blew a hard gale from N.N.W. The salvors remained on board during the night, and the smack remained in attendance. The next morning, the 29th, they assisted the crew in heaving up the anchor; it broke, however, and the chain came up without it. About 10·30 the smack went away, the principal salvor remaining on board, having failed to come to any arrangement with the captain in respect to his services; the bark proceeded to Gravesend, and, the weather moderating, arrived there at 5 o'clock on the same evening. It has not been contended before me, as I have already observed, that no salvage service was performed by the smacksmen; but that, inasmuch as the conditions of the agreement had not been fulfilled, they were disentitled to all salvage remuneration. It was also, however, argued, though I think with less confidence, that the salvors were disentitled to reward because their efforts had been unsuccessful, and the case of the *Edward Hawkins* (1 Lush, 517) was mainly relied upon, as I am informed it was, in the court below, in support of this latter proposition. The circumstances of that case, however, when it comes to be examined, were really wholly different, and in my judgment afford no precedent whatever for the present case. The main facts of that case were that the salvors left the vessel "in a position of extreme peril," from which she was saved by her own exertions; in this case it is admitted that the salvors did their utmost, and did not leave the ship in a position of peril without the consent of her master, or without having rendered certain services. It remains to consider that which has been mainly argued before me, the question as to the effect of this agreement. It is admittd that there was no want of exertion or skill on the part of the salvors in endeavouring to fulfil the conditions of it; but the fulfilment was rendered impossible by a sudden change of the weather—that is, was prevented by the act of God. I know no authority, and I should be very sorry if there were one, for the proposition that such an agreement as this in such circumstances could disentitle salvors to any remuneration at all. The principle upon which my learned predecessor decided the *Undaunted* (Lush, 92) is directly the other way. "The engagement to render assistance to a vessel in distress, and the performance of that engagement, as far as necessary, or so far as possible, establishes a title to salvage reward." It is to be observed also that there are other services which by no construction could be covered by the agreement; nor is the attendance of the smack upon a ship in this condition during the whole of that tempestuous night, in the neighbourhood of dangerous sands, by any means to be laid out of consideration. The services in this case were not of a high order, but they were unquestionably salvage services, and were as such entitled, in my judgment, to a reasonable remuneration. The agreed value of ship, freight, and cargo is 4271*l.* 3*s.* I shall fix the amount of remuneration at 40*l.*, with costs, both in this court and in the court below. I regret that no reasonable legal tender was made, which might have saved the expense of all these proceedings, and which I should certainly have been inclined to uphold.

Solicitors for the plaintiffs, *Lowless* and *Nelson*.

Proctors for the defendants, *Dyke* and *Stokes*.

UNITED STATES DISTRICT COURT OF WISCONSIN—IN ADMIRALTY.

Dec. 1869.

THE SCHOONER MAITLAND.

Material men—Materials and supplies at foreign port—Necessaries—Lien.

Where material men are desired by the master or owner of a vessel to furnish materials and supplies at a foreign port, they will have no claim upon the vessel unless they ascertained at the time that the master or owner was unable to pay for them, and that a necessity existed for a credit upon the vessel.

Where, therefore, it appeared that the owner at the time of entering into the contract with the libellants had money to pay for the repairs and supplies, and that the repairs were not absolutely essential for rendering her seaworthy:

Held, that the libellants had no lien upon the ship so as

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to entitle them to institute a suit in rem in a Court of Admiralty.

To create such a lien it must appear that the supplies could only be procured on the credit of the vessel.

The Sophie (1 W. Rob. 309) *followed.*

MILLER, J.—Libel for repairs. The vessel's home port was Buffalo. It is propounded in the libel that the vessel, on the 15th Feb. 1869, while at the port of Milwaukee, her owner or agent represented to libellants that she stood in need of repairs in order to render her seaworthy, and competent to proceed on her intended voyage, and requested said libellants to furnish said materials and supplies. That they were supplied by libellants on the credit of the vessel, the said owner or agent thereof not having either money or credit to purchase said materials and supplies, and which were suitable, proper, and necessary for the purpose of enabling the vessel to depart in safety on her intended voyage; and the value thereof is, by maritime law, a lien upon said vessel, her boats, tackle, apparel, and furniture, and that a balance of 1474 dols. 71 cents remains unpaid, although these libellants have often requested the said owner or agent to pay the same. John H. Moore, of Buffalo, claims that he is the owner of the vessel, subject to a mortgage of 10,000 dols, and the mortgagee has power to take possession of her at any time. The claimant alleges that before the time the repairs were done by libellants the vessel had been stripped and was laid up in winter quarters, in the port of Milwaukee, without any intention or possibility of her being employed until navigation should open in the ensuing spring. After the close of navigation in the fall of 1868, and after the vessel was laid up in winter quarters, claimant, believing that certain repairs would improve her condition for the next season of navigation and raise her rate, entered into correspondence with libellants as to the price of such repairs, and in Jan. 1869 he received from libellants a proposition in writing to make such repairs. The proposal was required to be accepted by claimant within ten days. Claimant answered in writing—"I accept your offer, and will give 550 dollars to do the following work on barque *Maitland*" (describing the work to be done, &c.) Claimant denies that the repairs were made on the credit of the vessel alone as propounded in the libel; and he alleges that said repairs were furnished by libellants on his own credit, and that he had money and credit to procure the same. He denies that the repairs were necessary to enable the vessel to depart in safety upon her intended voyage, and alleges that she could have been employed in navigation with safety during the ensuing season without the repairs, and that such repairs were made, not for the purpose of rendering the vessel seaworthy or safe for navigation, but to put her in better condition and in a higher class. As the issue here raised is one of admiralty jurisdiction, I omit all reference to the portions of the answer and evidence which relate to the amount of the bill of repairs and the manner of the work. Further correspondence took place between these parties in the month of Jan. 1869, respecting additional repairs to the vessel. In a letter of Jan. 23, claimant wrote to libellants, "inclosed please find my acceptance of your proposition. I understand you make no objection to my former terms, and suppose you accept them as you say nothing to the contrary. But I do not expect to keep you out of the pay any longer than you wish to. I will not be able to go up now, and will depend on your doing me a good job. I shall ask Mr. Vance to step around and consult when you get the deck off. Please take care of the ropes in the hold. The other work to be done may remain until the captain goes up, except such of the beams as needs repairing." In a letter dated Buffalo, July 16, 1869, claimant wrote to libellants: "Your valued favour of 13th inst. is received, which is accepted." He then directs as to the work, and then proceeds: "You will have to take acceptances, or some way, wait for pay until the vessel makes one trip, unless I can conveniently pay you. I have money that is promised, ample, but I may be disappointed; yet I hope not, but I will strain every point to pay you when you want it. But should I not be able to collect, then I will want the time." Libellants then did the work on the vessel in the port of Milwaukee. By rule No. 12 of practice in admiralty and maritime jurisdiction, it is provided that, "in all suits by material men, for supplies or repairs, or other necessaries for a foreign ship or a ship in a foreign port, the libellants may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*." The home port of this vessel being Buffalo, s he was foreign, in the sense of this rule, to the port of Milwaukee. The season of navigation being ended, the vessel was laid up at Milwaukee for the winter. The repairs may have been necessary for putting the vessel in a seaworthy condition as a grain-bearing vessel for the ensuing season. The vessel was not then on a voyage, bearing a cargo, or intending at the time to proceed on a voyage or trip from Milwaukee to Buffalo or any other port. There was no intention of putting her in employment before the opening of navigation the ensuing spring. Present necessity for the repairs did not exist when ordered or when made. The master did not order the repairs from pressing necessity, nor did he order them at all, but the owner, and that too, at a time when the vessel was not actually in employment. She might probably as well have been returned to her home port and have been repaired there as in the port of Milwaukee. The rule of the Admiralty is of ancient date, that a master of a vessel has power to create a lien for repairs and supplies obtained in a foreign port in a case of necessity. The case of *Thomas* v. *Osborne*, 19 How. 22, and the cases cited in the opinion conclusively establish this rule without farther references. And this power of the master extends to a case where he is chartered and special owner *pro hac vice*. Here the master is entirely unknown so the libellants as such. The whole negotiation and contracts were between the owner and the libellants. The master had returned to his home in Buffalo before the repairs were contracted for or performed. In the case of *Pratt* v. *Reed*, 19 Howard 359, the steamboat *Sultana* was owned in Buffalo and employed in trade between that port and other ports of the upper lakes. She was supplied with coal from time to time at the port of Erie, her owner being the master and present; and of such ownership Reed, the libellant, had knowledge when he supplied the coal. There was no representation of the necessity of the supplies other than that they were directed by the master at the times when furnished. When the owner was not present the coal was furnished at the request of the person in command. The bill rendered by libellant contained a running account of debit and credit through a period of nearly two years, and there did not appear to be any doubt of the necessity of the supplies when furnished. The court considered it essential for libellant to prove not merely a necessity for the supplies, but also a necessity at the time of procuring them, for a credit upon the vessel. This proof is as essential as that of the necessity of the article itself. The court says, "The supplies having been furnished at a fixed place according to the account current, and apparently under some general understanding and arrangement, the presumption is that there could be no necessity for the implied hypothecation of the vessel;

there could be no unexpected or unforeseen exigency to require it. For aught that appears the supplies could have been procured on the personal credit of the master, and in this more especially as he was the owner. We do not say that the mere fact of the master being owner, of itself excludes the possibility of a case of necessity, that would justify an implied hypothecation; but it is undoubtedly a circumstance that should be attended to in in ascertaining whether any such necessity existed in the particular case: (*The Sophie*, 1 Wm. Robinson 309.) It must appear that the supplies could only be procured on the credit of the vessel. The same position is reiterated by Justice Nelson, who wrote the opinion in one of the above cases and approved the other, in the *James Guy*, 5 Blatchford's, C. C. Rep. 496, where it is decided "to sustain a libel *in rem* against a vessel owned in New York for repairs upon her at Baltimore, at the instance of the master, the necessity of the repairs, and for a lien upon the vessel to enable the master to procure them must be shown. And the court says, "that the necessity for the repairs and for the lien must depend upon the facts and circumstances of the case." In the case of the *Neversink*, 5 Blatchford, C. C. Rep. 539, the court again declares that in the cases of *Thomas* v. *Osborn*, 19 Howard 22, and *Pratt* v. *Reed*, Ibid. 359, the rule which requires evidence of an apparent necessity existing at the time for supplying on the credit of a vessel, supplies furnished to her in a foreign port in order to create a lien upon her in favour of a material man was not extended beyond its ancient strictness as to the degree of proof required. And in that case it is decided that, where the master of the steamer has no funds to pay for coal, and her charterers who owned her *pro hac vice* resided in a foreign jurisdiction, and the coal was a necessary supply, and it was obtained by the master, and credit was in fact given to the vessel and her charterers; it was held that a lien was given on the vessel. It was also held that, when the material man resided at the home port of the vessel and furnished coal at a foreign port, through an agent there, the supplies were considered as furnished by the agent at the foreign port, the same as if the principal resided there. It evidently is the duty of material men, furnishing supplies at foreign ports to vessels, at the instance of the master, who is agent of the owner, to ascertain the necessity of the supplies and also of the inability of the master or owners of the vessel to pay for them before the vessel can be subjected to a maritime lien. Such also is the duty of material men in dealing directly with the owners of a vessel, as in this case. It does not appear that libellants required direct hypothecation of the vessel, or that such was agreed upon or promised by the owner. Nor does it appear that libellants made inquiry into incumbrances on the vessel, or questioned the pecuniary ability of the owner. The supplies were furnished at the instance and on the credit of the owner, without the aid of any facts upon which a presumption can arise of a legal hypothecation of the vessel. In the case of the steamer *St. Lawrence*, 1 Bl. 522, the evidence showed that the supplies being furnished, the amount and value being ascertained to the satisfaction of claimant's proctor, the owner of the vessel at the time gave his notes for the amount of the libellant's demand under the express stipulation between him and libellants that their lien against the vessel should not be discharged or released unless the notes were paid. The notes were afterwards surrendered. It was held that the lien was not waived by the acceptance of the notes. That was an express hypothecation of the vessel. In the case in hand the owner accepts the proposal of libellants to furnish supplies, and promised individually to pay a certain price, and again he agrees personally for additional repairs, libellants not at any time claiming a lien upon the vessel, even after notice from claimant that they might not be paid when the repairs were completed, but at a subsequent time. It is contended that this libel should be sustained by reason of remarks of the Justice in delivering the opinion in the case of the *Belfast*, 7 Wallace, p. 543, that "material men who furnish materials or supplies for a vessel in a foreign port, or in a port other than in the state where the vessel belongs, have a maritime lien on the vessel, or a security for the payment of the price of all such materials and supplies. They were such a lien because upon the principles of the maritime law, such materials and supplies are presumed to be furnished on the credit of the vessel," referring to cases anterior to those cited above. This remark of the judge in an opinion in a case involving the question of exclusive jurisdiction of the district courts of libels on contracts of affreightment, and not in any manner touching the lien of material men for supplies, cannot be taken to overrule the cases of *Thomas* v. *Osborn*, and *Pratt* v. *Reed*. The court cannot step aside from the contract between the parties because it appears in the answer of the claimant, that the vessel is encumbered with a mortgage to the amount of 10,000 dols. The claimant, for aught we know, may be abundantly able to pay all that the libellants can or may recover, irrespective of his interest in the vessel. The fact of the mortgage is no evidence of his inability to pay this debt. Libellants should have satisfied themselves of claimant's pecuniary circumstances before furnishing the supplies and making the repairs, and if they had doubts of his ability to meet his contract, they should have required a lien upon the vessel, or notified him that the supplies would only be furnished on the credit of the vessel. I am satisfied that libellants have no maritime lien on the vessel, and that the libel must be dismissed.

Nov. 1869.

THE MILWAUKEE BELLE.

Deck cargo—Perils of the sea—Jettison.

A schooner laden with wheat took on board a deck cargo of divers pigs of lead. They were applied for by the master to trim his vessel, and by the bill of lading they were to be delivered in as good order as shipped, "dangers of navigation excepted." They were jettisoned in the course of the voyage:

Held, that in the absence of proof of a custom to ship lead on deck, the owners of the cargo, and not the vessel, must bear the loss.

MILLER, J.—Libellants shipped on board this schooner at the port of Racine, in the State of Wisconsin, divers pigs of lead to be transported to the port of Buffalo, in the State of New York. By the bill of lading the pigs of lead were shipped on deck in good condition to be delivered in like good order, the dangers of navigation excepted. The schooner was laden with wheat in bulk. It is alleged in the libel that at the time the lead was received on board the vessel was so badly stevedored, that she was not in a proper condition to safely take it on deck, or to safely transport it according to the tenor or effect of the bill of lading, or to safely and securely hold and carry the under-deck cargo. And that the vessel being in an unseaworthy condition, set sail on her intended voyage with the lead on board. And by reason of the vessel not being well trimmed, and not in condition to resist the ordinary perils of the sea by reason of said improper trimming, and not by any embarrassment or

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danger caused by the lead being on deck, the officers and crew of the vessel jettisoned the lead from off the deck into the waters of Lake Michigan, whereby the lead became wholly lost, and was not delivered according to the tenor and effect of the bill of lading. Libellants demand strict proof whether the jettison was made necessary by a peril of the sea, or by the improper storage of the under-deck cargo. And if jettison were made necessary by a peril of the sea, then, by the custom and course of the admiralty and maritime laws, the loss is a case of general average loss. Claimants in their answer confess the shipment of the lead, and they urge that the vessel being tight, staunch and strong, and well manned and equipped, and having a cargo of 14,700 bushels of wheat in her hold, sufficiently and properly stowed and secured, and forty tons of pig lead shipped on deck, pursuant to the bill of lading, left the port of Racine, bound for the port of Buffalo, and while on her voyage on Lake Michigan she encountered a severe gale, laboured hard, shipping much water on deck, filling herself, and rendering it necessary to knock away the bulwarks to free her, and the gale increasing, it became necessary for the preservation of the vessel, and of the lives of the officers and crew, and for the safety of the whole, the officers, on consultation, determined to jettison a portion of the lead, and thereupon they jettisoned about 838 pigs, and on arriving at Buffalo the whole cargo was delivered except the pigs of lead jettisoned. It is also averred that the cargo under deck was not a full cargo, and was so known to the agent of the shippers, and the lead was shipped on deck at the request of said agent. The answer further alleges that the loss so occurred by a peril of the sea, is not a general average loss, nor is the same to be contributed for in general average. It is agreed between the advocates of the parties, that the storm was of force and violence sufficient to render the jettison necessary. The proof sustains the allegation that the master solicited the lead for the purpose of trimming his vessel. The proof does not establish a custom to ship lead on deck. Such has been done in several instances for the purpose of trimming grain bearing vessels. To establish a custom derogating from the general law, it is not enough to prove that the act has been frequently done. It must be proven to be so generally known and recognised, that a fair presumption arises that the parties in entering into their engagement do it with a silent reference to the custom; and tacitly agree that their rights and responsibilities shall be determined by it (a). This case does not rest on custom, there being an express agreement between the freighter and the master of the vessel, that the lead should be stowed on deck. The question presented for the consideration of the court is, is the loss of the lead by the jettison a general average loss? The general cargo having been delivered at the port of destination, upon payment of the freight, the demand is against the vessel alone for her proportional contribution. Under the view taken of the point presented, I will not consider whether this libel can be maintained against this vessel after delivery of the cargo. It appears that the master having ascertained his vessel was not trimmed, applied to the agent of the owner of the lead, to ship it on deck, for the purpose of trimming the vessel for the voyage, and thereby rendering her seaworthy. From this fact negligence is not chargeable to the master, in respect to putting the vessel in trim. The jettison was rendered necessary by a peril of the sea, for the safety of the vessel and cargo, and was a loss by the peril of the sea. It is a general and an ancient rule of the law of shipping, that goods shall not be carried on deck. Reasons for this rule are, that goods placed on deck are more liable to be lost by being swept overboard, and to damage by water, and endanger both ship and cargo, as the weight is put far from the hull, and thereby makes the vessel less stable, and less manageable, and to labour in a heavy sea. And it encumbers the deck and embarrasses the crew in working a sail vessel, and perhaps the common safety sometimes may not require jettison, if lading were not on deck to bring the dangers on the vessel, or contribute to enhance them. The rule is also a general rule, that goods laden on deck and jettisoned are not contributed for, and such is particularly the rule when goods are laden on deck by consent of the shipper. I have had this matter under consideration in former cases, and must dispense with reference to the very numerous cases affirming this rule. Maritime orders and rules, both ancient and modern, recognise the distinction between cargoes placed on deck with consent of the freighter, and cargoes under deck. They do not give a recourse against the master, the vessel, or the owner. The admiralty courts of England and America have almost uniformly treated the owner of goods on deck with his consent, as not having a claim on the master, in case of jettison, although bound to contribute. This being a proceeding against a sail vessel, I shall not enter upon the consideration of some modern judgments against vessels propelled by steam. The case of *Lawrence* v. *Minturn*, 17 How. 100 is referred to as a leading case of binding authority. The ship *Hornet* was libelled for the non-delivery of two steam boilers and chimneys shipped at New York, on deck by special agreement, and consigned to libellant in San Francisco. It being discovered on the voyage that the ship could not be navigated with safety in a storm, the deck load was thrown overboard. The facts in the case show that the jettison was justifiable, and the loss occasioned by a peril of the sea. The court say, "This bill of lading declares that the property is to go on deck. It excepts perils of the sea. The exception must be construed with reference to the particular adventure, which the contract of the affreightment shows was contemplated by the parties under this bill of lading. The question is not, what in other circumstances could be deemed a peril of the sea, but what is to be deemed such when operating on this vessel with this deck load. If a very burdensome cargo like iron is taken on board, and heavy weather met with, and jettison made, it would not be a ground of claim against the owner that the weather encountered would not have been sufficient to justify a jettison, if the cargo had been cotton. And when this freighter consented to place on the deck of this ship his boilers and chimneys, weighing upwards of thirty tons, not distributed about the deck, but lying in a small space, must he not be taken to have known that their necessary effect might be to embarrass the sailing of the ship in a gale of wind, and cause her to labour in a heavy sea?" The libel was dismissed. In this case, libellants having shipped on deck 1160 pigs of lead, weighing about forty tons, they consented that the vessel might thereby be rendered less manageable, and more liable to labour in a storm, and they, and not the vessel, must bear the loss of a portion of the deck load by the necessary jettison. It is contended that in equity the vessel should contribute for the loss, as the deck load was used in putting her in trim for sea. That is begging the question. I cannot enter into the consideration of the inducement to the contract of the parties. The libel will be dismissed.

(a) *Miller* v. *Tetherington*, 3 L. T. Rep. N. S. 893, is a case in which a custom of this kind was held to be proved.

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COURT OF BANKRUPTCY.

Reported by A. A DORIA, Esq., Barrister-at-Law.

Tuesday, Feb. 1.

(Before Mr. Registrar ROCHE)

ANONYMOUS.

Petition for adjudication—Hearing of—Creditor not attending—Dismissal of petition.

Where, upon the day appointed for hearing a petition, neither the petitioning creditor nor any one on his behalf attends, the court will, upon the application of the debtor, dismiss the petition, with costs.

On the 7th Jan. 1870, a petition for adjudication of bankruptcy was filed against the debtor, and, on the following day, an order for substituted service was made by the registrar, and the notice prescribed by the 61st General Order was directed to be inserted in the *Gazette*. The copy, petition, and orders were left at the residence of the debtor, who was then absent. On the 1st Feb., the day appointed for the hearing of the petition, the debtor and his solicitor attended the court at the time appointed, but neither the petitioning creditor nor his solicitor appeared to support the petition. Under these circumstances

Treherne (solicitor) applied, on behalf of his client, for an order to dismiss the petition, which was ordered accordingly, with costs.

Treherne and *Wolferstan*, solicitors for the debtor.

Monday, Feb. 7.

(Before the CHIEF JUDGE.)

Ex parte GRAHAM; *Re* JOB.

12 & 13 *Vict. c.* 106, *s.* 141—*Damages in tort recovered by bankrupt—Assignees not entitled.*

The assignees of a bankrupt are not entitled under the 141*st section of the Consolidation Act* 1849, *to the damages recovered by the bankrupt in an action of tort brought by him after adjudication.*

This was a motion on behalf of Mr. Graham, the official assignee, for an order that John Ladd, the defendant in an action brought by the bankrupt, should pay to him as assignee the amount of the damages recovered in the action, upon the ground that Job was, at the date of the action, a bankrupt, and had not yet obtained an order of discharge. The bankrupt was adjudicated upon his own petition on the 17th Dec. 1867, and Mr. Graham was appointed the official assignee, and remained sole assignee, no creditors' assignee having been chosen. On the 19th Dec. 1868 the bankrupt came up for his last examination, but the sitting was adjourned *sine die*, and no further proceedings have been taken in the matter of the bankruptcy.

On the 6th July 1869 the bankrupt commenced an action of trespass in the Court of Queen's Bench against John Ladd for damages, and for breaking and entering into his dwelling house, removing and carrying away the fixtures and the goods therein, disposing of the same to his own use, and expelling the plaintiff from possession of the house, whereby he incurred great loss.

On the 14th Jan. 1870 the bankrupt obtained a verdict, and damages were awarded amounting to 37*l.* 10*s.* On the 22nd Jan. notice of the bankruptcy of the plaintiff in the action was given on behalf of Mr. Graham, an assignee to the attorneys of John Ladd, and that Mr. Graham claimed to be entitled to the damages recovered. An interpleader summons was thereupon issued at the instance of Ladd, which was heard before M Smith, J. on the 1st Feb. His Lordship expressed his opinion that the Chief Judge in Bankruptcy, and adjourned the the official assignee should make an application to summons until the 9th for that purpose.

Aldridge (solicitor) asked that under the 141st section of the Consolidation Act 1849, the official assignee might be declared entitled to the damages so recovered. He contended that inasmuch as the bankrupt had not obtained his order of discharge his creditors were entitled to all moneys that might come to him between the date of his adjudication and of his order of discharge.

Warrington (solicitor) on behalf of the bankrupt, contended that, inasmuch as the damages were given in respect of a trespass against the person of the bankrupt, and as the cause of action being personal did not pass to the assignees in bankruptcy, the official assignee was not entitled to the damages the result of the action. He cited in support

Rogers v. *Spence*, 12 M. & W. 571; on app., 12 Cl. & Fin. 701;

Brewer v. *Dew*, 11 M. & W. 625.

It was stated, in answer to the Chief Judge, that the defendant had interpleaded for his own protection.

Head (solicitor) appeared for Mr. Ladd.

The CHIEF JUDGE.—I cannot see how the official assignee can sustain this claim. It appears that if the plaintiff had omitted all claims in respect of damage against his property, the jury might have awarded the same amount for personal damages, as they did, 37*l.* 10*s.* altogether. I cannot give the bankrupt any costs, as he appears to have been in default, his examination having been adjourned *sine die.* *Motion refused.*

Solicitor for the official assignee, *W. W. Aldridge.*

Solicitors for Ladd, *Head* and *Cook.*

Solicitor for the bankrupt, *G. S. Warrington.*

Tuesday, Feb. 8.

Re A DEBTOR'S SUMMONS.

Affidavit Form No. 2 *in schedule to General Orders Jan.* 1, 1870—*Need not be made by creditor himself—Particulars of demand should be served and demand made since Jan.* 1, 1870.

It is not imperative that the affidavit prescribed in Form No. 2 *in the schedule annexed to the General Orders of Jan.* 1, 1870, *should be made by the creditor suing out a debtor-summons under the* 17*th General Order, where the creditor carries on business through an authorised agent. The agent, if properly authorised, can make a sufficient affidavit in support.*

It is necessary that the demand mentioned in the affidavit Form No. 2 *should be made, and the particulars of demand also there mentioned should be served since Jan.* 1, 1870.

This was an *ex parte* application made to the Chief Judge, by leave of the registrar, who had refused to issue a debtor-summons under the 17th General Order of the 1st Jan. 1870, upon the ground that the affidavit tendered in support was insufficient, and also because the applications for payment deposed to in the affidavit were not made since the 1st Jan. 1870, the day when the Bankruptcy Act 1869 came into operation. The affidavit in support of the application was made jointly by the creditor and his son, who was described as foreman and manager to his father, and was substantially in the form No. 2 in the schedule to the General Orders. The two first paragraphs of the affidavit

were deposed to by the creditor and the two last paragraphs by his son; but it appeared from the affidavit that the account in writing of the particulars of demand was delivered in December 1869, and that personal application for payment had also been made in December. The registrar was of opinion that the third paragraph of the affidavit, form No. 2, must be deposed to by the creditor himself, and could not be made by another person, and that application for payment should have been made since 1st Jan. 1870. In answer to this second objection, it appeared that a writ in an action at common law had been served upon the debtor since the 1st Jan. 1870.

The following is the form of affidavit in the schedule:

1. That A. B. is justly and truly indebted to me in the sum of £ , &c., &c.
2. That the said A. B. resides at, &c., and carries on trade, &c.
3. That an account in writing of the particulars of my demand was, on or about the day of , sent by post to the said A. B., and that payment of the same has been on more than one occasion required to be made of the said A. B.
4. That I did on the day of apply (or cause application to be made) to the said A. B. personally for payment of the said debt.

NOTE.—*If the application was made by any other person than the creditor, it must be deposed to by such person.*

Sternberg (solicitor) appeared for the summoning creditor.

The CHIEF JUDGE.—I see nothing in the first objection. The affidavit of the son would be sufficient to obtain a debtor summons if it contained a statement that he was duly authorised to make the demand on behalf and with the authority of his father, and that he had made demand in writing for the debt to be paid to his father. As to the second objection, I think that the demand in writing should have been made since the 1st Jan. 1870, and also that particulars in writing should have also been delivered since that date. I do not think that the service of the writ was a sufficient demand.

Solicitor for applicant, *Sternburg*.

NISI PRIUS.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

COURT OF QUEEN'S BENCH.

Monday, Jan. 17.

(Before BLACKBURN, J.)

HENNEQUIN v. O'DOWD.

In an action to obtain payment of a school bill, evidence of a collateral breach of agreement on the part of the schoolmaster cannot be given by the defendant in order to reduce the amount of the bill, such a collateral breach being the subject of cross-action, and not of set-off.

Francis for plaintiff.

Robinson, Serjt., for defendant.

Action to recover the balance of a school bill for the board, lodging, and education of defendant's son.

While at the plaintiff's school the son of the defendant met with an accident through his own fault. Medical attendance was given him, but the defendant said that it was insufficient in kind. There was a plea upon the record alleging want of care in this respect, and at the trial the defendant offered evidence in support of it.

BLACKBURN, J.—I should think that such a matter would be the subject of cross-action, and not of set-off. It used to be exceedingly doubtful whether you would reduce the price of a carriage or other article as not being sufficiently made to order, but it is quite new to me to hear that where there is a contract with a schoolmaster for the education, &c., of a boy, you can cut off a portion of his bill for any collateral breach of contract. It is trite law that when an attorney brings his bill you cannot set up anything else except that he totally failed in performing the work, and here if they had actually killed the boy it might be otherwise.

Verdict for plaintiff for full amount.

Attorneys for plaintiff, *Few* and *Co.*, 2, Henrietta-street, Covent-garden.

Attorney for defendant, *W.* and *W. A. Waller*, 27, King-street, Cheapside.

COURT OF COMMON PLEAS.

Tuesday, Jan. 25.

(Before KEATING, J.)

MCGREGOR v. HIGH AND ANOTHER.

Fixtures—Conversion of—Measure of damages.

Under a count for conversion of fixtures by severing and removing them, the value of the fixtures in their severed state can only be recovered, and not the value of them, when annexed to the freehold.

This was an action for excessive distress. The declaration also contained a count in trover, but none in trespass.

A landlord distraining for rent in arrear, severed and removed the counter and beer-engine in a beer-house.

It appeared from the evidence that no sale of the articles had been made, and the count for excessive distress could not therefore be supported. A question arose as to the measure of damages recoverable upon the count for conversion. It was proved that the value of the articles when annexed to the freehold was considerably more than their value when detached. The counter was affixed to the freehold by screws, and the beer-engine had pipes connected with it leading down through a floor into casks in the cellar beneath.

The counter had been unscrewed in order to remove it, and the beer-engine had been severed by cutting through the pipes above the floor.

Kemp and *Edwyn Thomas*, for plaintiff.

C. H. Anderson and *Lucas* for defendant.

KEATING, J., to jury.—If you are of opinion that these were not fixtures, then they would be distrainable, and the defendant would be entitled to your verdict; if otherwise, if you think that they were affixed to the freehold, so that they could not be removed without injury and in a state that they could not be restored, then find for the plaintiff. As to the damages, they would be the value of the counter and beer engine in *the severed state*. The plaintiff cannot under the count for conversion recover the value of the things affixed in an *affixed state*, as their value would be estimated between an incoming and an outgoing tenant. But, on the other hand, I do not think he is confined to recovering only what would be the value at a broker's sale as has been suggested: for if the defendant took them without right he is a wrongdoer, and you have a right to estimate them at a fair value.

Verdict for the defendant.

Attorney for plaintiff, *G. O. Rush.*

Attorney for defendant, *W. W. Brown*, 22, Basinghall-street.

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House of Lords.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

June 25, 28 *and July* 3, 1869.

(Before the LORD CHANCELLOR (Hatherley), Lord CHELMSFORD, and Lord COLONSAY.)

RICHARD JOHN FOREMAN (app.) *v.* THE FREE FISHERS AND DREDGERS OF WHITSTABLE (resps.).

Anchorage dues—Consideration to public for—Port—Proof of existence of—Immemorial payment.

The plaintiffs, the owners in fee of the manor of Whitstable, in an action for anchorage dues, claimed in respect of a vessel casting anchor on a certain anchorage-ground situate within the sea below low water mark, adduced evidence that the tolls had been taken from time immemorial; that they kept buoys, beacons, and lights to mark the bounds between the oyster beds and the anchorage ground; that Whitstable, before and since the time of legal memory, had been mentioned in official documents as a port; and that in ancient times there was a place within the manor for the unlading of merchandise.

Held (affirming the judgment of the Exchequer Chamber), that the anchorage dues had a legal origin, the existence of a port being established. However commodious a place may be for vessels, it will not therefore become a port, the establishment of which must be by authority of the Crown; but evidence of traffic in respect of tolls of merchandise being taken, of a place being mentioned as a port in early documents, and of natural configuration favourable to the formation of a port, justify an inference of fact that a port did exist.

And such an inference will be readily drawn where an immemorial payment has been proved, because it is the duty of the courts to find, if possible, a legal origin for a right so long enjoyed.

The case of Gann *v.* Free Fishers of Whitstable, 12 *L. T. Rep. N. S.* 150, *explained and distinguished.*

This was an appeal from a judgment of the Exchequer Chamber, on a special case.

The respondents, the owners in fee of the manor of Whitstable, which includes oyster fisheries, and an anchorage ground, claimed a right to demand a toll of 1*s.* from every ship anchoring upon their anchorage ground.

In support of this claim evidence was adduced that the respondents, and those under whom they enjoy possession, had taken these tolls from time immemorial; that the respondents now keep buoys, beacons, and lights to mark the bounds between their oyster beds and the anchorage-ground; that these buoys, beacons, and lights had been kept up at various times, and at intervals during a long period, but there was no proof of their continued existence from the commencement of the custom to take tolls; that before and since the time of legal memory, Whitstable had been mentioned in official and private documents as a port; that in ancient times there was a place within the manor for the unloading of merchandise; and that the rigtht to take tolls had been expressed to be conveyed to the respondents with the possession of the ground.

The Court of Common Pleas held that the maintenance of the buoys, beacons, and lights, and the advantages which the public derive therefrom, taken in connection with the ownership of the soil of the anchorage ground, were a sufficient consideration to support the legality of the respondents' claim; that the payment of toll having been made from time immemorial, it ought to be referred to a legal origin, if there be anything to support it; that very slight evidence was necessary to support a right which had been uninterruptedly enjoyed from time immemorial, the legality of which the court is almost bound to presume; and that therefore the circumstances of this case were sufficient to make the claim of toll good, according to the rule laid down in the House of Lords in *Gann* v. *The Free Fishers of Whitstable*, 12 L. T. Rep. N. S. 150. See 16 L. T. Rep. N. S. 747. That judgment was affirmed in the Exchequer Chamber (18 L. T. Rep. N. S. 735). This was the subject of the present appeal.

The special case was of great length; the material facts are fully stated in the report of the case in the Common Pleas (16 L. T. Rep. N. S. 747).

Prentice, Q. C. (*F. M. White* with him) for the appellant. The right to the payment of these anchorage tolls can arise, neither from the Crown grant, nor from prescription. The Crown grant must have been subject to the right of the public to free navigation, of which the right of anchorage is an incident. Some consideration in the nature of a benefit to the public and to navigation, must be shown. (See *Gann* v. *Free Fishers of Whitstable*, 12 L. T. Rep. N. S. 150; 11 H. of L. Cas. 192.) Further, the consideration must be for the benefit of those who are charged with these anchorage tolls. A benefit to others would not be sufficient. See per Lord Tenterden in

Brett v. *Beales*, 10 B. & C. 510;
Hill v. *Smith*, 4 Taunt. 520;
Warren v. *Prideaux*, 1 Mod. 104;
James v. *Johnson*, 2 Mod. 143;
Com. Dig. "Toll."

No such consideration has been shown here. The buoys, beacons, &c., were not for the benefit of those anchoring on the ground, but were for the benefit of the respondents, the owners of the fishery, and were intended to mark out the boundaries of, and to protect the oyster-grounds. In *Lord Falmouth* v. *George*, 5 Bing. 286, it was held that the keeping a capstan and rope in a cove, to assist boats in landing, and without which they could not safely land in bad weather, was a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstan or not. In that case the benefit was to those who used or might sometimes be obliged to use the capstan, and who were subject to the toll. But it is not so in the present case. Whitstable was not a port at all, or, if so, it was only as a member of the port of Sandwich. It is not named in the list given by Lord Hale (De Port. Mar. c. 2; Harg. Law Tracts, p. 48), nor in Jeakes's History of the Cinque Ports. They also referred to

Bac. Abr. "Customs;"
Chitty on Prerogative, 145;
Mayor of Colchester v. *Brooke*, 7 Q. B. 339;
Heddy v. *Wheelhouse*, Cro. Eliz. 558;
Vinkinstone v. *Ebden*, Carth. 357;
Mayor, &c., of Nottingham v. *Lambert*, Willes, 111.

Mellish, Q. C., *Denman*, Q. C., and *Raymond* for the respondents.—The consideration which is necessary to support such a claim as the present, according to the decision in *Gann* v. *Free Fishers of Whitstable* (*ubi sup.*) here exists. The evidence shows that there was a grant of the soil of the anchorage ground to the lord of the manor of Whitstable before the time of legal memory, and that this ground was anciently part of a port or haven within the manor. The consideration for the tolls was the surrender by the lord of the manor of the soil, that it might be used for the landing or unlading of goods from vessels by persons frequenting the port, and the maintenance of the buoys and beacons for the purpose of guiding vessels to a safe anchorage. Doubtless the buoys and beacons were also for the protection of the oyster beds, but that

is immaterial. They commented on the cases cited above, and further referred to

Jenkins v. *Harvey*, Gale, 23;
Henley v. *Mayor of Lyme Regis*, 5 Bing. 91; 1 Bing. N. C. 222;
Duke of Somerset v. *Fogwell*, 5 B. & C. 875;
Mayor of Exeter v. *Warren*, 5 Q. B. 773;
Lawrence v. *Hitch*, 18 L. T. Rep. N. S. 483; L. Rep. 3 Q. B, 521;
Bryant v. *Foot*, 18 L. T. Rep. N. S. 578; L. Rep. 3 Q. B. 497;
3 Hallam's Middle Ages, c. 9, pt. 2;
Mayor of Colchester v. *Brooke*, 7 Q. B. 339.

Prentice in reply.

After the arguments of counsel, the House proposed the following question to the judges:—Whether, under the circumstances stated in the special case, a toll is payable in respect of a vessel brought up and anchoring in the same manner as the *Sancho Panza* (the vessel in respect of which the tolls were claimed)?

The judges delivered a unanimous answer that they were satisfied that there was evidence of the existence of a port, and so answered the question in the affirmative.

The Lord CHANCELLOR.—My Lords, I should propose to your Lordships in this case, in conformity with the opinion of Her Majesty's judges (to whose assistance we are much indebted) to affirm the judgment of the Exchequer Chamber, and to dismiss the appeal with costs. The case is reduced to a very narrow compass, owing to the investigation that it has received in the previous stages of the present litigation, and in the appeal of *Gann* v. *The Free Fishers of Whitstable*, 12 L. T. Rep. N. S. 151; 11 H. L. Ca. 192, heard by your Lordships in the year 1864. In the present, as in the previous case, the respondents brought an action for the recovery of the dues at the rate of 1*s.* per vessel in respect of anchorage, the vessel being brought up and anchored at Whitstable. In the former case the demand was supported by proof of payments made to the respondents from the year 1775 downwards in respect of every vessel casting anchor within a part of the manor of Whitstable, of which the plaintiffs there were owners, but they claimed this payment solely as a customary payment for the use of the soil. The House determined that such a claim could not be sustained. Their Lordships, who were then present, were of opinion that such a claim, however ancient the actual receipt may have been, could not be sustained, founded as it was solely on the ownership of the soil. For the right of free passage and the user of the sea as a highway, including the right of anchorage, could not be interfered with either by the Crown, as owner of a manor, or by a subject to whom such ownership has been transferred. It was held, to use the words of the then Lord Chancellor, Lord Westbury, "that some facts must be shown, which either prove, or from it can be inferred, that the soil claimed by the respondents was originally within the precincts of a port or harbour; or that some service of aid to navigation was rendered to the public, in respect of which the alleged grant was made. The other Lords present, including one of your Lordships, concurred in this view; Lord Wensleydale expressing his regret that the case was left bare of evidence as to whether or not the place of anchorage was a port. My noble and learned friend now present (Lord Chelmsford) admitted that every intendment should be made in favour of a payment uninterruptedly received time out of mind, if it was capable presumably of a lawful origin, but added that none had been presented in evidence there. In the case now before us the facts are much more fully disclosed by the special case in which judgment has been given for the respondents. The 6th paragraph of that case states the immemorial receipt of the toll claimed from every vessel casting anchor within the limits of the anchorage-ground in possession of the respondents, whether the anchoring was voluntary or of necessity. Is there, then, also a legal origin disclosed for it in the case, from the statements contained in which we are at liberty to draw inferences of fact? Two suggestions have been made of such legal origin: the one a supply of buoys and beacons by the respondent; the other, the fact of the *locus in quo* being part of a port. The authority of Lord Hale in his treatise (De Port. Mar. c. 6; Harg. Law Tracts, p. 74), as cited in the former and in the present case, is, I think, sufficient to establish the conclusion of law, that if the *locus in quo* is part of a port, a presumably legal origin for the toll is established. The duty of anchorage is stated by him to be "almost incident to every ownership of a port." He adds that this *primâ facie* arises from the property in the soil, but not necessarily, and may be the consequence of the franchise. If, then, we find the soil, which is in the respondents, to be part of a port, the immemorial payment may be referred to the ownership of the franchise, independently of the period at which they may have acquired the ownership of the soil. I pass by the question of the buoys and beacons, and I proceed to consider what evidence it contained in the special case of the existence of a port. It was said that there are no artificial works, but that the natural configuration of the place alone forms the port, if such port can be said to exist. I do not think that this would have any effect as regards the law. However commodious a place may be for vessels, it will not, therefore, become a port, the establishment of which must be by the Crown. But if the Crown do so establish a port with a suitable landing-place, whether the port be naturally or artificially formed, and if vessels avail themselves of that port to cast anchor there, I apprehend a sufficient consideration for the anchorage dues arises. Now it appears by the 23rd and 24th paragraphs of the special case, that in the twenty-first year of the reign of Edward I., Alexander Baliol, then lord of the manor, claimed to have, and the jury found that he and his ancestors, from time whereof memory is not, had, amongst other things, "wreck of the sea and toll with merchandise at Le Craston in the same manor." This toll was not an anchorage toll, but it tends to show that merchandise was at that early period landed within the limits of the manor. In 19 Edw. 2, a commission was issued for making search as to letters from foreign ports supposed to be brought by persons landing between Reculver, Greystone, and Whitstable; and search was directed in all places where ships ply by the coast between the said vills. In the 20 Edw. 2, a proclamation was issued, addressed to the warden of the Cinque Ports, against certain merchants coming with treasonable letters under colour of grants of safe conduct, and he was directed to prohibit such a practice in all the ports aforesaid, and other places where vessels arrive, and to make search in the aforesaid ports and places. A writ was then directed to the commissioners searching along the coast between Reculver, Greystone, and Whitstable, who were not to cease their search on account of any letters of safe conduct. In 9 Eliz. a special commission was issued to inquire into the port of Sandwich, and the creeks belonging to the same. Amongst the creeks of the port, in the certificate of the commission, is mentioned Whitstable as "a small creek having no officer, but only at Margate, and he a searcher's deputy." All, or nearly all, the grants

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of the manor contain a reference to "tolls" in the general words, as well as to wreck of the sea. The payment is found to be immemorial. There is evidence of traffic in respect of tolls of merchandise being taken; there is evidence of the spot being being treated as a creek of the Cinque Ports, the ground itself in its configuration is favourable to the formation of a port, and I conceive that your Lordships are justified in drawing the inference of fact that a port did exist, and therefore that the toll had a legal origin, and that the judgment of the Court of Exchequer Chamber is correct.

Lord CHELMSFORD.—My Lords, in considering this case, it is necessary in the outset to distinguish it from the decision of this House in the case of *Gann* v. *The Free Fishers of Whitstable* (*ubi sup.*). In that case the anchorage toll in question was claimed upon the ground of the defendant's vessel having cast anchor within the limits of the plaintiffs' free fishery in Whitstable Bay. In the plaintiffs' documents of title to the anchorage toll, it was described as "a customary payment usually and of right made to the lord of the manor of Whitstable for or on account of the anchorage of any ship or vessel within the said manor." The jury found that from 1775 downwards the plaintiffs, and those under whom they derived title, had, from time to time, claimed as of right to take, and had taken, the sum of 1*s.* from vessels casting anchor within that portion of the manor on which the defendant's vessel had cast anchor, and that they claimed to take it as a customary payment for such use of the soil. From the receipt of the toll from a period beyond the time of living memory, the jury might have been directed to presume that it had been immemorially taken; but their finding was limited to the actual taking of the toll from the year 1775 down to the time of their verdict. Upon the argument of the appeal however, it was admitted by the appellant that the anchorage toll had been paid to the lords of the manor of Whitstable from time immemorial; and in delivering my opinion to the House (as mentioned by my noble and learned friend on the woolsack) I stated "that every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, supposing itpresumably capable of a lawful origin." But all presumption was excluded in that case by the express statement of the nature of the plaintiffs' claim, which was of an anchorage toll payable to the lord of the manor for the anchorage of any ship or vessel within the manor, and (as the jury found) "as a customary payment for the use of the soil." Now, the right of the public freely to navigate the high seas is a paramount right, to which the right of the Crown in the soil is necessarily subservient; and, therefore, as the right of navigation must include the right of anchoring, the House held that the Crown, or its grantee, could not impose a toll upon this use of their soil without some additional consideration; and upon this state of the facts decided against the claim of the plaintiffs to take the anchorage toll. In the present case, the facts and circumstances are more fully stated, and the title to the anchorage toll is carried back to a very remote period. The right to recover this toll is not placed upon any particular ground, but depends upon all the statements in the special case from which your Lordships are ready to draw any inferences of fact. It is stated in the special case that "the plaintiffs, and those under whom they claim, have, from time immemorial, continually, down to the present time, taken the sum of 1*s.* from every vessel casting anchor within the limits of the anchorage ground now in their possession, whether the anchoring were voluntary or from necessity." Under these circumstances, as suggested by Lord Wensleydale in the case of *Gann* v. *The Free Fishers of Whitstable*, 12 L. T. Rep. N. S. 152, "it will be our duty, if the case admits of it, to find a legal origin for a right so long enjoyed." The right of anchorage is usually, if not universally, incident to the proprietorship of a port. Hale, (De Port. Mar. c. 6; Harg. Law Tracts, p. 74), in describing the several port duties which arise from the *jus dominii* of property or franchise in port, says, "These are of two kinds;" and as to the former, viz., "such as are common and ordinary, and so almost incident to every ownership of a port," he mentions, first, "anchorage, or a prestation, or toll for every anchor cast there, and sometimes though there be no anchor;" and he adds, "This doth in truth properly and *primâ facie* arise from or in respect of the propriety of the soil, and is an evidence of it. But yet it is not so always, but grows due in respect of the franchise." Now if the existence of a port is necessary to render an anchorage toll legal, and as Lord Hale says, "common and ordinary tolls" (of which he states anchorage to be one) "are almost incident to every ownership of a port," ought we not, from the immemorial taking of the anchorage toll of Whitstable, to presume that the lords of the manor had a port there, even if there were no fact in the case to prove the actual existence of one. It is admitted by the learned counsel for the appellant that a port of a certain kind existed at Whitstable from an early period, but that it was merely a port for the lading and unlading of goods and merchandise, which he contended would not give any right to an anchorage toll. The existence of this description of port he considers to be proved by the finding of the jury upon the *quo warranto* against Alexander Baliol in 21 Edw. 1, that amongst the liberties which he had in the manor of Whitstable was "toll with merchandise." But he argued that this was not such a port as would give a right to an anchorage toll. If this is correct, then, as anchorage toll was at this very time, and had for many years before, been paid to the lords of the manor of Whitstable, we must presume a legal origin for the payment arising from the existence of some other port, which would carry the anchorage toll with it as its incident. But I entertain no doubt that the Crown might have created a port for the lading and unlading of goods, for which it would be necessary that the grantee should erect wharves and landing places, and in respect thereof might have granted toll, not only upon goods brought into the port, but also for anchorage upon vessels casting anchor within the port. I find nothing in the authorities to warrant the argument of the learned counsel that the benefit conferred by the owner of the port must be precisely that in respect of which the toll is demanded. On the contrary, it appears from Lord Hale (De Port. Mar. c. 6; Harg. Law Tracts, 73), that, "though A. may have the propriety of a creek, or harbour, or navigable river, yet the king may grant there the liberty of a port to B., and so the interest of property, and the interest of franchise, be several and divided." And he afterwards mentions anchorage as a toll arising from the *jus dominii* or franchise of a port. In this case it is clear that the anchorage toll would not be payable in respect of any benefit which the anchoring vessel derived from the owner of the franchise. It was also argued for the appellant that toll could not be demandable for the use of the port of Whitstable as a place of anchorage, because it was not artificially formed, but was a natural roadstead, and therefore no obligation was laid upon the owner of the port to repair it and keep it accessible, so as to form a consideration as to the anchorage toll. This is only another form of the argument that an anchorage toll can only be due in respect of the specific benefit to

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vessels which the name imports. But that the repair of a port is not the necessary consideration for an anchorage toll appears from what has been already cited from Lord Hale, that the franchise of a port may be in one person, and the ownership of the soil within the limits of the port in another. In truth, the port which is admitted to have existed at Whitstable comes precisely within the definition of a port given by Lord Hale—viz., "a place for the arriving and unlading of ships or vessels," erected by charter of the King or a lawful prescription. And he says (De Port Mar. C. 2; Harg. Law Tracts, p. 46), "A port is *quid aggregatum*, consisting of somewhat that is natural, viz., an access of the sea, whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade; something that is artificial, as quays and wharfs, and cranes and warehouses, and houses of common receipt; and something that is civil, viz., privileges and franchises, viz., *jus applicandi, jus mercati*, and divers other additaments given to it by civil authority." That both a toll upon merchandise, and also an anchorage toll, were taken by the lords of the manor of Whitstable, is clear when we come to modern times. In the deeds of conveyance of the Fishery, and also in the Act for Incorporating the Free Fishers, the payment and dues for the anchorage of any ships or vessels (in the Act the words are, "for or on account of any ship or vessel") are distinguished from the payments or dues for the landing of any goods or merchandise, showing that these two descriptions of toll belonged, separately and distinctly, to the lord of the manor. With respect to the anchorage toll, it was observed that the deputation of Lord Bolingbroke to his water bailiff in 1775 was to receive 1*s.* tonnage for every vessel under 100 tons, and after that rate for every vessel of a larger burden, which is inconsistent with the claim now made of 1*s.* for every vessel. But it must be remembered that this is an authority to collect a toll which has been paid from time immemorial. And if there was any mistake in the description of the toll to be demanded, it is an admitted fact that the sum of 1*s.* from every vessel was always the amount received. The whole case really turns upon the fact stated in the special case, "that the plaintiffs and those under whom they claim have from time immemorial, continually, down to the present time, taken the sum of 1*s.* from every vessel casting anchor within the limits of the anchorage ground now in their possession, whether the anchoring were voluntary or from necessity." Unless anything appears to the contrary, we are bound to presume that this immemorial payment had a lawful commencement. There is nothing in this case of *Gann* v. *The Free Fishers of Whitstable* (*ubi sup.*) to compel us to assign a different foundation for the anchorage toll than the existence of a port in respect of which the toll was demanded and paid. If the documents do not prove the existence of a port, they are at least not inconsistent with one, and even without the liberty given to the judges in the Exchequer Chamber to draw any inference of fact from the statements in the special case, I think, from the immemorial payment of the anchorage toll, they were bound to presume that the lords of the manor of Whitstable were the owners of a port to which such a toll would be lawfully incident. I am of opinion that the judgment of the Court of Exchequer ought to be affirmed.

Lord COLONSAY.—My Lords, I entirely concur in the judgment proposed by my noble and learned friend on the woolsack. I do not consider that the present judgment at all differs from that which was given in the case of *Gann* v. *The Free Fishers of Whitstable*; the claim in that case was put upon a totally different ground.

Judgment affirmed.

Attorneys for the plaintiff in error, *Mercer* and *Mercer*, for *Towne*, Margate.

Attorneys for defendants in error, *Nethersole* and *Speechley*.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Thursday, Dec. 2, 1869.

(Before Lord Justice GIFFARD.)

Re BARNED'S BANKING COMPANY (LIMITED); COUPLAND'S CLAIM.

Company—Winding-up—Creditor holding collateral security—Proof of claim—Letter of credit—Construction.

Messrs. C. drew two sets of bills of exchange on the B. Company under the authority of two letters of credit of that company, against two cargoes of cotton. The first letter of credit stated that the bills, drawn in pursuance of it, were to be accompanied by corresponding bills of lading for cotton to be given up to the B. Company on their acceptance of the bills of exchange. The other letter of credit was in a similar form. The first set of bills were accepted, but not paid by the B. Company, and the second set were not accepted, as the B. Company had stopped payment before those bills were presented for acceptance. A claim was made by Messrs. C. in the winding-up of the B. Company to prove for the whole amount of the bills (which had been taken up by Messrs. C.) without deducting the proceeds of the cotton, which had been sold, and the price received by Messrs. C.

Held (affirming the decision of the Master of the Rolls, though on different grounds), that on the true construction of the letter of credit, the B. Company were only liable for the difference between the amount of the bills and the sum realised by the sale of the cotton.

Distinction between the case and Kellock's case, 18 *L. T Rep. N. S.* 671; *L. Rep.* 3 *Ch. App.* 769.

This was an appeal by Messrs. Coupland from a decision of the Master of the Rolls, which is reported 21 L. T. Rep. N. S. p. 286. The facts are there so fully stated that it is only necessary now to mention that Messrs. Coupland were creditors of Barned's Banking Company, in respect of certain bills of exchange drawn by them upon the company under the authority of two letters of credit issued by the company. The first letter of credit stated that the bills to be drawn in pursuance of it were to be accompanied by corresponding bills of lading of cotton to be given up to the company on their acceptance of their bills of exchange. The other letter of credit was in an equivalent form. Neither of the sets of bills having been paid by the company the question was whether Messrs. Coupland were entitled to prove against the estate of the company for the full amount of the bills, or only for the difference between that amount and the sum realised by the sale of the cotton. The latter sum had been received by Messrs. Coupland. The Master of the Rolls decided that Messrs. Coupland were only entitled to prove for the difference, and from this decision Messrs. Coupland appealed.

Jessel, Q. C. and *Westlake* on behalf of the appellants.—It is said on the other side that the bills of lading were only for the security of Barned's Banking Company, because they were to have the custody of them. But we say that the bills of exchange

being drawn against the cotton, the cotton was to be a security to Messrs. Coupland as well as to the company. [GIFFARD, L.J.—How is that consistent with the provision as to six months' sight contained in the letter of credit?] That was only to give time for the cotton to be realised. As between the persons for whom the cotton was purchased of Messrs. Coupland, the cotton was a security for the bills. [GIFFARD, L.J.—Does it not come to this, that Barned's Banking Company would have a right to an indemnity out of the proceeds of the cotton?] Only in this sense, that the bills were secured by the cotton. Messrs. Coupland were to have the security of the cotton and of the guarantee of Barned's Banking Company. [GIFFARD, L.J.—The fact is Barned's Banking Company were bound to apply the proceeds of the cotton in payment of the bills. It is not *Kellock's case* (18 L. T. Rep. N. S. 671; L. Rep. 3 Ch. App. 769) at all.] That was not the view taken in the court below. Except inferentially, there is no agreement that Barned's Banking Company shall be indemnified by means of the proceeds of the cotton. The case is like an agreement to guarantee the payment of a debt only if it is also secured by a mortgage to a trustee to be named by the guarantor. The mortgagee would then be entitled to payment and to the benefit of the security. The surety's right to the mortgage securities does not arise until he has paid the bills.

Without calling upon Sir *R. Baggallay*, Q. C. and *Kekewich*, who appeared for the official liquidators,

Lord Justice GIFFARD said that this was a very clear case. It was not *Kellock's* case at all. *Kellock's* case was one in which the company in liquidation had no interest in the security except in the character of mortgagors. But here, in truth, the company were mortgagees. To take, for instance, the case of the transaction with Messrs. Daunt, the company gave the letters of credit under the authority of which the bills were to be drawn, but when drawn they were to be accompanied by corresponding bills of lading of cotton, which were to be given up to the company on their acceptance of the bills. Clearly the company were only liable for the difference between the proceeds of the cotton and the amount of the bills. The letter of credit in *Wilson's* case was substantially the same. The company being thus entitled to an indemnity out of the proceeds of the cotton, *Kellock's* case had no application, and the appeal motion must be refussed with costs.

Solicitors for the appellants, *Elmslie, Forsyth*, and *Sedgwick*.

Solicitors for the official liquidators, *Freshfields*.

Dec. 11 *and* 18, 1869.

(Before Lord Justice GIFFARD.)

Re SPENCER.

Solicitor—Negligence—Liability—Money standing in court—Petition for payment out to a wrong person—Order made accordingly—Alleged mistake in the title of the account—Petition of re-hearing—Solicitor ordered to refund—Costs.

If a person, without any fraudulent intent, either makes or adopts a representation, which, if he had exercised reasonable care, he must have known to be untrue, and upon the footing of the truth of that representation an order is made by the court for payment of a sum of money to a person who is not really entitled to it, the person so making or adopting the untrue representation, is bound to make to the party injured by the making of the wrong order, a full indemnity, including the full costs of all proceedings necessary to correct the error.

A sum of money was paid into court under the Trustee Relief Act to an account entitled, "In the matter of the trusts of the will of M. S. deceased." This payment was made by the trustees of her will. Part of the sum so paid in was afterwards paid out to the persons entitled, and the residue remained in court to await the attainment of twenty-one by D., who, if he had attained twenty-one, would have been absolutely entitled to that residue. If he did not attain twenty-one, his surviving brother and sisters would then become entitled to that residue. D. died under twenty-one, and it was then found that the fund in court had already been paid out of court to persons who had no right to it. The persons to whom the fund was thus wrongly paid claimed to be entitled thereto in consequence of the death of a person also named M. S., a lunatic, who was a different person from M. S. (the testatrix). The wrong order was made upon a petition presented in the matter of the lunacy of M. S. (the lunatic). There were standing in court a fund to the credit of the lunacy of M. S. (the lunatic), and a fund to the credit of the estate of S. S., a sister of M. S. (the lunatic.)

The estate of S. S. was being administered in the Court of Chancery, and under her will M. S. (the lunatic) was entitled for her life to the residue of the estate, subject to which life estate the residue went to H. Before the death of M. S. (the lunatic), an application was made on behalf of the committee of her estate at the office of the Accountant-General for certificates of the different funds in court in which she was interested, and by mistake a certificate of the fund which stood to the credit of the trusts of the will of M. S. (the testatrix) was handed out with the other certificates to the solicitor who made the application. The result of this mistake was that the fund which stood to the credit of the trusts of the will of M. S. (the testatrix) was included in the account of the property of M. S. (the lunatic) which was filed at the Lunacy Office by the committee. Between the delivering out of the certificates and the passing of the account the commissioner changed his solicitor. M. S. (the lunatic) having died, another application was made at the Accountant-General's office by the new solicitor of the committee for certificates of the property in which she was interested, and the former mistake was repeated. The result of this was that a petition to the Lords Justices was presented by the solicitor of the committee on his behalf, and on behalf of the administrator and heir-at-law of M. S. (the lunatic), which was served only on H., and which alleged that the fund which stood to the credit of the trusts of M. S. (the testatrix) had been placed to that account by mistake, and that the fund really formed part of the residue of the estate of S. S., the sister of M. S. (the lunatic). Upon their petition an order was made by the Lords Justices for payment of the capital of that fund to H., and for carrying over some cash which had arisen from dividend upon it, in the matter of the lunacy of M. S. (the lunatic). Upon the subsequent discovery of the mistake a petition of rehearing was presented by the persons who were really entitled to the fund:

Held, that the committee, the administrator, and heir-at-law, H., the solicitors who presented the petition, and the solicitor who represented H. upon the hearing of the petition, as well as their London agents, were jointly and severally liable to make good to the persons really entitled the sums thus paid to the wrong persons, with interest thereon, and with costs, charges, and expenses as between solicitor and client.

The solicitor who presented the petition which contained an allegation that the fund had been carried to a wrong account, was bound to make every reasonable inquiry before inserting such an allegation, and if he had made proper inquiry he must have discovered that the

fund was paid into court upon an affidavit under the Trustee Relief Act; and if he had looked into that affidavit he would have found that no mistake had been made in the title of the account. For his negligence in not making these inquires, the court held him liable in the manner already mentioned.

The court held that the solicitors who acted for the respondent to the petition were equally liable for their negligence in accepting the truth of such an allegation without making any inquiry.

This was a petition for the re-hearing of a petition in lunacy, in the matter of Mary Spencer, a lunatic, upon which an order was made on 31st May, 1867, by the then Lords Justices (Sir G. J. Turner and Lord Cairns). At that time, Mary Spencer (the lunatic) had recently died, and the order which was made on the petition (*inter alia*) directed that a sum of 331*l.* 15*s.* 1*d.* Consols, standing in court, should be transferred to a Mr. Daniel Halestrap, the sole respondent to the petition, and that a sum of 38*l.* 18*s.* 6*d.* cash, also in court, which had arisen from dividends upon the Consols, should be carried over to the credit of the lunacy of Mary Spencer (the lunatic). It was afterwards discovered that neither Daniel Halestrap nor Mary Spencer (the lunatic) had any interest whatever in the sums thus dealt with, and the object of the petition of rehearing, which was presented by the persons who were really entitled, was to obtain the refunding of the moneys thus wrongly parted with.

The sum of 331*l.* 15*s.* 1*d.* formed part of a larger sum which was before the year 1865 transferred into court under the Trustee Relief Act, by the trustees of the will of Mary Spencer, deceased, who was a different person from Mary Spencer (the lunatic), and it stood to the credit of an account entitled "In the matter of the trusts of the will of Mary Spencer, deceased." Under her will Richard John Dodwell, an infant, would, if he had attained twenty-one, have become absolutely entitled to this fund, which remained in court until it should be ascertained whether he lived to that age or not. He died on the 4th July 1867, under twenty-one, and thereupon his surviving brother and sisters became entitled to the fund. With the view of getting possession of it, application was made on their behalf at the office of the Accountant-General, and it was then discovered that the account had been closed in his books, and that the fund had been paid away in the way already mentioned.

The mistake arose under the following circumstances: Mary Spencer (the lunatic) possessed property of her own, part of which was in court to the credit of the lunacy. She had a sister, named Sarah Spencer, who had also been a lunatic. She had died, and under her will Mary Spencer (the lunatic) was entitled for her life to the income of her residuary estate, which estate, after her death, was to go to Daniel Halestrap. The estate of Sarah Spencer was being administered in the Court of Chancery, in a suit entitled *Re Sarah Spencer's Estate; Spencer* v. *Halestrap*, and in that suit certain funds were paid into court. The committee of the estate of Mary Spencer (the lunatic) was Matthew Quinton Fleming. He being, in Jan. 1865, about to carry into the office of the Master in Lunacy his accounts of the estate of the lunatic, his solicitors, for the purpose of completing the accounts, applied at the office of the Accountant-General for certificates of the funds then in court in which Mary Spencer (the lunatic) was entitled. The then solicitors of Mr. Fleming were Messrs. George Gayton and Thomas Mott, of Much Hadham, in Hertfordshire; their London agents being Messrs. Hawkins, Bloxam, and Co.

The application at the Accountant-General's office was made by a clerk of Hawkins, Bloxam, and Co., and among the certificates given out to him was one of the above sum of 331*l.* 15*s.* 1*d.* Consols, which stood to the credit of the account, "In the matter of the trusts of the will of Mary Spencer, deceased." This certificate was with the others sent by the London agents to Messrs. Gayton and Mott, and it appears to have been assumed that the sum of Consols really formed part of the estate of Sarah Spencer (the lunatic), and that the name "Mary" in the title of the account had been by a mistake in the Accountant-General's office inserted instead of "Sarah." At any rate, the sum of 331*l.* 15*s.* 1*d.* was inserted in the draft account of the committee as being property in which Mary Spencer (the lunatic) had an interest, as she would have had if the fund had belonged to her sister Sarah Spencer. About this time, or a few months afterwards, Mr. Fleming changed his solicitors, and appointed as his solicitor in the matter of the lunacy Mr. George William Crook, a London solicitor. The committee's accounts had not been examined by Mr. Fleming before this change of solicitors, but soon afterwards he did examine them, and they were then sworn to by him and filed in the office of the Master in Lunacy, and as sworn to they included the above sum of 331*l.* 15*s.* 1*d.* Consols, as being a fund in which Mary Spencer (the lunatic) was interested, and stated that that sum was part of the residue of the estate of Sarah Spencer. Mary Spencer (the lunatic) died in 1866, and on the 8th Feb. 1867, the petition, which it was now sought to have reheard, so far as it dealt with the 331*l.* 15*s.* 1*d.* and 38*l.* 18*s.* 6*d.* cash, was presented to the Lords Justices in Lunacy. That petition was presented by Mr. Crook, as the solicitor of Mr. Fleming, the committee, and of Mr. William Ingold, the administrator and heir-at-law of Mary Spencer (the lunatic), they being the petitioners. The only person served with the petition was Daniel Halestrap. Mr. John Mott Richardson acted as his solicitor in the matter, and employed as his London agents Messrs. Charles Thomas Jenkinson and Arthur Cooper Jenkinson. This petition contained an allegation that the sum of 331*l.* 15*s.* 1*d.* Consols, and the sum of 38*l.* 18*s.* 6*d.*, which then respectively stood in court to the credit of the account entitled "In the matter of the trusts of the will of Mary Spencer, deceased," had been by mistake placed to that account, and that they really formed part of the residue of the estate of Sarah Spencer, the sister of the lunatic. The petition prayed (*inter alia*) that the sum of 38*l.* 18*s.* 6*d.* cash might be carried over to the credit of the lunacy of Mary Spencer (the lunatic), and that the 331*l.* 15*s.* 1*d.* Consols, and any dividends to accrue thereon, might be respectively transferred and paid to Daniel Halestrap, as being entitled thereto under Sarah Spencer's will. On the 31st May 1867 an order according to this prayer was made by the Lords Justices, and the cash and Consols were soon afterwards carried over and transferred accordingly, and a dividend of 4*l.* 17*s.* 10*d.*, which accrued due on the Consols before the actual transfer, was also paid to Daniel Halestrap.

The petition of rehearing was entered in the following manner:—

In Lunacy.—In the matter of Mary Spencer, late a person of unsound mind (deceased).
In the matter of Sarah Spencer (deceased), a person of unsound mind.
In Chancery.—In the matter of the estate of the said Sarah Spencer (deceased).
Between the said Mary Spencer (since deceased) and others, plaintiffs, and Daniel Halestrap, defendant.
In the matter of the Trustee Relief Act.
And in the matter of the trusts of the will of Mary Spencer (deceased).
And in the matter of George Williams Crook, Charles Thomas Jenkinson, Arthur Cooper Jenkinson, John Mott Richardson, William Benjamin Paterson, Robert Power, George Gayton, and Thomas Mott, solicitors of the court.

Messrs. Paterson and Power had been members of the firm of Hawkins, Bloxam, and Co. when the certificate of the 331*l.* 15*s.* 1*d.* Consols was delivered out in January 1865, from the Accountant-General's office to the clerk of that firm. The other three members of that firm had since left it, and were no longer on the roll of solicitors of the court.

The petition of rehearing was served on Mr. Fleming, Mr. Ingold, and Mr. Halestrap; on a Mr. Monck, whose interest was the same as that of the petitioners; on the representatives of the trustees of the will of Mary Spencer (the testatrix); and on all the solicitors named in the title of the petition.

The petition charged that all those solicitors had been guilty of gross and culpable negligence, and it prayed that the petition presented on the 8th Feb. 1867 might be reheard, and that the order of the 8th May 1867 might be reversed, or varied so far as it dealt with the sum of 88*l.* 18*s.* 6*d.* cash, and the sum of 331*l.* 15*s.* 1*d.* Consols, and the dividends thereon; and that the respondents, except Monck and the representatives of the trustees of Mary Spencer (the testatrix), might be declared jointly and severally liable to replace the Consols, and to repay the cash and dividends, with interest thereon, and to pay the costs, charges, and expenses of the petitioners properly incurred in the matter as between solicitor and client.

By the evidence of Mr. Crook it appeared that before he presented the petition in Feb. 1867, he went to the office of the Accountant-General for certificates of the funds then standing in court in which Mary Spencer (the lunatic) had an interest, and that the mistake originally made in 1865 was repeated, a certificate of the 331*l.* 15*s.* 1*d.* Consols standing to the account entitled "In the matter of the trusts of the will of Mary Spencer, deceased," was given to him with others.

Mr. Crook deposed that he asked for an explanation of this certificate, and that he was told by one of the clerks in the Accountant-General's office that their attention had already been called to the matter, and that the fund had been wrongly entered; and Mr. Crook went on to say that the clerk wrote in pencil on the certificate the words "should be Sarah." With reference to this point, however, Mr. Hart, one of the solicitors of the persons who presented the petition of rehearing, deposed that he had made inquiries at the Accountant-General's office, and that he had been informed there that the pencil note upon the certificate was not in the handwriting of any of the clerks belonging to the office.

Charles Hall and *M. Ingle Joyce* for the petitioners.

Wickens, for Messrs. Paterson, Power, Gayton, and Mott.

Bagshawe, for Messrs. Fleming and Ingold, and for Mr. Crook.

Lindley, for Mr. Halestrap and for Messrs. Jenkinson, and Mr. Richardson.

W. Pearson, for the representatives of the trustees of Mary Spencer, the testatrix.

The counsel for the respondents all admitted that the petitioners must have their money refunded, and that they were entitled to an indemnity against costs. The arguments were directed to the question who must be taken to be responsible for the error which had been committed.

Without calling for a reply,

Lord Justice GIFFARD said, that though the case was one of a kind which rarely occurred, there was no difficulty in saying what ought to be done. There was no question that the present petitioners were entitled to this money, and there could be no question that a very wrong order was made on the former petition. There was no imputation of fraud upon any one, but the mistake which was committed arose from very gross negligence. The evidence showed that the commissioner's accounts were not examined by Mr. Fleming till near the time when change of solicitors took place, and, therefore, what took place before that change could not be said to have been the proximate cause, the *causa causans*, of the wrong order ultimately made, and consequently Messrs. Paterson, Power, Gayton, and Mott would not have to pay any costs, though they could not receive any. With regard to all the other solicitors who were respondents on the present occasion, and with regard to Messrs. Fleming, Ingold, and Halestrap, the principle which ought to be acted upon in every case of this description was this—if a person chooses either to make or to adopt a representation which he ought to have known to be untrue, and must have known to be untrue if he had exercised reasonable care, and upon the footing of the truth of that representation obtained a wrong order from the court, he was bound fully to indemnify the persons injured by that order from all the consequences. Now in the present case Mr. Crook presented a petition which contained a distinct allegation that the 331*l.* 15*s.* 1*d.* and the cash, which stood in court to the account of the trusts of the will of Mary Spencer, deceased, had been carried to that account by mistake, as it really formed part of the residue of the estate of Sarah Spencer, and upon the footing of the truth of that allegation the cash was carried over to the credit of the lunacy of Mary Spencer (the lunatic) and Mr. Crook's client got the benefit of it. Now that fund must have been originally paid into court either under an order of the court, or upon an affidavit under the Trustee Relief Act. Anyone who had made proper inquiry at the Accountant-General's office, would have found that the fund was in fact paid into court upon an affidavit under the Trustee Relief Act, and if he had looked at that affidavit he would have seen under what circumstances the money was paid into court, and that no mistake had been made in the title of the account. There this untrue representation was, without any inquiry, adopted by the solicitors of Mr. Halestrap, and on the footing of its being true, the Consols were transferred to Mr. Halestrap; consequently he and his solicitors were bound to indemnify the present petitioners; therefore there would be no order against Mr. Wickens' clients, and the petitioners must pay the costs of the representatives of the trustees of Mary Spencer (the testatrix), but would be entitled to have them over from the other respondents. Then there would be a declaration made that Messrs. Fleming, Ingold, and Halestrap, and all the other solicitors who were bound as respondents were jointly and severally liable to make good to the petitioners the funds which had been wrongly parted with, with interest thereon; and were also jointly and severally liable to pay the costs, charges, and expenses of the petitioners as between solicitor and client. An order would be made for payment by the persons who were respectively primarily liable, Mr. Crook being primarily liable to pay the costs, charges, and expenses, Mr. Ingold to repay the cash, and Mr. Halestrap to replace the Consols and the dividends thereon. Liberty would be reserved to the other persons to apply to the court, in case the persons who were primarily liable, failed to discharge their obligations. There would be of course a taxation of costs, and a month from the date of the taxing master's certificate might be allowed to Mr. Crook for

payment, and Mr. Halestrap might also be allowed a month for the purpose of replacing the Consols.

Solicitors for the petitioners, *Chilton, Burton, Yeates*, and *Hart*.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Tuesday, Jan. 11.

HEALEY v. THE CHICHESTER AND MIDHURST RAILWAY COMPANY.

Judgment-creditor of railway company—Execution against shareholder whose shares are not fully paid-up—Form of order—8 & 9 Vict. c. 16, s. 36.

On a motion under the 36th section of the Companies Clauses Consolidation Act by an unpaid vendor, who had obtained judgment against the company, for leave to issue execution against a shareholder of the company whose shares were not fully paid-up:

Held, that execution should issue against the shareholder on a certain day unless he showed cause on or before that day why execution should not issue.

The plaintiff had filed a bill for specific performance against the company, and on further consideration the defendants had been ordered to pay the plaintiff the sum of 23,500*l.* together with interest and the costs of the suit. The plaintiff issued a writ of *fi. fa.*, and by the sheriff's return the total amount of goods of the defendants in his bailiwick appeared not to exceed the sum of 86*l.* 3*s.* 6*d.* after payment of expenses. The plaintiff then issued a writ of *elegit*, and recovered lands of the yearly value of 27*l.* 8*s.* 9*d.*

The plaintiff now moved under the 36th section of the Companies Clauses Consolidation Act for leave to issue execution against the London, Brighton, and South Coast Railway Company, who were shareholders to a large extent in the defendant company, to the extent of what remained unpaid on their shares.

The 36th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) is in the following words:

If any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereupon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid-up: Provided always that no such execution shall issue against any shareholder except upon an order of the court in which the action suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee.

Eddis, Q. C. and *Jason Smith*, in support of the motion, cited

Ex parte The Warkworth Dock Company, Re Phillips, 18 Beav. 629;

The Ilfracombe Railway Company v. *Lord Poltimore*, 18 L. T. Rep. N. S. 85; L. Rep. 3 C. P. 288.

Fry, Q. C., for the London, Brighton and South Coast Railway Company, contended that they were entitled to the same rights as at law; the common law courts always required a *scire facias* to be issued, and they were entitled to something of the same kind in equity, something in the nature of a trial before an order was made. He cited

Hitchins v. *The Kilkenny and Great Southern and Western Railway Company; Re Emery*, 10 C. B. 160.

Lord ROMILLY.—I will give the Brighton Company till the second seal after term to show cause why execution should not be issued. The order will be that the plaintiff have leave to issue execution against the Brighton Company to the extent of the balance remaining unpaid upon their shares, unless they show cause on or before the second seal after term why such execution should not issue. The costs of the motion will abide the event.

Solicitor for the plaintiff, *E. Fuller*.

Solicitors for the Brighton Railway Company, *Baxter, Rose, Norton*, and *Co.*

Jan. 15 *and* 17.

Re THE NORWEGIAN CHARCOAL IRON COMPANY. MITCHELL'S CASE.

Winding-up—Contributory—Transfer to infant to escape liability—Secret trust.

In August 1865, *M., the registered holder of shares in a company, transferred them for a nominal consideration to V., an infant, for the purpose of escaping liabilities in respect of the shares, and V. accepted the transfer on the understanding that the shares would soon be removed out of his name.*

About a year afterwards V. attained twenty-one, but he took no steps to repudiate the shares, which in June 1868 *were forfeited for nonpayment of calls. In July* 1868 *the company was ordered to be wound-up, and V.'s name was placed on the list of contributories.*

On summonses by V. and the official liquidator to have the executors of M. (who had died in the mean time) settled on the list instead of V:

Held, that V., having for two years after he attained twenty-one taken no steps to repudiate the shares, could not now be relieved from them, whatever right of indemnity he might have against M.'s estate; and that the company having accepted V. as a shareholder, could not now claim to have M.'s executors as contributories.

Adjourned summonses.

The Norwegian Charcoal Iron Company was registered as a limited company in 1862.

On the 16th Aug. 1865, James Mitchell, being the registered holder of 100 partly paid-up shares in the company, and wishing to get rid of part of his liabilities in respect of the shares, transferred eighty of them for a nominal consideration into the name of one Frederick H. Vandyke, who was at that time an infant, and a clerk in the office of Mitchell's brokers.

Vandyke deposed that the shares were transferred into his name for the purpose of enabling Mitchell to escape part of his liability, and that he had accepted the transfer only on the understanding that the shares would soon be taken out of his name.

Mitchell died on the 29th May 1866, and in the following September Vandyke attained his majority, but he took no steps to repudiate the shares; he, however, applied to Mitchell's executors for some compensation for the risk he ran by having the shares in his name, and received a small sum from them.

Frequent applications were made to Vandyke for payment of calls, but he took no notice of them, and the shares standing in his name were, on the 22nd June 1866, forfeited for nonpayment of calls.

In July 1868, the company was ordered to be wound-up, and Vandyke's name was placed on the list of contributories.

A list of contributories liable as past members was now being prepared, and two summonses were taken out, one by Vandyke, and the other by the

official liquidator, for the purpose of having Mitchell's executors settled on the list in respect of the 80 shares instead of Vandyke's. The summonses were adjourned into court.

Sir *Richard Baggallay*, Q. C., and *Ferrers*, in support of the summons, contended that Vandyke never having ratified the contract since he attained his majority, could now repudiate it, and that the transfer having been made on a secret trust, and with the express purpose of escaping liability, could not stand. They cited

Re The Mexican and South American Mining Company, Costello's case, 3 L. T. Rep. N. S. 421; 2 De G. F. & J. 302;

Re Cameron's Coalbrook Company, Hunt's case, 8 L. T. Rep. N. S. 377; 32 Beav. 387.

Jessel, Q. C. and *Oswald*, for Mitchell's executors, contended that Vandyke could not now repudiate the shares, as more than two years had elapsed since he had attained his majority. They cited

Re The Blakeley Ordnance Company, Lumsden's case, 19 L. T. Rep. N. S. 437; L. Rep. 4 Ch. 31;

The Dublin and Wicklow Railway Company v. *Black*, 8 Ex. 821;

Re Constantinople and Alexandria Hotels Company, Ebbett's case, 20 L. T. Rep. N. S. 574.

Sir *Richard Baggallay* was heard in reply.

Jan. 17.—Lord ROMILLY.—I am of opinion that the contention of the official liquidator fails in this case. The company accepted Vandyke as a shareholder, though they knew or might have known, that he was an infant at the date of the transfer. Vandyke having attained twenty-one, nearly two years before the commencement of the winding-up and having done nothing in the mean time to repudiate the shares, cannot now be removed from the list of contributories on the ground that he was an infant at the date of the transfer. Mitchell was perfectly at liberty to transfer his shares into the name of a trustee for himself, and the company having accepted the trustee as a shareholder, cannot now claim to have the *cestui que trust* as a contributory. Vandyke as trustee stands in two sets of relations, one as between himself and his *cestui que trust*, and another as between himself and the company. As between himself and Mitchell, the estate of the latter is no doubt liable to indemnify him against calls, but as between himself and the company he is personally liable. The result is that I must keep him on the list of contributories. Both summonses must therefore be dismissed, but all parties will have their costs out of the estate.

Solicitors for the summonses, *Hollingsworth, Tyerman*, and *Green*.

Solicitors for Mitchell's executors, *Johnson* and *Weatheralls*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Dec. 2, 3, 4, 10, *and* 11, 1869, *and Jan.* 31, 1870.

Re THE BANK OF HINDUSTAN, CHINA AND JAPAN; MITCHELL AND ASPINALL'S CASE.

Bankruptcy—Contributory—Deed of inspectorship—Future calls—Order for payment of—Process to enforce—Bankruptcy Act 1861, *ss.* 197, 198.

The Court of Bankruptcy has the exclusive right of deciding how far a deed of inspectorship is a protection to a debtor against his creditors.

Where, therefore, after the order for winding-up a company certain contributories executed a registered deed of inspectorship, and the liquidators applied to the court for an order for payment of calls found to be due subsequently to the execution of the deed;

Held, that the order must be made, and that the liquidators would then have to apply to the Court of Bankruptcy for leave to issue process according to the course of the court of equity.

This was a summons by the liquidators of the above banking company now in the course of liquidation, for an order for payment of certain calls from Messrs. Mitchell and Aspinall, who were on the list of contributories.

The question in dispute turned upon the jurisdiction of the courts of equity and bankruptcy in deeds of inspectorship.

The facts were shortly these:—

Messrs. Mitchell and Aspinall, who were in partnership, held fifty shares in the Bank of Hindustan, China, and Japan. In Dec. 1866, the bank was ordered to be wound-up under the supervision of the court. On the 4th June 1867, Messrs. Mitchell and Aspinall executed a deed of inspectorship, whereby after undertaking to get in and convert all their joint and separate estate for the benefit of all persons, companies and partnership firms who were, or who would be, entitled to prove under an adjudication in bankruptcy against the said debtors had such been made, they gave up all their said estate to the inspectors of the deed for the benefit of their creditors.

The separate estate of Mitchell amounted to 992*l.*, and that of Aspinall to 103*l.* There were no separate debts owing by either of them at the time of the execution of the deed.

The deed, although not in the precise form given in schedule D of the Bankruptcy Act 1861, was duly registered under the provisions of that Act. The names of the liquidators of the bank were inserted in the schedule of the deed as creditors, for some arrears due at the date of the execution of the deed, but not for any amount in respect of future calls.

In July 1868 there was a call made upon Messrs. Mitchell and Aspinall, and on the 9th Dec. 1868 a second call. Neither of these calls were paid. In Dec. 1868 the inspectors of the deed issued the usual advertisements, calling upon all persons having claims against the joint and separate estate of Messrs. Mitchell and Aspinall to come in and prove for the amount before the 21st Dec. 1868; and the liquidators having made no claim up to that time, the separate estates were carried over to the credit of the joint estate, and in the month of January following a dividend was declared on the joint estate.

In July 1869 the liquidators made a third call, and they then took out a summons in chambers for enforcing payment of the three calls, amounting together to 517*l.* 13*s.* 4*d.*

This summons was now adjourned into court at the instance of Messrs. Mitchell and Aspinall.

Karslake, Q. C., and *Willis* for the contributories, contended that the court had no jurisdiction to deal with the question; it was exclusively one for the Court of Bankruptcy.

Bell v. *Bird*, L. Rep. 6 Eq. 635; 18 L. T. Rep. N. S. 99;

Riches v. *Owen*, L. Rep. 3 Ch. App. 821;

Martin v. *Powning*, L. Rep. 4 Ch. App. 356; 20 L. T. Rep. N. S. 133.

The deed was properly registered under the 192nd section of the Bankruptcy Act 1861, and acted as a protection to the contributories against the claim of the liquidators. The liquidators ought to have proved in bankruptcy for the estimated amount of the calls at the time of the execution of the deed. All future calls could have been taken into account under it. The 75th section of the Companies' Act

1862 enacted that the liability of a person to contribute to the assets of a company under the list, in the event of the same being wound-up, was deemed to create a debt accruing from such person at the time when his liability commenced, but payable at the time or respective times when calls were made for enforcing such liability. And the section concluded by stating that it should be "lawful," in the case of the bankruptcy of any contributory, to prove against his estate the estimated value of his liability to future calls as well as calls already made. The rule equally applied to all cases of deeds within the Bankruptcy Act of 1861, for by the 197th section of that Act it was provided that the Court of Bankruptcy should determine all questions arising under such deeds, according to the law and pract e in bankruptcy, so far as they might be applicable, and that the court should have power to make all such orders as it would be authorised to do if the debtor in such deeds had been adjudged bankrupt, and his estate was being administered in bankruptcy. The deed, therefore, being within the jurisdiction of the Court of Bankruptcy, there could be no proceedings against the contributories without the leave of that court, for by the 198th section of the Bankruptcy Act 1861 it was provided that after notice of the filing and registration of such deeds had been given, no execution, sequestration, or other proceeding against the debtor's property in respect of any debt, "and no proceedings against his person" in respect of any debt other than such process by writ or warrant as might be had against a debtor about to depart out of England, should be available to any creditor or claimant without leave of the court. Further, if the order asked for by the liquidators were made the Court of Bankruptcy had no power to give any protection against the process of this court for contempt. They also referred to

The Richmond Hotel Company, Ex parte King, L. Rep. 3 Ch. App. 10; 16 L. T. Rep. N. S. 188;
The Financial Corporation v. *Lawrence*, L. Rep. 4 C. P. 731;
Re Duckworth, L. Rep. 2 Ch. App. 578; 16 L. T. Rep. N. S. 580;
Hastie's case, L. Rep. 7 Eq. 3, and 4 Ch. App. 274; 20 L. T. Rep. N. S. 93;
Re Price's Trust Deed, L. Rep. 6 Eq. 460; 19 L. T. Rep. N. S. 113;
Oxford and Canterbury Music Hall Company, L. Rep. 8 Eq. 696;
Griffith and Holmes on Bankruptcy,
Bankruptcy Act 1861, ss. 134, 192, 197, and 198, and
Companies' Act 1862, ss. 74, 75, and 77.

Greene, Q. C. and *Landley*, for the liquidators, submitted that the deed was not a good deed. It was not in the form given in schedule D of the Bankruptcy Act 1861, and was not distinguishable from that in the *Richmond Hotel Company, ex parte King* (*sup.*). Messrs. Mitchell and Aspinall had made no attempt to have their names struck out from the list of contributories, and they have no grounds now for resisting the order asked. (They were stopped by the court.)

Karslake, Q. C. in reply.

Jan. 31.—The VICE-CHANCELLOR.—The balance due from Mitchell and Aspinall, as contributories to the company is found to be 517*l.* 13*s.* 4*d.* An order is now applied for by the liquidator for the payment of that sum. The application is resisted on the ground that soon after the order for winding-up, and before the call was made, these contributories executed a deed of inspectorship, which was duly registered under the Bankruptcy Act. The order for winding-up was made in Dec. 1866. The deed of inspectorship is dated on the 4th June 1867, and registered in the Court of Bankruptcy on the 21st June 1867. In July 1868 the first call was made. In Dec. 1868 the second call. These were not paid, and in July 1869, the call for 517*l.* 13*s.* 4*d.* was made, for the payment of which the order is now asked. On a careful perusal of the 197th and 198th sections of the Bankruptcy Act 1861, under which this deed of inspectorship has been registered, I can see no reason to doubt that it is for the Court of Bankruptcy to say whether process for the sum of 517*l.* 13*s.* 4*d.*, or any part of it, should issue against those contributories. The amount due from them as contributories has been duly ascertained in this court. It is for this court to make an order for the payment of what is found to be due. When the order for payment is made the Act of Parliament makes it the duty of the liquidator to apply to the Court of Bankruptcy under the 198th section for leave to issue process for the payment. All questions as to the deed of inspectorship are, by the 197th section, expressly committed to the Court of Bankruptcy. These contributories have now asked this court to decide the question as to the deed of inspectorship, and as to their right to protection under the Bankruptcy Act. But it seems to me that Parliament has committed that question to the Court of Bankruptcy in very clear terms. It is said that the 198th section gives to the Bankruptcy Court no right to give any protection against the process of this court for contempt. On that point the language of the Act seems to me to leave no doubt. All process of every kind, whether against the estate or the person of the bankrupt, is within the language of the section. Process of this court for contempt is process against the person, and as such is certainly within the words. The section says, "No execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, &c., shall be available to any creditor or claimant without the leave of the court"—that is, the Court of Bankruptcy. Can there be any doubt that, the order now asked is an order for payment of a debt? Can there be any doubt that the process of this court, by which the order for payment is to be enforced, is "process against the person in respect of a debt?" No doubt would have occurred to my mind as to the construction of the statute were it not for the case of the *Richmond Hotel Company* (*sup.*) before Wood, V. C., and on appeal before Lord Cairns, as Lord Justice, who altered the order of the Vice-Chancellor, and the case of the *Financial Corporation* v. *Lawrence* (*sup.*). In these cases the matters were brought before the court in such a way as called for a decision on the validity and scope of the deed registered in bankruptcy. The order ultimately made in the *Richmond Hotel* case under the winding-up was made for the amount which the court, on the effect and construction of the deed in bankruptcy, held not to be provable under that deed. But from the way in which the question was presented to the court, and the course which the argument took, and the judgment of the court on that argument, the language of the Act of Parliament seems in no degree to have attracted the attention of the court, nor is there any reason stated for the construction which it may be guessed was assumed to be the proper construction. One of the counsel indeed, argued that process for contempt from this court for enforcing its order for payment was not within the 198th section. It is to be inferred from the beginning of the judgment of the Vice-Chancellor, that he approved of that among other arguments in the general approbation of the arguments of the same learned counsel, and although he never expressly notices the argument as to process for contempt, or the proposition which it went to establish,

yet his judgment, as well as that of Lord Cairns, seems to be based on the assumption that process of this court for contempt is not within the enactment. As to the case of the *Financial Corporation* v. *Lawrence*, the only question which counsel agreed to submit to the Court of Common Pleas was the validity of the deed and the extent of its operation, so that the question of jurisdiction was kept out of view. In the present case it has been argued that the liquidators should have proved in bankruptcy for the estimated amount of the call. But according to the 77th section of the Companies Act, it does not seem that they were bound to do this. The enactment is permissive, and having a discretion they had a right to exercise it in the way which seemed to them most for the benefit of the company. According to the words of the 197th section of the Bankruptcy Act it is for the Court of Bankruptcy to determine all questions arising under the deed according to the law and practice of bankruptcy, so far as they may be applicable. And the 198th section prohibits any execution against the property or person of the bankrupt without the leave of the Court of Bankruptcy. This leaves the question of protection, and the extent to which the protection is to be given, exclusively to the Court of Bankruptcy in which the deed is registered. If this court, disregarding the Act of Parliament, were now to entertain the question of protection, and to decide how far the deed is a protection, or whether it is a protection at all, it would create a great confusion and interfere for no useful purpose with the statutory jurisdiction in bankruptcy. Entertaining as I do these opinions as to the construction of the statute, and considering that the authority of the Act of Parliament is the highest authority, the order must now be made for payment of the ascertained balance. The duty of the liquidators will be to apply to the Court of Bankruptcy for leave to issue process according to the course of this court.

Solicitor for Messrs. Mitchell and Aspinall, *Joseph Harwood.*

Solicitors for the liquidator, *Ashurst, Morris,* and *Co.*

V. C. MALINS' COURT.

Reported by G. T. EDWARDS, Esq., Barrister-at-Law.

ERRATUM.—*Poupard* v. *Fardell.*—In this case, reported *ante* page 696, the solicitors for the plaintiff were *Marriott, Jordan,* and *Cooper,* and for the defendant *C White,* and not as printed.

Thursday, Feb. 10.

CAMPBELL v. MAYOR, &c., OF LIVERPOOL.

Dedication of burial ground—Reverter of fee-simple—Lands Clauses Act—Notice to treat—Admission of title.

By an Act of Will. 3 *a piece of land was inclosed and dedicated as a churchyard or burial ground for the inhabitants of the parish of Liverpool, and under the sentence of consecration the corporation of Liverpool renounced all right to the ground. In* 1854, *under an Order in Council, the churchyard was closed against burials. Under the Liverpool Improvement Act* 1864, *the corporation served on the incumbent, ordinary, and patron of the parish a notice to treat for the purchase of a part of the churchyard for the purposes of the Special Act. The question of compensation was referred to arbitration, and a sum awarded, but eventually the corporation refused to pay any compensation, on the ground that the churchyard, on being closed against burials, reverted to them in fee:*

Held, that, as the corporation had by the sentence of consecration renounced all right to the ground, there was no reverter to them of the fee-simple, and that, if necessary, the court would have presumed a conveyance.

A notice to treat and proceeding to arbitration under the Lands Clauses Act do not constitute an admission of title.

By an Act of 10 & 11 Will. 3, it was enacted that the town and township and liberties of Liverpool should for ever be a distinct parish of itself, and be called by the name of the parish of Liverpool; and that it should be lawful for the inhabitants of the said town and liberty of Liverpool to erect and build a new church, and to provide and inclose a cemetery, churchyard, or burying place about the same. And it was enacted that the said church, and the ground thereunto belonging to be inclosed and used for a cemetery or churchyard, should be the parish church and churchyard of the said parish of Liverpool; and the same was thereby enacted and declared to be for ever separated and dedicated to the service of God, and to be applied to the use and behoof of the inhabitants of the said town and liberty. Such new church was accordingly shortly afterwards built, and a cemetery or churchyard provided and inclosed.

In 1704 the church was consecrated under the name of St. Peter's church, and by the sentence of consecration the corporation renounced all right and title to the churchyard, which was thenceforth used as a burial ground, until, by an Order in Council of the 7th April 1854, it was closed as a burial place.

By the Liverpool Improvement Act 1864 (incorporating the Lands Clauses Consolidation Act 1845, and the Lands Clauses Consolidation Acts Amendment Act 1860), the corporation of Liverpool were authorised to take, among other pieces of land, a part of St. Peter's Churchyard for the formation of a street, and accordingly, on the 10th Feb. 1866, they served on the plaintiff, who was then the incumbent of the church, and on the ordinary and patron, the usual notice to treat. The plaintiff then gave notice to the corporation that he was seised, as the rector of the parish of Liverpool, of the piece of land proposed to be taken, and made a claim for compensation accordingly. By agreement the question of compensation was referred to Mr. Manisty as arbitrator, who awarded the sum of 5550*l.* less a sum of 350*l.*, the cost of new church gates and rails which were to be put up by the corporation. The corporation, however, refused to pay the compensation money on the ground that on the making of the order in council prohibiting further burials there was a reverter to them of the churchyard. The plaintiff then instituted this suit for the completion of the purchase and for the payment into court of the purchase-money and the costs of the arbitration.

Cotton, Q. C., *Wickens,* and *C. Stewart,* for the plaintiff, contended that the effect of the Act of Will. 3, was to preclude the corporation from claiming any right to the churchyard. The sentence of consecration, by which they distinctly renounced all right and title to the ground, was equivalent to a grant in fee; and by the notice to treat and the proceeding to arbitration they admitted the plaintiff's title. They referred to

Re St. Pancras Burial Board, L. Rep. 3 Eq. 173;
Champneys v. *Arrowsmith,* L. Rep. 2 C. P. 602;
L. Rep. 3 C. P. 107; 16 L. T. Rep. N. S. 589.

Sir *Roundell Palmer,* Q. C. and *Freeling,* for the corporation, argued that a common notice to treat under the Lands Clauses Act does not constitute an admission of title; it is simply addressed to such persons as may claim any title or interest, and leaves

the question of title open. Neither does the proceeding to arbitration have any such effect. In this case the corporation granted the ground for sacred uses, and when these sacred uses were discharged the land reverted to its original use. The right of the rector under the grant was merely to receive the burial fees, the fee-simple remaining in the corporation; when, therefore, the order in council was made forbidding the burials, these fees became no longer payable, and consequently there was no subject for compensation. They referred to

East and West India Docks and Birmingham Railway Company v. *Gattke*, 3 M. & G. 155;
Re North London Railway Company, ex parte Cooper, 2 Dr. & Sm. 312; 11 L. T. Rep. N. S. 661;
Burgess v. *Wheate*, 1 Wm. Black. 123.

The VICE-CHANCELLOR said, that the Act of Will. 3 authorised this piece of ground to be inclosed as a cemetery or burial ground, and declared that it should be for ever separated and dedicated to the service of God. By the sentence of consecration the corporation absolutely renounced their right of ownership in the land. It had been contended that there was no ground for holding that the land had ever passed from the corporation; that there had been no conveyance by them of the fee simple, and therefore that the fee remained in them, though the land was dedicated to the purpose of a burial ground so long as it might be required. They further contended that the purpose for which the land was required having ceased, there was a reverter to them of the fee simple. He did not accede to this proposition, for, as the corporation had renounced possession of the ground, and it had been dedicated to the purpose of a cemetery, he would have been bound, if necessary, to presume that a conveyance of the legal estate had been executed; but such a presumption was unnecessary, for the renunciation of the land by the corporation had operated as a release, and precluded all claim by them to the land. So the matter remained until the year 1854, when, in pursuance of an order in council, the ground was closed against interments, and it then ceased to be used as a burial ground, but it still remained as a repository for the bodies interred there, and was, therefore, still a burial ground. The bodies might have remained for ever in the ground, or circumstances might have so changed as to require the ground to be again used for burial purposes. Therefore, from the year 1854 until the passing of the Act of 1864, authorising the construction or widening of the street, the land was still a burial ground. Then the Act of 1864 gave power to the corporation to take certain pieces of land, and particularly this burial ground, for the formation of a street, and accordingly a notice to treat was served on the patron, ordinary, and incumbent. It was contended that this was an admission of title, and at first he was inclined in favour of that view, but he now thought that it was only a precautionary measure, the object simply being to include in the notice everyone who might be considered as *claiming* any interest in the ground, and therefore that the notice left the question of compensation open. This bill was then filed to ascertain whether the plaintiff had a title to sell the ground or not. On the whole case, he was of opinion that the renunciation by the corporation was complete, and that the ground was vested, as in the *St. Pancras* case, in the parish; that the corporation had no right or claim whatever to the ground, and must be dealt with as strangers. There was, however, another question, a difficult one, namely, what was to be done with the money? That question was not now raised, and all he could decide was that there was no right of reverter in the corporation, and the land must be treated like any other land taken for the purposes of the Liverpool Improvement Act 1864. The 5550*l.*, less the sum paid for church gates and rails, must, therefore, be paid into court, together with the costs of the arbitration and of these proceedings.

Solicitors for the plaintiff, *Field, Roscoe, Field*, and *Francis*, agents for *Eden, Stanistreet, Pears*, and *Logan*, Liverpool.

Solicitors for the defendants, *Torr, Janeway*, and *Tagart*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., and Hon. ROBERT BUTLER, Barristers-at-Law

Wednesday, Dec 8, 1869.

GLOVER v. MOORE.

Assignment of proceeds of future sale of commission—Priority—Notice.

By an agreement in writing, dated 20th Aug. 1866, *L., an officer in the army, promised to make over to the plaintiffs the proceeds of the sale of his commission for the benefit of his creditors, and wrote a letter to Messrs. C., the army agents, requesting them to pay the proceeds to the plaintiffs. In July* 1867 *the plaintiffs sent this letter to Messrs. C. In Aug.* 1867 *L. became bankrupt, and the defendant was appointed his assignee. On the* 15*th Oct. his commission was sold, and on the* 4*th Nov.* 1867 *Messrs. C. paid the proceeds to the defendant:*

Held, that the plaintiffs were entitled to priority over the defendant.

By an agreement in writing, dated 20th Aug. 1866, Mr. C. L. Lane, then a lieutenant in the 7th Fusiliers, at Quebec, promised to make over and secure to the plaintiffs, merchants and traders at Quebec, for the benefit of his creditors, the proceeds of his commission as a lieutenant.

On the 20th Dec., 1866, Mr. Lane wrote and delivered to the plaintiffs the following letter, addressed to Messrs. Cox and Co., the army agents:—

GENTLEMEN,—Intending to request permission to retire from Her Majesty's service by the sale of my commission as Lieutenant 7th Royal Fusiliers, I have the honour to request that, in the event of my application being granted, you will please pay to Mr. Thomas Glover and Mr. John Darlington the proceeds of my commission, or any other moneys that you have now or that may come into your hands to the extent of 1000*l.* sterling. . . .
Quebec, Dec. 20, 1866.

In July 1867 the plaintiffs sent the letter to Messrs. Cox, who stated, in reply, that Mr. Lane's commission had not been sold, and that they had no money of his in their hands.

In Aug. 1867 Mr. Lane became bankrupt in England, and the defendant was appointed his assignee in bankruptcy.

On the 15th Oct. 1867 Mr. Lane's commission was sold for 570*l.*, which sum was paid by Messrs. Cox to the defendant on the 4th Nov. following.

On the 25th Nov. 1867, the solicitors of the plaintiffs wrote to the solicitors of the defendant, giving them notice not to part with the 570*l.*, as the plaintiffs had a claim on it, and that in the event of his doing so they should file a bill. On the 23rd Jan. 1868, the solicitors of the plaintiff wrote to the defendant requesting payment of the 570*l.* The defendant claimed to retain the same as assignee in bankruptcy.

The plaintiffs filed their bill on the 29th Jan. 1869, praying for a declaration that the plaintiffs were entitled to the 570*l.* as trustees of the agreement of the 20th Aug 1866, for the payment of the sum to them, and for other incidental relief.

Amphlett Q. C., and *Caldecott*, for the plaintiffs,

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contended that there had been a good equitable assignment of the proceeds of the commission to them. A notice of it to the army agent before the sale of the commission would have been a nullity. This was decided in *Buller* v. *Plunkett*, 1 G. & H. 441; *Webster* v. *Webster*, 31 Beav. 393; *Somerset* v. *Cox*, 33 Beav. 634. [The VICE-CHANCELLOR.—If the notice had no effect, then it must have been in the order and disposition of the bankrupt.] But with the consent of the true owner: *Bartlett* v. *Bartlett*, 1 De G. & J. 127. The plaintiffs did all they could to perfect the assignment.

O. Morgan, Q. C., and *Jemmett*, for the defendants, referred to

Sect 141 of the Bankruptcy Consolidation Act 1849;

Ryall v. *Rowles*, 1 Ves. 248; 1 W. & T. Leading Cas. 615 (2nd edit).

The VICE-CHANCELLOR (without calling for a reply).—This seems to me a clear case, when one comes to understand the facts of it. It is quite clear, according to the authorities, that this sort of expectancy, or whatever it may be called, was capable of being bound by an assignment, or by covenant, or by a contract for a valuable consideration. The owner of the commission had said that when his commission was sold the proceeds should go in a certain way. That amounted to an equitable assignment of the proceeds, if and when the proceeds came into existence. In the mean time, before the actual sale, he becomes bankrupt. The assignees in bankruptcy could take nothing but what the man had, that is to say, equitably and beneficially; they could not take anything which somebody else had a prior right to. He could not defeat the right of the plaintiffs by becoming bankrupt. Of course, there is then the order and disposition clause to be considered, but upon that clause it is quite manifest that the order and disposition clearly only applies to those things which are in the ordinary disposition of the bankrupt with the consent of the true owner. It is in truth a punishment of the true owner for his *laches* or complicity in allowing the bankrupt to obtain a false credit. That is the principle upon which that statutory provision was made. If the true owner did not consent to it, then it appears to me that the true owner has not lost his right. In this case the true owner did all he possibly could. The true owner gave notice to the only person whom he thought was likely to know anything about it. It has been alleged that that notice is a nullity. But the fact that the notice was a nullity does not make it less clear that the true owner did all he possibly could to prevent its getting into anybody else's hands, and to prevent the bankrupt obtaining a false credit. That being so, it appears to me that the plaintiff is entitled to the declaration which is asked, namely, that the plaintiff is entitled to the priority.

Declaration as prayed. Order defendant to repay the plaintiff the sum of money with interest at 4 per cent. within fourteen days after service of the decree. Defendant to pay the costs of the suit.

Solicitors: *Harcourt* and *Macarthur*; *R. S. Taylor* and *Son*.

Friday Dec. 10, 1869.

EADE *v.* MORGAN.

Practice—Dismissal of Bill—Subpœna to hear judgment.

Where the plaintiff by setting down a cause on bill and answer, and stating that he should serve a subpœna to hear judgment, prevented a defendant from moving to dismiss, and, shortly before the cause came into the paper, gave notice that he did not intend to proceed further:

Held, that the defendant was entitled at the hearing (the plaintiff not appearing) to an order dismissing the bill with costs, on production of an affidavit of the notice by the plaintiff to set down the cause on bill and answer.

The bill in this cause was filed on the 30th April 1868. The last of the answers, that of the defendant, Edwin Morgan, was filed on the 31st Dec. 1868.

On the 18th March 1869, the solicitors of the defendant Edwin Morgan received a letter from the solicitor of the plaintiff dated the preceding day, stating that he had set down the cause on bill and answer, and that he should serve subpœna to hear judgment. No subpœna was served, and in a letter dated the 20th Nov. 1869, the plaintiff's solicitor wrote to the solicitors of the defendant, stating that he did not intend to proceed further in the cause, and that he gave this notice in order that they might avoid any further costs by appearing on the hearing of the cause, and stated that the cause on being called on would be struck out for want of appearance by the plaintiff.

Caldecott now applied on behalf of the defendant Edwin Morgan (the cause being in the paper for hearing), that the bill might be dismissed with costs. By setting down the cause for hearing on bill and answer, the plaintiff had prevented the defendant from moving to dismiss the bill for want of prosecution (Ord. xxxiii. r. 10), and the defendant could only get his costs at the hearing.

The VICE-CHANCELLOR said that the defendant was entitled to an order dismissing the bill, with costs, on production of an affidavit of the notice by the plaintiff to the defendant of having set down the cause on bill and answer.

Solicitors: *Frederick Bradley*, *Edwards*, and *Mayhew*; *Baker* and *Key*.

Friday, Dec. 17, 1869.

FREEMAN *v.* POPE.

Voluntary settlement—Validity of as against subsequent creditor—Stat. 13 *Eliz. c.* 5.

A. executed on the 3rd March 1863 *three instruments, one a voluntary settlement in favour of his godddaughter P. of a policy of insurance on his own life for* 1000*l.*, *the second a bill of sale of his furniture and effects to secure the sum of* 350*l. advanced to him by W., and the third a surrender of copyhold premises to the said W. for valuable consideration. At the time of executing these instruments A. was in solvent circumstances. Subsequently, however, A. became embarrassed, and at the time of his death, which occurred in* 1868, *was largely in debt; but with few exceptions all the debts were incurred subsequently to the deed of* 1863. *A. died intestate, and left no assets. The plaintiff was a creditor subsequent to the voluntary deed of* 1863:

Held (following the decisions in Jenkyn *v.* Vaughan *and* Spirett *v.* Willows), *that the settlement was fraudulent and void as against creditors.*

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This suit was instituted by a creditor, for the purpose of administering the estate of the Rev. John Custance, and for setting aside a deed of settlement as being fraudulent and void as against creditors. The following are the facts:—

By a deed of settlement dated the 3rd March 1863, and made between the above-named John Custance of the one part, and the defendant, George Pope, and William Rushmore and Ellen Elizabeth Walpole (hereinafter called the trustees), of the other part, after reciting that John Custance was possessed of a policy of assurance on his own life in the Pelican Life Assurance Company for the sum of 1000*l.*, and reciting that J. Custance was desirous of settling the said policy in manner thereinafter mentioned, as a return for the kindness and attention he had experienced at the hands of Julia Thrift, the wife of William James Thrift, it was witnessed that, in consideration of the premises and of the sum of 5*s.* paid to him by the trustees on the execution thereof, he, the said J. Custance, did thereby assign unto the above-named trustees, their executors, administrators, and assigns, all the aforesaid policy of assurance, whereby the sum of 1000*l.* was expressed to be assured by the above-mentioned company upon the life of the said John Custance in consideration of the annual premium of 63*l.* 8*s.* 4*d.*, upon trust for such persons as the said Julia Thrift should by deed or will direct or bequeath; and by the same deed John Custance covenanted to pay the annual premium on the policy.

At the time of executing the above deed, John Custance was indebted to Ellen Elizabeth Walpole, the mother of Julia Thrift, to the amount of 850*l.*, and on the day of the date of the above-mentioned deed John Custance executed a bill of sale of all his household furniture and other effects to Ellen Elizabeth Walpole, as a security for her debt. On the 20th Jan. 1868 Ellen Elizabeth Walpole obtained a judgment against John Custance in respect of her debt of 850*l.* and interest for the sum of 437*l.* 11*s.* 4*d.*, and shortly afterwards a writ of sequestration was issued at her suit against the livings of Blickling and Erpingham, of which livings John Custance was the incumbent. In Feb. 1868 Ellen Elizabeth Walpole, in order to facilitate a loan of 600*l.*, agreed at the request of John Custance, to postpone her bill of sale to a bill of sale then executed by John Custance of all his furniture and effects to a Mrs. Howes to secure payment of the sum of 600*l.* At the date of the deed of settlement of the policy, John Custance was indebted to Messrs. Gurneys and Co., bankers, in the sum of 489*l.* 4*s.* 2*d.*, of which amount the sum of 111*l.* 9*s.* 5*d.* was still owing. He was also indebted at the same period to James Bresse, of Aylesham, in the sum of 7*l.* 9*s.* 6*d.*, and since then there was a further sum due to Bresse. There were several other creditors of John Custance whose debts were contracted prior to the month of March 1863, who were not fully paid.

The bill alleged that John Custance was, prior to the month of March 1863, in insolvent circumstances, and continued so up to the time of his death, which took place on the 21st April 1868. He left no will, and letters of administration were granted to the defendant Alexander Robert Chamberlain, a creditor of the intestate, who is now the sole legal personal representative of the intestate. At the time of his death John Custance was indebted to the plaintiff in the sum of 62*l.* 12*s.* 8*d.*, being an account for provisions supplied subsequently to the deed of settlement. The plaintiff applied to Chamberlain for payment of the above sum, but he refused to pay the same, on the ground that he had no assets in his hands. Shortly after John Custance's death, all his furniture and other effects were sold by Mrs. Howes under her bill of sale, and the proceeds of such sale were not sufficient to satisfy the amount due on such bill of sale, and there was still due thereon the sum of 70*l.* The sum of 437*l.* 11*s.* 4*d.*, with subsequent interest, was still due to Ellen Elizabeth Walpole. The defendant Pope alleged that John Custance was, at and before the date of the hereinbefore mentioned deed of settlement, seised or entitled to a copyhold cottage and premises at Catten, and that he was possessed of, or entitled to certain dock shares of the value of 1500*l.* and upwards. The plaintiff insists that the dock shares were, in 1861, transferred by John Custance to the above-mentioned Ellen Elizabeth Walpole; and that by a surrender, dated the 3rd March 1863, in consideration of the sum of 50*l.* expressed to be paid to the said John Custance, by the said Ellen Elizabeth Walpole, the said John Custance did absolutely surrender the said copyhold cottage and premises at Catten, to the use of the said Ellen Elizabeth Walpole, who was shortly afterwards admitted as tenant thereof.

The bill alleged that the effect of the hereinbefore-mentioned deed of settlement, bills of sale and surrender (all of which were executed on the same day), was to divest John Custance, who was then utterly insolvent, of all his available property applicable to the payment of his debts. William James Thrift died some years ago, and his widow has since married the defendant, George Pope. On the 8th May 1868 the plaintiff's solicitors gave to the directors of the Pelican Life Assurance Company notice that this suit was going to be instituted, and that they should not pay over the sum of 1000*l.* due on the policy, or any part of it, to Mrs. Pope, or to any other person, until a decree had been obtained from the Court of Chancery. By a deed poll dated the 3rd June 1868 Julia Pope, in exercise of her power of appointment, appointed the policy of assurance to her husband, the defendant George Pope. The defendant Tucker, as secretary of the Pelican Life Insurance Company, paid into court the sum of 981*l.* 5*s.* 10*d.*, being the amount assured by the policy after deducting his costs.

E. E. Kay, Q. C. and *H. H. Cozens-Hardy* were for the plaintiff.

Osborne Morgan, Q. C. and *H. A. Giffard* were for the defendants.

H. Fellows appeared for the defendant Chamberlin.

The following cases were cited by counsel:

Adams v. *Hallett*, L. Rep. 6 Eq. 468; 18 L. T. Rep. N. S. 789;
Ware v. *Gardner*, L. Rep. 7 Eq. 317; 20 L. T. Rep. N. S. 71;
Jenkyn v. *Vaughan*, 3 Dr. 419;
Taylor v. *Jones*, 2 Atk. 600;
Richardson v. *Smallwood*, Jac. 552.

The VICE-CHANCELLOR.—Were the case absolutely free from authority, I should have thought that the question I had to put to myself under the statute was, in the words of the statute, "whether there was actually any intention by this settlement on the part of the settlor to defeat, hinder, or delay his creditors." If I were a special juryman to whom such a question were put by a judge, I should, upon the facts of this case, come to the conclusion that this gentleman had no such intention whatever. I am satisfied that he had not any idea whatever of defrauding or cheating his creditors by making that settlement in favour of his god-daughter of the policy of insurance which he had made several years before in her favour, when there was no pretence for supposing that he was in embarrassed circumstances at all. But I am bound, as it seems to me, sitting here as Vice-Chancellor, by

two decisions, one of Lord Westbury, L. C., and another by Kindersley, V. C. The decision of Kindersley, V. C. is, that if there be a creditor subsequent to the deed, and there be also at that time an unpaid creditor prior to the deed the subsequent creditor has exactly the same right to file a bill as the prior creditor had, that is to say, I am to try the case at the suit of the present creditor, Mr. Freeman, as if the bankers were the plaintiffs and not Mr. Freeman. Then assuming it to be the suit of the bankers, it appears to me that I am equally bound by the decision of Lord Westbury in the case of *Spirett* v. *Willows*. I confess I cannot follow the reasoning. He says, "The plaintiff sues as a creditor to set aside a voluntary settlement or deed of gift made by the defendant his debtor. The plaintiff's debt was contracted before the time of making the settlement. He has since recovered judgment at law, and the debtor has become bankrupt. The plaintiff complains, in the words of the statute of Eliz., that his judgment and execution are hindered, delayed, and defrauded by the conveyance of the goods and chattels of his debtor made by his voluntary settlement. The defence is, that at the time of making the settlement, the debtor reserved, and had property enough to pay the plaintiff, and all his other creditors in full, and that the settlement, therefore, is not fraudulent because the debtor remained solvent after he had made it. There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors, but I think the following conclusions are well founded. If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." That is to say, it is immaterial whether the debtor had any intention whatever of defeating his creditors, but if in the result, from some accident, the debt remained unpaid for some years by reason of a voluntary settlement or a subsequent declaration of the debtor during his lifetime the creditor was absolutely delayed in the payment of the debt, that then, however honest the settlement was, however solvent the man was at the time, if at the time he had 100,000*l.* and put 100*l.* in the settlement and then the creditor for 100*l.* happened to be unpaid in consequence of the man losing his money in the interval, that that would be quite sufficient to set aside the voluntary settlement. That is the decision of Westbury, L. C. I am bound by that decision; and therefore, although I desire to express my opinion that this gentleman having regard to his income and his means had no intention whatever to cheat his creditors at that time, I must declare this settlement to be fraudulent and void as against his creditors. I do it in deference to that decision. The costs must follow the result.

Solicitors for the plaintiff, *Sole*, *Turner*, and *Turner*, agents for *Miller* and *Son*, Norwich.

Solicitors for the defendants, *Hawkins*, *Patterson Snow*, and *Burney*, agents for *John Perks*, Burton-on-Trent.

Saturday, Jan 29.

Re North Wales Slate Supply Company.

Practice—Winding-up—Petition dismissed—Rehearing.

The court has no jurisdiction to make an order on a petition to wind-up a company which had been dismissed with costs, otherwise than on an appeal or rehearing.

This was a petition to obtain an order to wind-up the North Wales Slate Company, under the following circumstances:—

A similar petition had been previously presented, but, being opposed by the company, was dismissed with costs on the 4th Dec. 1869.

Since that time the company, finding themselves in very embarrassed circumstances, intimated their willingness to the petitioner to obtain a winding-up order; and for this purpose the petitioner obtained leave for the petition, which had been already dismissed on the 4th Dec. 1869, to be put in the paper for hearing.

W. F. Robinson, in support of the petition, now applied for a winding-up order.

E. A. Hadley, who appeared for the company, did not oppose.

The Vice-Chancellor said he would make no order on the application, as having made an order dismissing the petition he had no jurisdiction to discharge it. The right course would have been to have presented a petition for re-hearing.

Solicitors: *Tyrrell*; *W. Smith*.

Saturday, Feb. 19.

Re Nicholl's Settlement.

Practice—Trustees refusing to transfer funds—Co-trustee lunatic—13 & 14 Vict. c. 60, s. 24.

Two executors of a sole trustee refused to transfer a fund; the third executor was a lunatic:

Held, that the court could not make an order under the 24th section of the Trustee Act 1850.

This was a petition for an order to vest certain shares in the Oxford Canal Company in the beneficiaries under a settlement. The surviving trustee had died, having appointed three executors, one of whom had become lunatic, and the other two had refused for twenty-eight days to transfer the property. The application was made under the 13 & 14 Vict. c. 60, s. 24, which enacts that where anyone of the trustees of any stock or *chose in action* shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or to recover such *chose in action* according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him, or her, by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose in action*, in the other trustee or trustees of the said stock or *chose in action*, or in any person or persons whom the said court may appoint jointly with such other trustee or trustees.

The Vice-Chancellor intimated that the petition should have been entitled in lunacy.

Edward Cutler, for the petitioners, submitted that it was not necessary that the petition should be entitled in lunacy, as the refusal of two of the executors to transfer the stock brought the case within the meaning of the above section.

The Vice-Chancellor refused to make the order, and said that although it was true that one or more of several executors could deal with the fund for the purposes of administration, yet here they must be taken to be mere trustees, and he could not deal with the interest vested in the lunatic. The Vice-Chancellor suggested that the matter should be mentioned to the Lord Justice.

Solicitors: *J.* and *R. Gole*.

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Wednesday, Feb. 16.

ALI v. FORRESTER.

Practice—Trust fund 500l.—Costs.

When a trust fund is reduced to 500l. before the filing of the bill, the court will only allow costs according to the County Court scale.

This was a suit instituted by Jane Ali against the trustees of a will, under which she claimed the moiety of a legacy of 200*l.* The facts were these: Ursilla Cook by her will, dated 22nd Feb. 1841, gave all her property, amounting to 716*l.* 10*s.* 2*d.*, to trustees upon certain trusts, among others, to pay to Frances Benton the sum of 200*l.* During the lifetime of Frances Benton, the interest on the 200*l.* was paid to her by the trustees of Miss Cook's will.

Frances Benton made her will on the 10th Nov. 1864, and died shortly after. By her will she bequeathed to her two daughters, the plaintiff and Harriet Mohammed, in equal portions the 200*l.* bequeathed to her by Ursilla Cook.

On the 19th Oct. 1865 the defendants sold out a sum of 216*l.* 10*s.* 2*d.*, part of the estate of Miss Cook, thereby reducing the estate to 500*l.* The bill then prayed that the amount due to the plaintiff by the defendants should be paid to her.

B. B. Rogers was for the plaintiff.

J. T. Crossley, *J. Finlaison*, and *Marcy* appeared for the several defendants.

The VICE-CHANCELLOR made a decree in favour of the plaintiff according to the prayer of the bill with costs.

J. Finlaison contended that the costs should be according to the scale of the County Courts, the legacy being 200*l.*, and the whole trust fund only 500*l.*

B. B. Rogers submitted that the original trust fund being over 500*l.*, the suit was rightly instituted in this court.

The VICE-CHANCELLOR was of opinion that the costs should be according to the County Courts scale the bill being filed in respect of the moiety of a legacy for 200*l.*, and the trust fund at the commencement of the suit not exceeding 500*l.*

Solicitors for the plaintiff, *Harrison* and *Gregory*.

Solicitors for the defendants, *S. B. Robertson* and *W. J. Myatt*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs., Barristers-at-Law.

Tuesday, Jan. 18.

SMITH v. BUCKINGHAM.

Patent—Sale of—Warranty—Plea.

By an agreement reciting that the plaintiff "had lately invented an approved composition or material to be employed in waterproofing, or rendering woven fabrics impervious to moisture, for which he has duly obtained provisional protection under the Patent Law Amendment Act 1852, and obtained a certificate of allowance of the provisional protection," the defendant contracted with the plaintiff for the sale to the defendant "of the said invention, and all benefit and advantage to be derived therefrom and from the letters patent which may hereafter be granted therefor," for a certain sum to be paid in different portions. In an action on this agreement, for the nonpayment of a portion of the money, the defendant pleaded that the plaintiff "had not invented an improved or any composition or material which could be employed in rendering woven fabrics impervious to moisture:"

Held, on demurrer, that the plea was bad.

This was a demurrer to a plea.

Declaration:

For that an agreement, bearing date the 18th Nov. 1865, was made between the plaintiff and defendant, in the words and figures following, that is to say: "This agreement, made and entered into this 18th Nov. 1865, between Henry Francis Smith, of Winchester, in the county of Lancaster, india-rubber and gutta percha manufacturer, of the one part, and James Buckingham, of Walworth Common, in the county of Surrey, manufacturer, of the other part. Whereas the said Henry Francis Smith hath lately invented an approved composition or material to be employed in waterproofing, or rendering woven fabrics impervious to moisture, for which he has duly obtained provisional protection under the Patent Law Amendment Act 1852, and obtained a certificate of allowance of the provisional protection dated the 6th Oct. last; and whereas the said Henry Francis Smith hath contracted with the said James Buckingham for the sale to him of the said invention, and all benefit and advantage to be derived therefrom, and from the letters patent which may hereafter be granted therefor, for the sum of 510l., subject to the terms and conditions hereinafter mentioned. Now it is therefore agreed by and between the said parties hereto that in consideration of the sum of 160l. paid by the said James Buckingham to the said Henry Francis Smith on or before the 1st Dec. next, and of the further sum of 350l. to be paid on the completion of the necessary specification and grant of the letters patent, he the said Henry Francis Smith doth hereby agree to transfer and make over to the said James Buckingham, his executors, administrators, and assigns, all his interest in the said invention or improvement thereof, and all benefit to be derived from the said provisional protection, or from any letters patent to be hereafter granted for the said invention, and to execute a proper assignment thereof to the said James Buckingham, his executors, administrators, and assigns, whenever called upon to do so, and receiving the said sum of 350l., the balance of the said purchase money; and it is further agreed between the said parties that he, the said James Buckingham, shall employ the said H. Francis Smith in the manufacture and selling of the goods to which the said invention shall be applied, for the term of fourteen years and shall pay him the sum of 4l. per week from the 1st Dec. next, so long as the amount of fabrics manufactured and sold by the said James Buckingham, and to which the said invention shall be applied, shall not exceed 1000 yards per week. But when the average amount of any three months shall exceed that quantity, then and in such case the said James Buckingham shall at all times thereafter pay to the said H. Francis Smith the sum of 1d. per yard upon the whole amount manufactured and sold in lieu and stead of the said weekly sum of 4l.; and it is further agreed that the said H. Francis Smith shall, during the said term of fourteen years, if he shall not be prevented by sickness or ill health, duly and properly attend to and superintend the manufacture of the said Francis, and the application of the said invention thereto, or the sale and disposal thereof in the best manner that he is able, and shall not during the said term, either alone or in partnership with any other person, be directly or indirectly connected in any other business or manufacture of a similar or a like nature; and that he shall in due time make the proper and sufficient specification, and take the proper steps for obtaining the letters patent for the said invention, the expense whereof shall be borne by the said James Buckingham. And further, that he or they at all times have free access to the books in which the accounts relating to the manufacturing and selling the goods in question are kept, for the purpose of ascertaining the quantity per week manufactured and sold. And it is further agreed that the said James Buckingham, his executors, administrators, or assigns, shall continue to manufacture and sell the said goods for the said term of fourteen years, and to supply sufficient skill and capital for the due and proper manufacturing thereof, and to pay the said H. Francis Smith, his executors, and administrators such weekly or other sums as aforesaid, or in default therefor, it shall be lawful for the said H. Francis Smith, his executors, or administrators, to manufacture such goods, and apply and use such invention on his or their own account as if the agreement had not been entered into. In witness, the hands of the parties the day and year aforesaid.—JAMES BUCKINGHAM; H. FRANCIS SMITH."—And the defendant paid the said sum of 160l. to the plaintiff, and the necessary specification in the said agreement mentioned was completed, and the said letters patent granted, and the plaintiff has always been and is now ready to transfer and make over to the defendant, his executors administrators, and assigns, all his interest in the said invention, and to execute a proper

assignment thereof according to the said agreement, and tendered and offered a sufficient assignment to the defendant of the said premises, which the defendant always refused to accept, and the plaintiff entered into the service of the defendant in the capacity and upon the conditions stated in the above-mentioned agreement, and so continued therein until the breach of the said agreement (hereinafter alleged), and was always ready and willing to continue in the said service, and to serve the defendant during the remainder of the said term, and all conditions were performed and all things happened, and all times elapsed, necessary to entitle the plaintiff to receive the said sum of 350l. from the defendant, and to be retained by the defendant in his said service in the capacity and on the terms aforesaid, yet the defendant did not pay the said sum of 350l. to the plaintiff; and the defendant, before the expiration of the said term of fourteen years, as in the said agreement mentioned, dismissed the plaintiff from the said service, and refused to retain the plaintiff therein for the remainder of the said term, whereby the plaintiff was deprived of the wages and profits which he would have derived from being retained in the said service, and remained for a long time unemployed and lost the full benefit of divers expenses which the plaintiff necessarily incurred in and about entering into and performing the said agreement on his, the plaintiff's part; and that defendant also then broke the said agreement in this, that although whilst he was in the plaintiff's service the amount of fabrics manufactured and sold by the defendant, and to which the said invention was applied, did not exceed 1000 yards per week, for divers weeks the defendant did not during the said weeks pay the plaintiff the said sum of 4l. per week during the said weeks, &c.

The declaration also contained the ordinary money counts.

Plea (No. 2) to the first count in the declaration: The defendant says that the plaintiff had not invented an improved or any composition or material which could be employed in rendering woven fabrics impervious to moisture.

Demurrer to this plea, and joinder in demurrer.

Macnamara, in support of the demurrer.—The only ground on which the plea could be supported is, that it showed a total failure of consideration; but this plea does not show that: for it appears in the pleadings that the invention had been provisionally registered, and that the statutory protection had been obtained until the letters patent should be granted. There is no allegation of fraud on the part of the plaintiff; and there is clearly no express warranty on his part. Is there then an implied warranty? It has been held that there is no implied warranty in such a case. In *Hall* v. *Conder*, 2 C. B., N. S., 22, the declaration set out an agreement which recited that the plaintiff had invented a method for the prevention of boiler explosions, and had obtained a patent for the use of the same in the United Kingdom, and was desirous of taking out patents in foreign countries, and that the plaintiff "agreed to make over and transfer, and did thereby accordingly make over and transfer to the defendants, one-half of the said foreign patents when the same should be obtained, and one-half of the English patent." A plea that the invention was wholly worthless, and of no public utility, and was not new as to the public use thereof in England, and that the plaintiff was not the true and first inventor thereof, was held bad on the ground that in the absence of any allegation of fraud, it must be assumed that the plaintiff was an inventor, and there was no warranty, express or implied, either that he was the true and first inventor within the meaning of the statute of James, or that the invention was useful or new, but that the contract was for the sale of the patent such as it was, each party having equal means of ascertaining its value, and each acting on his own judgment. The court, in delivering judgment, say (p. 41), "Did the plaintiff profess to sell, and the defendant to buy, a good and indefeasible patent right? or was the contract merely to place the defendant in the same situation as the plaintiff was in with reference to the alleged patent? in which case his position would be similar to that of the plaintiff in *Kintrea* v. *Perston*, 1 H. & N. 357. The plaintiff professed to have invented a method for the prevention of boiler explosions. It is not alleged that he was guilty of any fraud. He must therefore have been an inventor: for if he was not, he must have known it, and would have been guilty of fraud in pretending to have invented. Whether he was the true and first inventor within the meaning of the statute of James is another question. The first material allegation in the plea is that the alleged invention was wholly worthless, and of no utility to the public. Now that was a matter as much within the knowledge of the defendants as of the plaintiff. The next allegation, viz., that it was not new as to the public use thereof in England, and that the plaintiff was not the first and true inventor, was also a matter as much within the knowledge of the defendants as of the plaintiff. Why, therefore, should we assume that the plaintiff meant to assert that the patent was indefeasible, and that the defendant purchased on that understanding, rather than that each knowing what the invention was, and having equal means of ascertaining its value, they contracted for the patent, such as it was, each acting on his own judgment? We think that the latter was the true nature of the contract, and that there was no warranty, express orimplied." *Crossley* v. *Dixon*, 10 H. of L. Cas. 293, was also referred to, in which it was held that while a person is using, under a licence, a patent machine, and paying a royalty for its use, or the use of its principles embodied in any other machine, he cannot, in a proceeding against him for nonpayment of royalties in respect of the use of another machine, alleged to embody the principle of the patent invention, set up a defence that the patent is not valid.

Brown, Q.C. (with whom was *Gibbons*) in support of the plea. The sale was of an invention supposed to have been made by the plaintiff, and if it turns out that no such invention was made by the plaintiff, the subject-matter of the sale did not exist at the time the contract was made, and the case falls within the principle that where the subject-matter of the contract is non-existent at the time it is entered into, the contract falls to the ground. In the case of *Hall* v. *Conder* (*ubi sup.*) cited in support of the demurrer, a patent had been already obtained by the plaintiff, in which respect that case differs from the present, no patent having been obtained by the present plaintiff at the time the agreement was made. If a patent had existed at the time, it would be no answer to allege by plea that the patent was bad, in the absence of express warranty; but it is submitted the case is different where no patent existed at the time the contract was entered into. Both parties, it is to be taken on the pleadings, in the absence of any allegation of fraud, contemplated at the time of the contract, the existence of an actual invention made by the plaintiff, and in view of that entered into the contract. [COCKBURN, C. J.—Both parties believed the plaintiff had invented something for which he would get letters patent. Does not the defendant, then, take his chance in the matter? And the invention being provisionally registered is substantially the same as if a patent had been obtained] In *Hall* v. *Conder*, the agreement was to sell the patent such as it was. [COCKBURN, C. J.—And the present case only throws the matter one step backwards. The plaintiff sells an invention which he has provisionally registered, and the defendant buys it, such as it is, without waiting till after the letters patent have been obtained.] It is submitted the present case is not that of the sale of an invention such as it is, but the sale of a real invention. [HANNEN, J.—The plaintiff may well be an inventor in some sense, though he has not invented what is sufficient to accomplish the pur-

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poses intended.] In such a case, he has really invented nothing, and the plea alleges that the plaintiff had not invented an improved "or any" composition or material which would accomplish the purposes intended. The plea in *Hall* v. *Conder* alleged that the plaintiff was not "the true and first inventor" of the method in question, which is a different thing from saying that he had not invented it at all. [LUSH, J.—The first part of the plea in that case is substantially the same as the present.] The substratum of the whole agreement is the supposed existing invention, and if that does not really exist, the contract is at an end. In Benjamin's Treatise on the Sale of Personal Property, p. 57, the law is thus stated: "As there can be no sale without a thing transferred to the purchaser in consideration of the price received, it follows that if at the time of the contract the thing has *ceased to exist*, the sale is void." After referring to the case of *Strickland* v. *Turner*, 7 Ex. 208, and *Hastie* v. *Couturier*, 9 Ex. 102; 5 H. L. Cas. 673, he says, "These cases are sometimes treated in the decisions as dependent on an implied warranty by the vendor of the existence of the thing sold; sometimes on the want of consideration for the purchaser's agreement to pay the price. Another, and perhaps the true ground, is rather that there has been no contract at all, for the assent of the parties being founded on a mutual mistake of fact, was really no assent, there was no subject-matter for a contract and the contract was therefore never completed. Pothier says, "There must be a thing sold which forms the subject of the contract. If then, ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if, when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part burnt down, the contract is null, because the house, which was the subject of it, did not exist; the site and what is left of the house are not the subject of our bargain, but only the remainder of it."[MELLOR, J.—Here whatever existed at the time still continued to exist.] The plea denies the existence of everything alleged to have existed. [LUSH, J.—No, you do not say that the plaintiff had not invented anything at all, but anything "which could be employed in rendering woven fabrics impervious to moisture."] That was the only thing in negotiation between the parties. In *Chanter* v. *Leese*, 4 M. & W. 295, to an action on an agreement for the sole use of a patent obtained by the plaintiff for an improvement in furnaces, the plea setting out the plaintiff's patent, and pleading that it was not at the time of the grant a new invention as to the public use thereof in England, whereby the grant was void, which the plaintiff at the time of the making of the agreement well knew, was held on demurrer a bar to the action. "If," said Lord Abinger, C. B., "a man contract to pay a sum of money in consideration that another has contracted to do certain things on his part, and it should turn out before anything is done under it that the latter was incapable of doing what he engaged to do, the contract is at an end. The party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated;" remarks which apply in principle to the circumstances of the present case.

Macnamara, in reply.—*Chanter* v. *Leese* was cited in *Hall* v. *Conder*, and distinguished on the ground, as stated in the judgment of the court, that "there the plaintiff contracted that the defendants should have the *exclusive right* to sell certain things for which patents had been obtained. There was no doubt as to what the parties contracted for; and as the plaintiff, if one of the patents was invalid, could not confer the privilege which he agreed to confer, and for which the defendant contracted to pay, the consideration for the defendant's promise failed, and, to use the language of Lord Abinger, "the whole resting in contract, and nothing having been done under it, the contract was at an end. Here the plaintiff was capable of fulfilling all that he contracted to do. He had already done it in equity. The defendants might have had all that they contracted to receive, and were therefore bound to pay." Besides, the plea in *Chanter* v. *Leese* stated that the plaintiff well knew, at the time of making the contract, that the patent was void. The plaintiff in the present case must, on the pleadings, be taken to have supposed that he had made a discovery which would be practically useful; otherwise he would not have gone to the expense of provisional registration. Certain inchoate rights are given by the Patent Law Amendment Act 1852 (15 & 16 Vict. c. 83) in such cases, and there is therefore no total failure of consideration. Sect. 8 provides that after the certificate of allowance has been obtained, "the invention therein referred to may, during the term of six months from the date of the application for the letters patent for the said invention, be used and published without prejudice to any letters patent to be granted for the same, and such protection from the consequences of use and publication is hereinafter referred to as provisional protection." *Chanter* v. *Hopkins*, 4 M. & W, 399, was also referred to.

COCKBURN, C. J.—I confess that I have had very great doubt about this matter, not with reference to the law governing such a contract, but with reference to the character of the plea which has been demurred to. I quite agree that where a man supposes himself to have invented something which may have been the subject of a patent, and another man under the same belief, and himself a seller, buys that invention, such a contract may well be, and the buyer takes his chance of its being a patented invention, and if it turns out that the invention does not prove to be new, then it won't do for the buyer to turn round and say, "I won't buy because it is no invention at all." It is a very different thing for a man, believing himself to have discovered some process whereby a given result may be obtained, but which fails, more or less, to sell it to another, where he is conscientious in believing—this is very different from the case of a man selling as an invention to another that which in point of fact, existed only in his own imagination, and had no result. I cannot help saying that in such a case the maker of such an agreement would not be bound by his bargain. There must be some industry used, some novelty produced, and then the man who buys it must take it such as it is. I can distinguish the case supposed from the case of an invention which has some foundation and effect, but which does not achieve the whole object for which it was devised. In the case where there is some invention, but its efficacy is only partial, a contract may take place, and the persons contracting will be bound by their contract. But where the invention has no foundation and effect I think it will not do, and the difficulty here is, to determine whether this plea amounts to a denial of the existence of any invention at all, or is merely intended to have the effect and has the effect of denying the *efficacy* of the invention to any extent at all. I think, however, after having discussed the matter with my learned brothers, that this plea does not deny that there has been any invention at all, but only denies that the invention is such as will fully accomplish the purpose for which the invention was patented. I think upon the whole, looking at the declaration which states the subject-matter of a contract, we cannot hold good a plea which negatives only some matter of contract.

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In that point of view I think the plea is bad; for if a man believes honestly that he has made some discovery by which a given thing may be accomplished, and represents that to another man who believes the representation, and the other man so believing enters into an agreement to purchase the invention, and that a patent shall be taken out, it is not because it turns out incomplete that the man can get rid of his bargain; and on that account I think the plea does not deny the fact of some invention having been made by the plaintiff, and that it is therefore bad.

MELLOR, J.—I think, having reference to the nature of the contract between the parties, that the plea does not show a total failure of consideration. What appears to me to be the bargain is this: One says, "I have invented a process which will have the effect of waterproofing cloth," and the other man believes that. The declaration states that the plaintiff "lately invented an improved composition or material to be employed in waterproofing or rendering woven fabrics impervious to moisture, for which he has duly obtained provisional protection under the Patent Law Amendment Act 1852, and obtained a certificate of allowance of the provisional protection, &c.," and then states that he has contracted with the defendant "for the sale to him of the said invention, and all benefit and advantage to be derived therefrom, and from the letters patent which may hereafter be granted therefor," on consideration of the payment of a certain sum of money by the defendant. That is the state of things on which the bargain proceeds. The one says, "I believe I have invented a process of this description. I have methods to suit it, and have filed a provisional specification." The other buys that invention wishing to derive profit from the transaction. There is no implied or express warranty. The defendant has got what he bargained for, and therefore I think the plea is no answer to this declaration.

LUSH, J.—I am of the same opinion. I think that the plea fails to show that the defendant did not get what he bargained to get. The declaration setting out the agreement for the sale and purchase of the plaintiff's invention for waterproofing cloth, the plea simply alleges "that the plaintiff had not invented an improved or any composition or material which could be employed in rendering woven fabrics impervious to moisture." The plea contains no averment that the defendant knew that his invention would not answer the purpose. That brings me back to the question what was agreed to between the parties. Did the plaintiff mean to sell merely the result of his labour? It appears clear that the agreement was for the sale of that which both parties supposed the plaintiff had invented. But there is no warranty of title nor any allegation of it at all. There is nothing to show that it was not the defendant's intention to put himself simply in the plaintiff's place, and to purchase what he supposed he had invented.

HANNEN, J. concurred.

Judgment for the plaintiff.

Attorney for the plaintiff, *Chipperfield.*

Attorney for the defendant, *Champion.*

Friday, Jan. 21.

NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCIATION *v.* ARMSTRONG AND OTHERS.

Marine insurance—Valued policy—Ship valued at less than actual value—Subrogation—Right of underwriters to damages recovered by shipowner.

In a valued policy of insurance, the parties are bound by the value therein named in respect of all rights and obligations which spring out of it.

A valued policy of insurance for 6000l. on one of the defendants' vessels was underwritten by the plaintiffs, the real value of the vessel being 9000l., and no other insurance being effected on it. The vessel having been run down and sunk by another vessel, pending the risk, the plaintiffs paid to the defendants the 6000l., and afterwards recovered by proceedings instituted in the defendants' name against the owners of the ship which caused the damage the sum of 5683l. 11s. 7d.:

Held, that the plaintiffs (the underwriters) were entitled to the whole of the amount so recovered (after deducting the amount payable to the owners of the cargo and freight), and that the defendants were not entitled to any part of it on the ground that the vessel insured was of greater value than that named in the policy.

This was an action brought for the recovery of 4948l. 18s. under the circumstances set forth in the following special case, by consent of the parties stated for the opinion of the court.

The defendants by and under the name and firm of the Hetton Coal Company, by a policy of insurance caused themselves to be insured, lost or not lost, from the 20th Feb. 1866, at noon, until the 20th Feb. 1867, at noon, upon the body, machinery, tackle, apparel, boats, and other furniture, of and in the steamship called the *Hetton*, of which they were owners, beginning the adventure upon the said steamship, with all her machinery, ordnance, tackle, apparel, &c., whatsoever, from the day and date above mentioned, at noon, until the 20th Feb. 1867, at noon, against perils of the seas, and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said steamship, machinery, and premises, or any part thereof, including damage done to the said steamship; and it was by the same policy provided that in case of any loss or misfortune it should be lawful for the plaintiffs to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said steamship, machinery, and premises, or any part thereof, without prejudice to that insurance. And by the said policy it was stipulated that the said steamship, machinery, tackle, apparel, boats, and other furniture, for so much as concerned the defendants, by agreement between them and the assurers, the plaintiffs, in and by the said policy, were and should be valued at 6000l.

Before the plaintiffs subscribed the said policy they had received from the defendants a written request of which the following is a copy, namely:—

To the Directors of the North of England Iron Steamship Association.

Be good enough to insure in your association the undermentioned steamers for the sums placed opposite their respective names, from the 20th Feb. 1866 to the 20th Feb. 1867, at noon inclusive, subject to your rules.

Owner's name or Policy.	Steamer's name.	....	Value.		Sums to be insured.
			Hull.	Machinery	
Hetton Coal Co.	*Hetton.*	....	60 00l.		6000l.
Ditto.	*Cochrane.*		60 00l.		6000l.

(Accepted) JOHN ORMSTON, WM. D. STEPHENS, } Directors.

(Signed) ROBERT SHARP, for the Owners.

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The plaintiffs for a consideration in that behalf subscribed the said policy for 6000*l.* and became insurers thereon to the defendants for that amount on the said steamship, machinery, tackle, apparel, boats, and other furniture.

The defendants at the time of the making of the policy and thence until and at the time of the loss hereinafter mentioned, were interested in the said steamship and premises to the amount of all the moneys by them insured therein.

In Dec. 1866 the said steamship *Hetton* was run down and sunk by a steamship called the *Uhlenhorst* and was thereby (being one of the perils insured against) totally lost.

The plaintiffs thereupon, under the said policy paid to the defendants the said 6000*l.* for such loss.

Proceedings were afterwards instituted by Messrs. Dyke and Stokes, under instruction from the plaintiffs in the High Court of Admiralty in the names of the defendants against the owners of the latter vessel for the recovery of damages and compensation for the loss of the *Hetton* and her cargo, and the injuries to her master and crew occasioned by the same being run down by the said *Uhlenhorst*, and eventually on an appeal from the judgment of that court, the Privy Council gave judgment in that suit against the owners of the *Uhlenhorst* for the sum of 5683*l.* 11*s.* 7*d.*

About three months after such proceedings being taken by Messrs. Dyke and Stokes as aforesaid in the High Court of Admiralty, the following notice was served by Messrs. Shum and Crossman, acting on behalf of the owners of the *Hetton* upon Messrs. Dyke and Stokes, and received by them.

In the High Court of Admiralty in England.

THE UHLENHORST.

As the attorneys and agents for and on behalf of Sir William Armstrong, &c., the owners of the *Hetton*, and the plaintiffs in this suit, we hereby give you notice, and require you not to part with any moneys received, or that may be received by you from the owners of the *Uhlenhorst*, or otherwise in this suit, except to us the undersigned, or to the above-named, the owners of the *Hetton*. And we further give you notice that should you part with such moneys after the receipt of this notice, except to us or the above-named, the owners of the *Hetton*, we shall hold you responsible for the same. Dated the 28th day of March 1868.—Yours, &c.,

SHUM and CROSSMAN.

After the service of the aforesaid notice, and during the proceedings in the High Court of Admiralty, various negotiations took place between the parties interested relative to the course to be adopted, and ultimately it was agreed between them as follows:

Memorandum of agreement between the owners of the *Hetton*, her cargo, master and crew, of the one part, and the North of England Iron Steamship Insurance Association of the other part, whereby (the *Hetton* having been run down by the *Uhlenhorst*, and the *Uhlenhorst* having to pay 5600*l.* or thereabouts and interest and costs) it is agreed that the said sum of 5600*l.*, or as much as may be paid by the owners of the *Uhlenhorst*, and interest, shall be received by H. Graham Stokes as solicitor for the insurance association, the *Hetton* having been insured therein, and Wm. Crossman as solicitor for the owners of the *Hetton*, and held by them until the rights of the parties to the said sum of 5600*l.*, or thereabouts, and interest shall be agreed to or determined.

Dated 16th July 1868.

For the North of England Iron Steamship Insurance Company, JOS. E. MILLER, Sec.

For the Owner of the *Hetton* Steamship, G. H. COCHRANE, Chairman.

The sum of 5683*l.* 11*s.* 7*d.* has been paid by the said owners of the *Uhlenhorst*, and 5495*l.* 18*s.* 6*d.*, part thereof, is at present deposited, pursuant to the agreement in the last paragraph set forth, in the London and Westminster Bank pending the decision of the court in this case. The residue of the said sum of 5683*l.* 11*s.* 7*d.*, namely 187*l.* 13*s.* 6*d.*, has been paid to the master and crew of the *Hetton*, who were entitled to it.

A portion of the said sum of 5495*l.* 18*s.* is payable to the owners of freight, and of the cargo on board the *Hetton* up to the time of the loss. The residue is payable for the loss of the *Hetton* and its machinery, tackle, apparel, boats, and other furniture.

The value of the said *Hetton*, and the machinery, tackle, apparel, boats, and other furniture of and in it, was before and at the time of the effecting of the said insurance, declared as aforesaid by the defendants to be the sum of 6000*l.*

That was the only insurance effected on the *Hetton*.

The plaintiffs claim the whole of the said 5495*l.* 18*s.* to be paid to them, after deducting the amount payable to the owners of the cargo and freight. On the other hand, the defendants allege that the value of the *Hetton* at the time she was lost was 9000*l.*, and, notwithstanding its value is declared in the policy to be 6000*l.*, and that sum has been paid by the plaintiffs as above stated, the defendants claim to be entitled to participate in the said sum of 5495*l.* 18*s.*, after such deduction as aforesaid.

The question for the opinion of the court is whether or not the plaintiffs (assuming the *Hetton* at the time of the loss to have been of the value of 9000*l.*) are entitled to have payment made to them of the whole, or, if not of the whole, of any and what part, of the said 5495*l.* 18*s.*, after deducting the amount payable to the owners of the cargo and freight as aforesaid.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiffs pursuant to an agreement entered into by the parties hereto, in accordance with the Common Law Procedure Act 1852.

But if the court shall be of opinion in the negative, then judgment shall be entered up for the defendants pursuant to the said agreement in accordance with the said Act.

Plaintiffs' points: First. That they are entitled to have the whole of the 5495*l.* 18*s.*, after deducting the amount payable to the owners of the cargo and freight. Secondly. That as the value of the ship is declared in the policy to be 6000*l.*, that must for all purposes as between the assurers and the assured be taken to be the value, notwithstanding the actual value may have been more at the time of the loss.

Defendants' points: First. That the defendants, under the circumstances stated, were entitled to be indemnified by the owners of the *Uhlenhorst*. Secondly. That under the circumstances set forth in the special case, the value stated in the policy of insurance is in no way binding upon the defendants. Thirdly. That inasmuch as the defendants have only received 6000*l.* on account of their vessel, which at the time of her loss was worth 9000*l.*, they are entitled to receive, out of the 5495*l.* 18*s.* received from the owners of the *Uhlenhorst*, the sum of 3000*l.*, so as to make up the said sum of 9000*l.*

Honyman, Q. C. (with him *Udall*), for the plaintiffs.—The underwriter is subrogated to the assured, and stands exactly in his position; he has a right to bring an action in the name of the assured against the owners of the vessel in default, and to keep whatever amount he recovers in that action. The general principle is established by a variety of decisions beginning with *Randal* v. *Cockran*, 1 Ves. Sen. 98, in which it was held that an insurer, after satisfaction, stands in place of the assured as to the goods, salvage, and restitution in proportion for what he paid. So it was held in *Mason* v. *Sainsbury*, 3 Doug. 61, that where insurers had paid the amount of the loss occasioned by the demolition of a house by rioters, they might maintain an action in the name of the assured against the hundred, under the statute 1 Geo. 1, c. 5, s. 6. In *Yates* v. *Whyte*, 4 Bing. N. C. 272, the plaintiff sued the defendants for damaging his ship by collision, and it was held that the defendants were not entitled to deduct from the

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amount of damages to be paid by them, a sum of money paid to the plaintiff by insurers in respect of such damage. Tindal, C. J. said, "I think this case is decided in principle by that of *Mason* v. *Sainsbury*. There a party, whose property had been burnt by a mob, was allowed, after receiving the amount of his loss from an insurance office, to sue the hundred on the statute of Geo. 1, for the benefit of the insurers. The only distinction between that case and the present is, that there the action for the wrong was brought at the instance of the insurance office, which is not the case here. But it establishes that a recovery upon a contract with the insurers is no bar to a claim for damages against the wrongdoer." In the *Quebec Fire Insurance Company* v. *St. Louis*, 7 Moo. P. C. 286, where the parish church of Boucherville, in Lower Canada, having been in great part destroyed by fire, which was occasioned by the negligence of the respondents' servants, and being at the time insured by a policy effected by the curé upon the church and sacristy, the curé and one of the *marguilliers-en-charge*, by a notarial instrument, transferred to the appellants (who had granted the policy), in consideration of the payment by them of part of the amount of the damage sustained by the fire, the right to sue and claim from the respondents the amount so paid, and it was held that this constituted a valid subrogation of the debt due to the insurers in right of the *fabrique*, according to the French law prevailing in Lower Canada. At p. 316 Parke, B. says, "The learned counsel contended that an assuree by a policy against either maritime or terrestrial risks is clearly within the equity of the rules, and has a similar right to require a subrogation at the time of the payment of loss. The authorities cited in support of that position seem to us to establish that the assurees have that right; they are, Alauzel on Assurance, p. 384, s. 477; Pardessus, Cours de Droit Commercial, 595; Quinault, p. 248; Toullier, tit. 4, sec. 14, pp. 329–336; and Pothier on Assurance, p. 248, who lays it down that in the case of a general average, the assurer, after having indemnified the assured against the losses sustained for the common benefit, ought to be subrogated to the rights of the assured, to the contribution which in such case must be made. These authorities are so consistent with justice, and founded upon so equitable a principle, that we have no difficulty in adopting them; and we do not think that any of these are shown to have been derived, as was suggested in argument, from the Code Napoleon, which is not in force in Canada." An authority to the same effect is *Dickinson* v. *Jardine*, L. Rep. 3 C. P. 639; 18 L. T. Rep. N. S. 717, where A. insured goods at Canton by a policy which included jettison among the perils insured against, and the goods having been jettisoned under circumstances which entitled A. to a general average contribution from the owners of the ship and of the rest of the cargo, which arrived safely in London, the port of discharge, A. sued the underwriters for the whole amount insured, without having first collected the contributions to which he was entitled from the other owners of the ship and cargo; and it was held that he was entitled to recover, and that the underwriters, having paid him, would then be entitled to stand in his place with respect to the general average contribution. "The result is," (said Willes, J.) "that the owner has two remedies, one for the whole value of the goods against the underwriters, the other for a contribution in case the vessel arrives safely in port; and he may avail himself of which he pleases, though he cannot retain the proceeds of both, so as to be repaid the value of his loss twice over. This is the usual case where here is an insurance, and a loss following therefrom within its terms, which would be total but for he liability of a third person." It may be said that all this holds only in cases where the assured has received the whole value of the vessel insured, and that, as in the present case, he got only 6000*l.* instead of 9000*l.*, the value of the vessel at the time of the loss, the rule does not apply to him. But it is submitted that this view is founded on a misconception of the nature of the policy, which in the present case is a valued one. And it has been held that, in the absence of fraud, the valuation in the policy is conclusive as between the assured and the underwriters. In Phillips on Insurance, sect. 1183, the law as to this is thus stated: "If the valuation is neither intended as a cover for a wager by both parties, nor fraudulently made, it is binding on the parties, in case it can be carried into effect, and will, as between them, determine the value of the property, and the circumstance of the property being valued very high has not in itself been held to be a sufficient proof of a wager, or of a fraudulent intention on the part of the assured;" and it is submitted that this applies not only to cases of an action on the policy itself, but also to all actions arising out of the policy. Suppose the vessel had been sunk, and the hull were afterwards raised, the underwriter would be entitled to it as salvage. "In cases of abandonment," says Arnold, Maritime Insurance p. 1002 "the assured is entitled to the whole amount of the insurance, and the underwriter on payment of such amount is entitled to the net proceeds of whatever may be saved, in other words, to the salvage, after deducting the expense of saving and recovering it. We have also seen that even where no abandonment has been made, he is equally, on payment of a total loss, entitled to the net salvage that may ultimately come to hand." At page 1004 he says, "If after payment of a total loss, the salvage or proceeds of its sale be withheld from the underwriter, he may bring an action for money received against the assured, and recover unless by his own act at the time of settling loss (as by paying less than the whole amount of insurance in full of all demand) he have waived his claim to the salvage," for which he cites *Brooks* v. *McDonnell* 1 Y. & Coll. 500. In that case an insurance had been effected on goods on board a ship consigned to Buenos Ayres, which was captured by the Brazilian government, and condemmed for an attempted breach of blockade. Notice of the capture having been given by the insured to the underwriters, and an offer made by the insured to abandon, the underwriters declined the offer of abandonment, and after some negotiation, it was arranged that on payment by the underwriters of 35*l.* per cent. on the sum insured, the policy should be delivered up to be cancelled, which was accordingly done. Some years afterwards, in pursuance of a convention between Great Britain and Brazil, the goods having been ordered by the latter government to be restored to the owner, and compensation to be made, a claim was made by the underwriters to the whole or a part of the sum awarded for compensation; but it was held, that having declined the offer of abandonment, the payment of the 35*l.* per cent. was a compromise of their liability under the policy, and that they were not entitled to any portion of the sum awarded for compensation. "I do not, in any manner," said the Lord Chief Baron in delivering judgment, "dispute any of the general principles laid down in the course of the argument on the part of the defendants in this case. A policy of assurance is clearly only an instrument of indemnity. As a general rule it cannot be carried further. . . . Looking at the facts stated on both sides, I can feel no doubt that the assured were entitled to some compensation. No doubt is suggested as to their right to bring an action immediately after the loss was ascertained; but whether they should at that time bring an action or wait the possible restoration

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of the goods seems to have been a matter of doubt. It has been contended on the one side, that I should treat this as a case of a total loss, and that the 35*l.* per cent. paid by the underwriters must be considered as a payment by them in respect of a composition, *i.e.*, as if they had paid 100*l.* per cent. The necessary consequence of this would be that the underwriters would be entitled to the whole of the money, deducting the expenses of recovering it." And the law is thus broadly stated in Arnold's Marine Insurance, p. 867 (last edit.), "The effect of a valid abandonment is to transfer the whole interest in what remains of the thing insured, so far as it is covered by the policy, together with all the rights and liabilities arising out of its ownership from the assured to the underwriters, in proportion to the amount of their several subscriptions. And this transfer, according to what seems to be the true principle, is retrospective, operating from the moment of the casualty which gave the right to abandon. . . . The effect of abandonment is not only to transfer the remains of the abandoned property, but also to clothe the underwriter from the moment of loss with all the rights and all the responsibility of ownership." [LUSH, J.—If it is conceded that the payment to the assured by the underwriter of the actual value of the vessel, would give him all the rights of the assured, the question here is merely whether the payment of the agreed value has not the same effect?] "The payment of a total loss by the insurers," says Phillips, sect. 1707, "or their liability to pay such a loss in consequence of an abandonment, gives them an equitable right to the property, or what remains of it, so far as it was covered by the policy, including the *spes recuperandi*, and the rights identified with the insurable interest or depending upon the possession of it." And sect. 1711, "All claims against third parties on account of negligence or agency occasioning the damage to the subject, or destruction of it, by a peril insured against, are assigned to the underwriter by an abandonment, so far as the subject is covered by the policy, as a claim against the owners of another vessel for damage by collision with the one insured;" and in sect. 1723 the same writer says, "A mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may be afterwards recovered from other parties on account of the loss. The effect of the payment of a loss is equivalent, in this respect, to that of an abandonment." In *Irving* v. *Richardson*, 1 M. & Rob. 153, it was argued, on the authority of *Bousfield* v. *Barnes*, 4 Camp. 228, that the defendant was not bound by the sum mentioned in the policy as the value of his vessel; but Lord Tenterden, C. J., said, "I was prepared to give my opinion in point of law, if it had been necessary, that this case is not governed by that cited. There the sum mentioned as the value was different in the two instances; here it was the same. I am of opinion that where a person effects two insurances, declaring the same value in each, he is bound by that sum, and cannot receive beyond that extent." *Bruce* v. *Jones*, 1 H. & Colt. 769, was also referred to. The defendants are estopped from saying that the value of the *Hetton* was more than 6000*l.*, and they are not entitled to recover from the plaintiffs anything more than what has already been paid.

A. L. Smith (with whom was *Watkin Williams*) for the defendants.—The real point in this case is whether the amount mentioned in the policy as the value of the *Hetton* is conclusive upon the parties under all circumstances whatever; and it is submitted that the amount is absolutely conclusive only in case of an action on the policy itself, which is not the present case. The doctrine of estoppel between the parties has never been held to apply except in the case of an action on the policy itself, and it would be a great extension of the doctrine to apply it to such a case as the present. No case has been cited in which the assured had not first been fully indemnified before the underwriter was held entitled to stand in his place, and to exercise all his rights; and this has not been done here, as the real value of the vessel at the time of the loss was 9000*l.* If the doctrine contended for by the other side is correct, the owners of the vessel could never after effecting this insurance have underwritten an increased risk, though the value of the vessel might have been subsequently greatly increased by the addition of new machinery, &c. In *Randal* v. *Cockran* (*ubi sup.*) the decision was that the insurer "after satisfaction," *i.e.*, after fully indemnifying the assured, stands in his place. So in *Yates* v. *Whyte* (*ubi sup.*), Wilde, Serjt. says *arguendo*, "They (the defendants) could not call on the underwriters to indemnify the plaintiff, in order to induce him to renounce the action against the defendants, while on the other hand, if the plaintiff recovered against the defendants, he would hold the sum recovered as trustee for the underwriters, since all he can claim against them is indemnity for actual loss," a view which is adopted by Lord Tenterden in his judgment. The necessity of the assured being first fully indemnified is also alluded to by Park, J. in the same case:—"This point has been decided ever since the time of Lord Hardwicke; so much so that it has been laid down in text writers that where the assured *who has been indemnified* for a wrong, recovers from the wrongdoer, the insurers may recover the amount from the assured;" and the same remark applies to the other cases which have been cited. [LUSH, J.—Suppose the vessel were now raised, to whom would she belong?] No doubt to the underwriter. [LUSH, J.—And that, no matter what her value might be—even though it exceeded 9000*l.*] That would be a case of salvage. The question here is whether the underwriter is entitled to be subrogated to the assured, so as to bring an action against the wrongdoer until the assured has been first indemnified. In *Bousfield* v. *Barnes*, 4 Camp. 229, Lord Ellenborough, C. J. said, "I think the valuation in this policy is only conclusive in settling a loss upon it between the assured and the underwriters, who have subscribed it, without taking into consideration what has been transacted between the assured and third persons. If a total loss happens, these underwriters shall not pay more than the amount of the valuation; and if there be a partial loss, the valuation regulates the amount of the average contribution. I will likewise take care that the assured do not recover upon the whole more than the real value of the subject-matter insured. But I think it is not enough for the underwriters, on a particular policy, to show that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity. In the present case the ship insured is proved to have been worth above 8000*l.* The plaintiff has received only 6000*l.* from the London Assurance. He has, therefore, an interest of 2000*l.* to which he may apply the policy on which the action is brought." The rule of law deduced from this case is thus stated in Arnould's Marine Insurance, p. 860 (edit. of 1857), "It must carefully be borne in mind that as a general rule the valuation is *only conclusive between the parties to the same policy;* and if the assured has sought to protect a portion of his interest in any subject of insurance by one valued policy, and afterwards another portion of his interest in the same subject, by a second valued policy, the valuation in the one policy on which he has recovered does not limit him as to the

sum he may recover on the other; provided the value of his interest in the subject insured exceeds the amount in the policy on which he has recovered." The necessity of previously indemnifying the insured is also alluded to by Blackburn, J. in delivering the judgment of this court in *Stringer* v. *English and Scottish Marine Insurance Company*, L. Rep. 4 Q. B. 692. He says, "It is clear, as a matter of fact, that they (the insured) elected to come upon the insurers for an indemnity for a total loss, and that by so doing, the insurers, when they have indemnified them, will be entitled to be subrogated for them, and get what they can out of the hands of the Americans for their own benefit." So that it comes back to the question whether the defendants have been indemnified, and it is submitted that they have not, unless they are held to be estopped by the value of the vessel lost, which is stated in the valued policy.

Sir *G. Honyman*, Q. C. was not called on to reply.

COCKBURN, C. J.—I think we need not further trouble Sir George Honyman. We are satisfied that our judgment must be in favour of the plaintiff; and I ground my judgment in the matter upon the general proposition that where the value of a vessel insured is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the whole value of the thing insured, then, in respect of all rights and obligations which arise upon the policy of insurance, the parties are estopped between themselves from disputing the value of the thing insured as stated in the policy. I take it, then, to be clearly established that it is one of the rights of the underwriter in the case of a total loss, that whatever remains of the vessel in the shape of salvage, and whatever rights accrue to the owner of the thing insured and lost, pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does so satisfy it. It is admitted here that if this ship had been recovered from the bottom of the sea by being brought up by any of those contrivances which modern skill and science have occasionally made available for that purpose, the body of the vessel would have passed to the underwriters. If, on the other hand, her value had proved to be more than the estimated value in the policy, the underwriter would have been entitled to the vessel so recovered. But I think it is clear also, where we have, instead of the vessel, the supposed value of the vessel, or so much of it as the delinquent vessel was called upon to contribute for the loss, that so much of that as is recovered must be taken to be recovered in respect of the lost ship and to represent it; and then, just as the underwriter would be entitled to the ship if it could have been bodily got back, so he is entitled to that which is the representative of the vessel in the shape of damages to be paid by the owners of the vessel which caused the collision. It seems to me further, to be altogether monstrous to say that where there is a case of a valued policy and an open policy, it is to depend upon the question of which party is first sued, whether the underwriter shall or shall not be bound to pay more than the value of the policy. It is conceded by Mr. Smith that if there were a valued policy and an open policy, and the assured was first to sue upon his open policy and recover his 3000*l.*, taking the figures he has put of 6000*l.* and 3000*l.*—that he would not be entitled to recover on the valued policy the whole amount of that policy, but only so much as constituted the difference between the amount in the open policy and the amount of the estimated value in the valued policy. So, again, it must be conceded, that if this sum had been recovered first from the owners of the vessel that caused the damage, the underwriter upon the valued policy could not have been compelled to pay the whole of that valued policy, because the value of the vessel as between them must always be taken to be the amount at which it is stated in the policy. Though the proposition certainly startles one a little, that the underwriter who has only paid 6000*l.*, the estimated value as stated in the policy and agreed upon between the parties, shall, if the vessel should prove to be equal in value to that amount or worth more than it, get all that can be recovered in respect of the loss of the vessel—still, that is an incident that arises upon this novel form of policy, in which the value of the vessel is taken at a fixed sum agreed upon between the parties. If parties will enter into such policies they must take the consequences, and I do not think we can bend the old rules which exist in respect of marine policies and wrest them from that which was their original position, for the purpose of adapting them to these new-fangled forms of insurance. It has always been considered as a settled rule in insurance law, as I started with observing, that where there is a total loss, the underwriter who pays upon a total loss, whether it is an actual or a constructive total loss, is entitled to anything that remains of the vessel, and to anything which would otherwise have accrued to the owner of the vessel by reason of his ownership. Where the policy is an open policy and simply a policy of indemnity, as to the actual value of the vessel no difficulty would arise in such a case. It is only because we have here a valued policy that these difficulties present themselves. I think we must still apply the old rules, and not make new ones; and if a party chooses to have his vessel or his goods, as the case may be, taken at a fixed value, instead of the contract being one similar to what it is in an ordinary policy, which is simply one of indemnity to the extent of the real value, and any benefit thereby accrues to the underwriter, the underwriter must be held entitled to it. I think, therefore, on the whole of this case, that our judgment must be for the plaintiffs.

MELLOR, J.—I am of the same opinion. Mr. Smith says that the question which determines the matter in the present case is, what is the effect of the agreement as to the value of the vessel, and I agree with him that that is so. The basis of the contract is the agreed value of the vessel, and when, to avoid all questions as to the real value, the parties come to an agreement as to the value, which is to be the basis of the contract, it appears to me to follow as a matter of course that all those rights that spring out of such a transaction as the present, must apply to the actual agreed value which is the basis upon which the parties contracted. It appears to me then, without saying more, that that is the determining point of the case; and I really cannot see if the parties do for the sake of avoiding all those questions which would otherwise arise, agree to a particular value, why they should not be held to agree to it for all purposes which spring out of the policy.

LUSH, J.—I am of the same opinion. A person effecting an insurance may either agree with the insurer as to the amount which is to be considered as the sum forming a complete indemnity, or he may leave it open. If he fixes the amount which he is to be paid in the case of a total loss, and the underwriter accepts that amount, that amount must be binding upon both parties. If each of the parties agrees that a certain sum shall be deemed to be the value of the thing insured, the underwriter in the case of a total loss is not to be at liberty to say that the thing is not worth so much; he is bound to the amount fixed upon, whether it is the amount or not. And, on the other hand,

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insuring is not at liberty to say that the thing is worth more; he is also bound by the amount agreed upon. It is for the purpose of avoiding all question about the value that the parties have agreed to fix the amount, and therefore for all purposes as to the adjustment of the value under that policy, both the parties are bound by the amount so agreed upon. Mr. Smith admits that the underwriter in the present case, having paid the full amount agreed upon in the policy as the value of the thing insured, would be entitled to the wreck if he could get it. Now, if the underwriter here got the wreck up, and if he procured the wrongdoer to repair the vessel, the vessel so repaired would still belong to the underwriter. What difference can it make whether the wrongdoer repairs the thing in specie, or pays in money the amount that it would take to repair it? In either case the vessel so insured becomes the property of the underwriter, by reason of his having paid that which both parties agree shall be deemed to be the full value of the property. It follows, therefore, that the underwriter is entitled to our judgment.

Judgment for the plaintiffs.

Attorneys for the plaintiff, *Williamson, Hill,* and *Co.*

Attorneys for the defendant, *Shum* and *Crossman.*

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING, Esqrs., Barristers-at-Law.

Feb. 4, and May 6.

CALLAGHAN (app.) v. DOLWIN (resp.)

Friendly society—Reference to justices—Right of appeal—20 & 21 Vict. c. 43 s. 2—21 & 22 Vict. c. 101 s. 5.

The decisions of justices on disputes between members of friendly societies referred to them under the 21 & 22 Vict. c. 101 s. 5, are final and cannot be reviewed by a Superior Court on a case stated under the 20 & 21 Vict. c. 43. Watts *v.* The Justices of Kent, 14 *L.T. Rep. N.S.* 448 (*Reported nom* Reg. *v.* Lambarde, *L. Rep.* 1 *Q. B.* 388), *overruled.*

This was a case stated for the opinion of the court by a justice of the peace, pursuant to the 20 & 21 Vict. c. 43.

The judgment of the court having turned upon their jurisdiction to review the decision of the justice on a case stated under the 20 & 21 Vict. c. 43 it is only necessary to give a summary of the facts stated in the case.

The complaint was preferred by the respondent against the appellant, who was the secretary of the Royal King's Lodge Benefit Society, and charged that the appellant, on the 25th April 1868, unlawfully refused to pay the respondent, he being a free member of the society, and having complied with the regulations thereof, the sum of 10*l.*, being the sum allowed by the third rule of the society for the funeral of the wife of a free member thereof.

The rules of the society were certified by the Registrar of Friendly Societies; and by rule 36 disputes under the rules between members and the trustees, treasurer, or other officers, were to be referred to justices pursuant to the 21 & 22 Vict. c. 101, s. 5, under which this complaint was made.

The dispute between the parties turned upon the construction of two of the rules, and the question for the opinion of the court was whether the magistrate's construction of rule 14 was correct in point of law.

Lister (*T. Atkinson,* Serjt., with him), for the appellant, contended that the magistrate's construction of the rule was incorrect.

Warton, for the respondent, contended that the magistrate was in the position of an arbitrator, and that his decision was final. He referred to the 4 & 5 Will. 4, c. 40, s. 7, by which provision was made for referring disputes between members of friendly societies to justices. By the 18 & 19 Vict. c. 63, s. 40, it was enacted that disputes should be decided according to the rules, and that such decision should be binding and conclusive without appeal. That section contained a proviso that where by the repealed Acts disputes were to be referred to justices they should be referred to the County Court judges, and that proviso was repealed by the 21 & 22 Vict. c. 101, s. 5, which again substituted justices for the County Court judges, but did not affect the earlier part of the section. He cited

Crisp v. *Banbury,* 8 Bing, 394;
Kelsall v. *Tyler,* 25 L. J. 153, Ex.;
Dwarris on Statutes 668, 2nd edit.;
Conservators of the Thames v. *Hall,* L. Rep 3 C. P. 415,; 18 L. T. Rep. N. S. 361;

[KEATING, J. referred to *Reg.* v. *Evans,* 23 L. J. 100, M. C.; 18 L. T. Rep. 361.]

Evans (*amicus curiæ*) cited
Reg. v. *Lambarde and others,* L. Rep. 1 Q. B. 388 (reported *nom Watts* v. *Justices of Kent,* 14 L. T. Rep. N. S. 448);

where Shee, J. in the Bail Court, decided that a dispute referred to justices under the 21 & 22 Vict. c. 101, s. 5, was within the 20 & 21 Vict. c. 43, and that the justices were bound to state a case.

Warton contended that as that was a decision of a single judge, and no reasons were given, it was not binding on this court.

Lister, in reply, contended that the magistrate heard the case as a justice of the peace, and not as an arbitrator, that a case stated under the 20 & 21 Vict. c. 43, was not an appeal, and that the question was already decided in *Reg.* v. *Lambarde.*

Cur. adv. vult.

May 6.—M. SMITH, J., now delivered the judgment of the court (Byles, Keating, and Montague Smith, JJ.)—A dispute between a member of the Royal King's Lodge Friendly Society, and one of the officers of the society, was decided by a magistrate; but, at the instance of the officer of the society, the magistrate stated a case for the opinion of this court under 20 & 21 Vict. c. 43, s. 2. Upon the case coming on to be heard before us, it was objected by the respondent that there was no power in the magistrate to state the case, on the ground that he acted as a referee, and that his decision was without appeal. By the 36th rule of the society, it is provided that disputes arising between members and any officers of the society shall be referred to justices, pursuant to 21 & 22 Vict. c. 101, s. 5. Upon consideration of the Friendly Societies Acts, we think no appeal lies. The 18 & 19 Vict. c. 63, s. 40, enacts that every dispute between a member and officers of the society shall be decided in the manner directed by the rules of such society, and expressly enacts that "the decision so made shall be binding and conclusive on all parties, without appeal." Then a proviso is added, that where the rules of any society shall have directed disputes to be referred to justices, such disputes shall be referred to and decided by the County Court as thereinafter mentioned. The 41st section then provides for the settlement of other disputes, besides those by the rules referred to justices, by the County Court, and declares that its decisions shall not be subject to appeal. The County Court was thus by the proviso of the 40th

section of 18 & 19 Vict. c. 63, substituted for the justices; but their decision was without appeal. The substitution, however, did not long continue to exist, for by 21 & 22 Vict. c. 101, s. 5, the proviso of the 40th section of 18 & 19 Vict. was repealed, and "in lieu thereof," it was enacted that, where the rules of any society shall direct disputes to be referred to justices, then a justice, upon complaint made by any member, &c., may summon the persons against whom complaint is made at a time and place mentioned, and any two justices then present, "shall proceed to hear and determine the said complaint, which complaint shall be heard and determined in manner directed by 11 & 12 Vict. c. 43; and such justices may make such order thereupon, either for payment of money or otherwise, together with costs not exceeding 10*s*, as they shall think fit." Now this Act which repealed the proviso of the 40th section of 18 & 19 Vict. c. 63, left unrepealed the body of that section, which enacted that every dispute should be decided in manner directed by the rules of the society, and that the decision so made should be "binding and conclusive on all parties without appeal." The Act of 20 & 21 Vict. c. 43, empowering justices to state a case for the opinion of the court, had passed in the interval between the above two Friendly Societies Acts. It was contended by the appellant, that, as the complaint is by 21 & 22 Vict. c. 101, directed to be heard and determined by justices in manner directed by 11 & 12 Vict. c. 43, they hear and determine it as justices: and that the power to state a case under 20 & 21 Vict. c. 43 arises, as in other complaints heard and determined by them. This contention of the appellant amounts to an assertion that there is an implied repeal of the 40th section of 18 & 19 Vict. c. 63, and it appears to us, on an examination of the statute, that such an implication cannot be made. It was further contended that the power to state a case was for the assistance of the magistrates, and was not an appeal. But an examination of the provisions of 20 & 21 Vict. c. 43, does not support that contention. No doubt the proceeding on a case is only upon a determination erroneous in point of law; but in form and substance it is an appeal from the magistrate. It is given, after the determination, to the dissatisfied party, who is called "the appellant," and the proceeding "an appeal." Further, the effect of the 4th and 5th sections is that the justices are bound to state a case, unless the application be frivolous; and if they refuse the Court of Queen's Bench may compel them to do so. Then, by sect. 6, the court to which a case is transmitted may not only reverse, affirm, or amend, but may make such other order in relation to the matter as they may think fit. It seems clear, therefore, that the proceeding by way of case is an appeal from the determination of the justices, and that such a proceeding is opposed to the enactment of sect. 40 of 18 & 19 Vict. c. 63, that "the decision" (when made in manner directed by the rules) "shall be binding and conclusive on all parties without appeal." The 5th section of 21 & 22 Vict. c. 101, appears to us to do no more than prescribe what the mode of procedure before the justices shall be according to 11 & 12 Vict. c. 43; and that it was not meant to take from them the character of referees, viz., persons so elected by the society to decide upon their disputes. The limitation of costs to 10*s*. shows also that the Legislature meant the proceeding to be inexpensive. If we were to hold that this appeal lies, we should attribute to the Legislature an intention opposed to the whole policy upon which, in this respect, the Friendly Societies Acts are founded. Throughout the series of statutes on the subject, it has been provided that disputes between members and the society are to be decided by arbitration only; and the courts have given effect to this policy by holding that the jurisdiction of the Superior Courts in such cases was ousted, although not taken away by express words. See the cases at law of *Crisp* v. *Bunbury*, 8 Bing. 394; *Ex parte Payne*, 5 D. & L. 679; and *Reeves* v. *White*, 17 Q. B. 995. In the last-mentioned case Lord Campbell, C. J. in delivering the judgment of the court, says:—"In *Ex parte Payne*, 5 D. & L. 679, Erle, J. after full argument and great deliberation, put this construction on the 27th section of 10 Geo. 4, c. 56, considering it to be the expressed intention of the Legislature to protect societies and their members, who are generally persons in an inferior rank of life, with small means, from the vexation and ruin which might be brought upon them by litigation in courts of law, and to provide for them a domestic tribunal by which all their differences might be speedily decided, and at very small expense." The courts of equity have given the same construction to the Acts. In *Armitage* v. *Walker*, 2 K. & J. 211, where a question arose under the Benefit Building Societies Act (6 & 7 Will. 4, c. 32), Wood, V.C., says, "The Legislature intended carefully to provide that these societies should not be dragged before courts of law or equity, if it could possibly be avoided, and has taken care to enact that the whole discussion of these affairs shall be disposed of in a cheap and summary manner, by the decision of an arbitrator or justice, as the parties shall choose; and, when they have once made their selection, the power of the justices or of the arbitrator, acting always within the rules of the society, is complete, and is not subject to revision by any court of law or equity. That is the primary matter to which attention must be drawn; and it is necessary to be extremely careful that the jurisdiction of the court shall not be set up to control the arbitrators so selected, except upon a very clear and distinct case being made out, of the abuse of their office." The gist of these decisions is, that the persons selected by the rules to settle disputes are, whether justices or other referees, to be regarded as arbitrators; and the exception in Wood, V.C.'s judgment refers to the well-known equitable relief afforded in the cases where arbitrators have misconducted themselves, and abused their powers. There is no authority to be found for the view of the appellant, except a decision of Shee, J., in the Bail Court, where that learned judge held that the justices were bound to grant a case under 20 & 21 Vict. c. 43; *Reg.* v. *Lambarde*, L. Rep. 1 Q. B. 388. But in the reports of that case it does not appear that sect. 40 of the 18 & 19 Vict. c. 63 was brought to the attention of the learned judge, nor that the earlier statutes and the decisions upon them were referred to. With every respect, therefore, for the learned judge, we cannot consider that decision binding upon a question of such great practical importance. In the result, we come to the conclusion that the magistrate, in hearing this dispute, acted in the character of an arbitrator under the rules of the society, and consequently that his decision cannot be reviewed by this court upon the case stated, and that the appeal should be dismissed.

Appeal dismissed with costs.

Attorneys for appellant, *Godfrey* and *Herbert*.

Attorney for respondent, *H. T. Roberts*.

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COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law

Friday, Jan. 21.

REG. *v.* EAVES.

Excise—Appeal—Notice of appeal—Notice of hearing—Adverse party—7 & 8 Geo. 4, c. 53, s. 83—4 Vict. c. 20, s. 30.

The appellant in an appeal against a conviction under the Excise Acts by two of the justices of Liverpool, served notice of hearing of the appeal by leaving notices with clerks at the respective places of business of the two magistrates in Liverpool, and also by leaving a notice with a clerk at the excise office in Liverpool. The person on whose information the conviction was obtained was one B. E., an officer of excise at Liverpool:

Held, that no sufficient notice of hearing had been given within the 83rd section of 7 & 8 Geo. 4, c. 53, and 4 Vict. c. 20, s. 30, the first of which, besides notice to the justices, requires notice of hearing to be given to the "adverse party," and the second of which requires it to be given to or left at the place of abode of the respondent.

The appellant in the same appeal gave a written notice of appeal to the clerk to the justices in court immediately after the conviction, the two justices being then present:

Held, a sufficient service of the notice of appeal upon the justices within 7 & 8 Geo. 4, c. 53, s. 83.

Case stated by the Recorder of Liverpool for the opinion and direction of the Court of Exchequer under 7 & 8 Geo. 4, c. 53, s. 84, the facts of which were, so far as material, as follows:—

This was an appeal by David Eaves to the Midsummer Quarter Sessions for the borough of Liverpool, holden on the 13th July 1869, from the judgment of two justices of the borough in the matter of an information exhibited by Benjamin Evans, an officer of excise.

The appellant was, on the 15th June 1869, convicted by the said justices in a penalty of 100*l.*, for being concerned in the removal, deposit, and concealment of a quantity of exciseable goods contrary to the provisions of the 7 & 8 Geo. 4, c. 53. The information on which the said conviction was obtained was laid by the said Benjamin Evans, who was an officer of excise, then and still acting and residing in Liverpool.

Immediately on the conviction being pronounced, the appellant's counsel stated verbally in court that his client would appeal against the said conviction. About the same time the attorney for the appellant served on the clerk of the magistrates of the borough of Liverpool a notice of appeal, the said two magistrates and the said clerk then being in court.

Such attorney at the same time handed a copy of such notice to Mr. William Tyndall, the attorney who represented the said Benjamin Evans on the hearing of the said information, the said Benjamin Evans being present at such hearing. Mr. Tyndall at once handed it back, stating that he declined to accept it, and that the appellant's attorney had better look at the Act of Parliament, because the legal preliminaries to an appeal being heard were numerous and intricate. Mr. Lynch, the appellant's attorney, insisted that the service on Mr. Tyndall was a sufficient notice.

The following is a copy of the notice before mentioned:

To John Torr and Alfred Turner, Esqrs., and to the Commissioners of Excise.

I hereby give you notice that I intend to appeal against the decision this day made against me.

Dated the 15th June 1869.

DAVID EAVES, per TERBAY and LYNCH,
Attorneys for the said David Eaves.

On the 17th June, about mid-day, the appellant's attorney caused another notice to be served on the head officer of excise at Liverpool; on the same day at three, a copy of such notice was personally served on each of the justices; and a copy was in like manner served on a clerk in the office of the clerk of the peace. This notice was addressed to Evans and the two justices, and set forth appellant's intention of appealing, and the grounds on which he intended to rely. On the 5th July the appellant's attorney caused to be served a notice of hearing of the appeal on clerks of, and at the places of business of each of, the convicting magistrates. On the same day a like notice was left at the excise office, in the borough of Liverpool, with a clerk there. This notice was addressed to the commissioners of excise, Benjamin Evans, and the two justices. The question for the court was, whether the appellant had given the notices, and complied with the preliminaries necessary to entitle him to have the said appeal heard.

The 7 & 8 Geo. 4, c. 53, s. 83, enacts that—

No such appeal as aforesaid shall be allowed unless the party or parties appellant shall, at, and immediately upon the giving of the judgment appealed against, give notice in writing of such appeal to the commissioners of excise or the justices of the peace respectively, from whose judgment such appeal shall be made; and also to the adverse party or parties in such appeal, and shall lodge such notice at the office, or with the registrar of the commissioners of appeal, or with the clerk of the peace for the justices of the peace at such general quarter sessions as aforesaid respectively, by and before whom such appeal is to be finally adjudged and determined, and no such appeal as aforesaid shall be heard, unless the party or parties appellant on such appeal shall within one week at least before such appeal is to be finally adjudged and determined, give notice in writing to the adverse party or parties on such appeal of the time and place when such appeal is to be heard.

It is also enacted by 4 Vict. c. 20, s. 30, that

The notice of the time and place when and where any appeal to the Barons of Her Majesty's Court of Exchequer, or to the justices assembled at the quarter sessions of the peace is to be heard, shall be given on the part of the appellant to or left at the place of abode of the respondent seven clear days at least before such appeal is to be heard and determined.

L. Temple for the appellant.—It will be contended that personal service of notice of appeal on the magistrates was necessary, and that there was none here. I contend that the notice here given was sufficient, being given to the clerk of the peace, their officer, in their presence. The service also on the adverse party was sufficient. The more substantial difficulty arises out of the mode in which notice of hearing was given; it will be urged that Benjamin Evans was the adverse party within the meaning of the statute. The notice was certainly neither given to him personally nor left at his place of abode; but it is submitted that substantially the excise authorities were the adverse parties, and the notice was left at the excise office.

C. Russell (with him the *Attorney-General*, the *Solicitor-General*, and *Locke*, Q. C.) for the Crown.—In the absence of any statutory provision for substituted service, a notice must be served personally. The notice to the justices was given to the clerk of the peace, and was therefore insufficiently served. Then the point as to the notice of hearing is clearly fatal. The adverse party is the person on whose information the conviction is obtained, not those under whose orders he may be acting. He is the person who legally represents the prosecution, and the notice must be given to him.

The COURT (Kelly, C.B., and Martin and Pigott, BB.) were of opinion that the notice of appeal to the justices was sufficient, but, being of opinion that no sufficient notice of hearing had been given, gave judgment for the Crown.

Judgment for the Crown.

Attorneys: *Vizard* and *Co.*; *Solicitor of Inland Revenue.*

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Jan. 29 and 31.

PREHN AND OTHERS v. THE ROYAL BANK OF LIVERPOOL.

Letter of credit—Agreement by bank to accept and pay plaintiffs' bills—Breach of contract to pay—Action against defendants for breach—Tort or contract—Damages—Measure of—Nominal or substantial.

The plaintiffs, a firm of merchants carrying on business at Alexandria, and having a branch firm at Liverpool, being desirous of purchasing grain at Alexandria and shipping it to England for sale, obtained from the defendants a letter of credit authorising the Alexandria firm to draw bills upon the defendants' bank against grain so sent forward to England; the defendants thereby agreeing to accept the said bills, and to pay them at maturity, the plaintiffs also undertaking to provide, by bills of lading for the grain shipped to England, for the bills to be drawn, so that the defendants should be placed in funds while the bills were running, by the proceeds of the sales of the grain to enable them to meet and pay the said bills at maturity, and so to be kept out of cash advances; for which accommodation the defendants were to receive a commission of one-half per cent. Under that arrangement bills to the amount of 21,928l. were drawn by the plaintiffs at Alexandria upon, and were accepted by, the defendants, and funds exceeding that amount were duly paid into the bank by the plaintiffs before the bills became due. Shortly, however, before the maturity of the bills the bank suspended payment, and gave notice to the plaintiffs that the moneys lodged by the plaintiffs against the bank's acceptances of the plaintiffs' bills could not, under present circumstances, be so applied. Thereupon the plaintiffs at once borrowed the necessary amount, at a commission of 2½ per cent., from financial agents in Liverpool. This commission, amounting to 548l. 11s. 4d., together with 44l. 13s. 4d., the expenses of noting and protesting, and 97l. 4s. 3d., the costs of telegraphic messages to and from Alexandria and Liverpool, for the purpose of giving and receiving information on the subject, to and from the holders of the bills, and ascertaining the best means of protecting the plaintiffs' credit, was paid by the plaintiffs, amounting, in the whole, to 690l. 8s. 11d.; and in an action to recover back that amount from the defendants, as damages sustained by the plaintiffs by reason of the breach of contract, it was

Held, by the Court of Exchequer (Kelly, C.B., and Martin, Channell, and Pigott, BB.), that the plaintiffs were entitled, in an action on special contract, to recover the above mentioned several sums from the defendants, as damages naturally and proximately flowing and resulting from the latter's breach of contract to accept and pay the said bills; and that, by their notice to the plaintiffs of their inability to meet the bills at maturity, the defendants must be taken to have given an implied sanction to the plaintiffs' incurring such expenses under the circumstances.

This was an action by the plaintiffs, as drawers of certain bills of exchange, to recover damages from the defendants for a breach of their contract to accept and pay the said bills when the same became due; and by their declaration the plaintiffs stated that the plaintiffs' Alexandria firm being about to purchase and ship to England for sale cotton and grain, it was thereupon agreed by and between the plaintiffs and the defendants for commission and reward to the defendants in that behalf, that the defendants should accept drafts drawn by the plaintiffs' said Alexandria firm upon the defendants, for the payment of the price of the said cotton and grain, and that the plaintiffs should, from time to time, pay over to the defendants the proceeds of the sales of the said cotton and grain, to be appropriated by the defendants to meet and pay, and that thereout they should meet and pay, the said drafts so to be accepted by them as aforesaid, as and when the same should become due and payable. And that, under and in pursuance of the said agreement, certain drafts were drawn by their said Alexandria firm upon and accepted by the defendants, amounting together to wit to the sum of 21,928l. 12s. 1d., and before the said drafts or any of them became due, the plaintiffs from time to time paid to the defendants, to be appropriated to and for the purpose of meeting and paying the said drafts, moneys in the whole exceeding the said sum of 21,928l. 12s. 1d., and more than sufficient to meet and pay the said drafts; and the defendants, before and at the time of the breaches of agreement hereinafter mentioned, had in their hands, under and in pursuance of the said agreements, moneys for the purpose of and appropriated to meeting and paying the said drafts, as and when the same became due, exceeding the said sum of 21,928l. 12s. 1d., and more than sufficient to meet and pay the said drafts; and all things were done, &c., to entitle the plaintiffs to a performance by the defendants of the said agreement, and to maintain this action for the breaches thereof hereinafter mentioned; yet the defendants, before the said drafts or any of them became due and payable, gave notice to the plaintiffs that they would not meet or pay the same when the same became due and payable, and wholly refused and declined to carry out the said agreement on their part, and thereupon the plaintiffs were forced and obliged, at great expense, to make other arrangements for meeting and paying the said drafts, and for providing the funds necessary for that purpose; and afterwards to meet and pay the said drafts, and were put to great costs, charges, and expenses in and about noting and protesting the said drafts, and in and about protecting their credit, and the credit of their Alexandria firm.

Plea.—Payment into court of 44l. 13s. 4d. as enough to satisfy the plaintiffs' claim.

Replication.—Denying the sufficiency of the sum paid into court to satisfy the plaintiffs' claim, and issue thereon.

The following particulars of the plaintiffs' claim were delivered pursuant to the order of Bramwell, B., dated 20th July 1869.

	£	s.	d.
The costs, charges, and expenses of noting and protesting, in Alexandria and Liverpool, twenty-three bills of exchange for want of better security, and of noting acceptance by Messrs. Marriott and Co. *supra* protest for the honour of the drawers at 1l. 18s. 6d. each	44	5	6
Postage	0	7	10
	£44	13	4

"The costs, charges, and expenses, to which the plaintiffs were put in and about protecting their credit, consisted of the sum of 548l. 11s. 4d. paid by the plaintiffs to Messrs. Marriott and Co., of Liverpool, to provide for the plaintiffs' drafts at maturity, being a commission at the rate of 2½ per cent. on the sum of 21,928l. 12s. 1d., the amount of such drafts; and also consisted of the sum of 97l. 4s. 3d. paid and expended in transmitting telegrams from Liverpool to Alexandria, and from Alexandria to Liverpool, such last-mentioned costs, charges, and expenses being incurred at divers times and on divers days between the said 23rd Oct. and the 20th Dec."

At the trial of the above action, at Liverpool, at the last summer assizes, before Hayes, J. and a special jury, the following appeared from the evidence, oral and documentary, to be the facts of the case.

The plaintiffs in the year 1867 were merchants carrying on business at Alexandria, and having also a branch house of business at Liverpool, of which one of the partners in the firm, Mr. W. C. R.

Quentrell, was the resident manager and head. In the autumn of that year (1867), the plaintiffs' Alexandria firm were desirous of purchasing cotton and grain at Alexandria for shipment to England, and of drawing against cotton and grain so sent forward to England. Accordingly the plaintiffs, by Mr. Quentrell their resident Liverpool partner, arranged with the then manager of the defendants' bank (Mr. Withers), that the drafts of the Alexandria firm, in payment for such cotton and grain, should be accepted by the bank, upon the understanding that the proceeds of such cotton and grain should be specifically appropriated for the payment of such drafts at maturity, and should be carried to a special and separate account opened for that purpose; and, in conformity with that arrangement, the plaintiffs obtained from the defendants a letter of credit by which the plaintiffs' Alexandria firm were authorised to draw upon the defendants' bank, and by which the defendants agreed to accept the said bills or drafts; the plaintiffs undertaking to provide by bills of lading for goods to be shipped to England for the bills so to be drawn, so that the defendants should be placed in funds, while the bills were running, by the proceeds of their sales of cotton and grain, to enable them to pay the said bills at maturity, and so to be kept out of cash advances, for which accommodation the defendants were to receive a commission of one-half per cent. This arrangement was made by correspondence between the parties, of which the following are the material parts:—

The plaintiffs to the defendants.

Liverpool, 8th Aug., 1867.

DEAR SIR,—With reference to our conversation of this morning in regard to a credit for our Alexandria firm, to be used for transactions in grain, we beg now to state the nature of the business. The grain, to be shipped by our friends, is sold in Liverpool or in London before shipment, and the terms of sale are cash, against delivery of documents within seven days after receipt. Our friends *would draw on your bank* at the time of shipment and remit to you, either simultaneously, or within very short time, as soon as the shipment is completed, the shipping documents. We would then collect the amount, and pay it over to you, *such collections to be considered as in trust, and especially to be applied towards the payment or covering of the drafts* of our friends. As the Alexandrian drafts on your bank would be at three months date, you would be covered in cash over two months before maturity. We shall be very glad if you will grant our friends this facility, as we see the probability of doing a considerable and safe business just now; and we are prepared to pay you *your usual commission* of half per cent. on such transactions. Awaiting your reply, &c., &c.

WM. QUENTRELL and Co.

H. H. Withers, Esq., Manager Royal Bank of Liverpool.

The reply of the defendants to the above letter.

The Royal Bank of Liverpool,
Liverpool, 9th Aug. 1867.

Messrs. Wm. Quentrell and Co.

DEAR SIR,—I beg to inform you, in reply to your note of yesterday, that your firm in Alexandria is at liberty to draw on the company to the extent of 20,000*l.* in furtherance of grain shipments *on the conditions stated*.—I am, &c., &c.,

H. H. WITHERS, Manager.

In pursuance of and accordance with the above arrangement, the plaintiffs' firm in Alexandria, in the months of Aug. and Sept. 1867, made various shipments of grain to England and drew on the bank, in respect thereof, several bills (twenty-three in number) amounting in the aggregate to 21,928*l.* 12*s.* 1*d.*, and which bills would severally reach maturity on different days in the months of Nov. and Dec. 1867 respectively. The plaintiffs also, pursuant to their engagement, caused the proceeds of the various shipments, as they came forward, to be paid into the bank to meet the said bills at maturity, so that on the 21st Oct. 1867, and at the time when the bank stopped payment, there was a sum of 22,000*l.* and upwards in the bank applicable to that purpose.

The bank suspended payment on the 21st or 22nd Dec. 1867; and immediately on hearing a rumour of that event, the plaintiffs, by their Liverpool partner, wrote the following letter to the defendants:

Royal Bank of Liverpool. Liverpool, Oct. 22, 1867.

Gentlemen,—We request you to let us know immediately who are the holders of the drafts of Wm. Prehn and Co., in Alexandria, to the amount of 13,300*l.* drawn upon you, and which were presented yesterday. It is of the greatest importance to us to know, as we have to provide for them at once. We are, &c., WM. QUENTRELL and Co.

We shall thank you to refer the holders of any drafts presented to us.

The reply of the defendants to the above letter:—

The Royal Bank of Liverpool,
Liverpool, Oct. 23, 1867.

Messrs. Wm. Quentrell and Co.

Dear Sirs,—Your favour of yesterday has been under consideration, and I regret now to have to inform you I am advised that the moneys lodged by you against this bank's acceptances to your firm's drafts, *cannot, under present circumstances be so applied*. I am, &c.,

H. H. WITHERS, Manager.

The plaintiffs to the defendants:—

The Royal Bank of Liverpool, Liverpool, Oct. 25, 1867.

Gentlemen,—Having specially provided you with the moneys to take up the bills mentioned in the memorandum overleaf, we presume that, notwithstanding the stoppage of the present business of the bank, you will apply those moneys according to their special destination, and pay the bills at maturity. We shall be glad of your reply. We are, &c., WM. QUENTRELL and Co.

The bank, however, still declined to pay the drafts.

Immediately on the stoppage of the bank, and their refusal to meet the plaintiffs' drafts, the plaintiffs (Mr. Quentrell) telegraphed to the Alexandria firm informing them thereof, and desiring them to refer all holders or buyers of the plaintiffs' drafts on the bank to the plaintiffs at Liverpool. The Alexandria firm telegraphed back to Liverpool that holders of bills would not be satisfied with the plaintiffs' acceptance merely, but that they considered the substitution of some other bank absolutely necessary. Several telegrams passed to and from Liverpool and Alexandria on the subject, with a view to making arrangements for the preservation of the credit of the plaintiffs' firm, and preventing the bills from going back dishonoured to Alexandria. Application was made by Mr. Quentrell to various financial houses in Liverpool for assistance, but without success, by some of whom even he was advised that the plaintiffs should themselves suspend payment. Ultimately, however, he succeeded in obtaining the requisite amount from Messrs. Marriott and Co., who agreed to make the advance on receiving a commission of 2½ per cent. on the amount (21,928*l.* 12*s.* 1*d.*), which commission, amounting to 548*l.* 11*s.* 4*d.*, together with 97*l.* 4*s.* 8*d.* telegraph expenses, and 44*l.* 13*s.* 4*d.* notarial and protest expenses, making a total of 680*l.* 8*s.* 11*d.*, was paid by the plaintiffs.

It was proved by Mr. Quentrell that the course adopted by him was a usual and proper one under the circumstances, and was necessary to protect the honour and credit of the firm; and that, had he not done so, the bills would have gone back to Alexandria dishonoured, the expenses attending which course would have considerably exceeded those incurred by the steps which he took to get the money.

The defendants at the trial contended that the notarial expenses were all that the defendants were liable to pay.

A verdict was found for the plaintiffs for 645*l.* 15*s.* 7*d.*, in addition to the 44*l.* 13*s.* 4*d.* paid into court, and leave was reserved to the defendants to move to enter a nonsuit or a verdict, or to reduce the damages.

In pursuance of that leave, a rule *nisi* was subsequently obtained, in Michaelmas Term last, by *Quain*, Q.C., on the part of the defendants, to set aside the plaintiffs' verdict and to enter a verdict for the defendants, or a nonsuit, on the ground that

the sum for which the verdict was returned was not recoverable as damages in this action. Against that rule

Milward, Q.C. and *R. G. Williams* for the plaintiffs, now showed cause. This was an action on a special contract which was set out in the declaration. No doubt the holders of the bills might have sent the bills back to Alexandria and fixed the drawers with the whole expenses occasioned by the defendants' breach and default. The cases showed that the damages found by the jury here were recoverable in such an action as the present, and that, being founded on an express contract, the plaintiffs would be entitled to recover nominal damages, even though no actual damage were proved. Thus, in *Marzetti* v. *Williams and others*, 1 B. & Ad. 415; 9 L. J. 42, K. B., where a banker had refused payment of a customer's cheque, having sufficient funds of the customer in his hands, it was held that the latter might maintain an action of tort against the banker for such refusal, though he had sustained no actual damage and that it was immaterial in such a case whether the action, in form, were in *tort* or in *assumpsit;* as though in form founded in tort, it was in substance founded on a contract. And in *Rolin and another* v. *Steward* (P. O.), 14 C. B. 595, 23 L. J. 148, C. P., which was an action against a banker for dishonouring an acceptance and cheque of a customer, there being sufficient assets in his hands to meet them, and in which no special damage was proved, Lord Campbell, C. J., directed the jury that they ought to give neither nominal nor excessive, but such reasonable and temperate damages as they should consider to be a compensation for the injury sustained by the plaintiffs from the dishonouring of their cheques; and that direction was afterwards approved and upheld in *banco*, as above, by the Court of Common Pleas, Cresswell, J., in his judgment there, saying that *Marzetti* v. *Williams* (*ubi sup.*) went the full length of justifying that direction. It is clear, therefore, that substantial damages may be given in such a case, even without proof of any actual damage. The case in the American Court of *Riggs* v. *Lindsey*, 7 Cranch 500 (cited in a note to Story on Bills, 4th edit., sect. 398), is also an authority that these damages are recoverable. [They were here stopped by the court, who called on]

Quain, Q. C. and *D. Fletcher* for the defendants, to support their rule. An extremely important point, with regard to the law of damages, was involved in this case. It is contended for the defendants that the damages found by this verdict are not legally recoverable. Had the plaintiffs had funds of their own with which to meet the bills, there would have been no damage except the costs of protest. The damages claimed arise from the fact of the plaintiffs having had to borrow the needful funds. But the defendants are not liable for that. It might be that the plaintiffs might have had to mortgage an estate, or to dispose of a quantity of cotton in a falling market in order to raise the money, but would that have been recoverable in damages? It is submitted that it clearly would not. [MARTIN, B.—The plaintiffs have bills coming due, and they go to the bank and say, "You pay these bills for us, and we will allow you ½ per cent." Is not that notice to the bank that they wanted this accommodation?] The arrangement was, in fact, a letter of credit. The foreign dealers will have the security of a bank. The plaintiffs might be the richest house in Liverpool, yet the course would be just the same; the bank get a commission of ½ per cent. for lending their names. That gave no indication to the bank that Prehn and Co. could not take up the bills. It is said by the other side that the defendants are to be liable for all possible expenses which the plaintiffs might be put to to raise the money. Yet the plaintiffs might have had to pay 40 or 50 per cent. for it, and are defendants to be liable, having no knowledge of the plaintiffs' circumstances, and never having guaranteed? For such a small commission it is not to be supposed that the bank would undertake such a responsibility as the plaintiffs seek to cast on them. The cases cited *contra* of bankers dishonouring customers' cheques were distinguishable. Such refusal amounted to slander. There, too, the banks were solvent. Here the bank was notoriously insolvent, and no discredit or slur, therefore, was cast on the plaintiffs by the refusal to pay, and so no damage arose. The plaintiffs are drawers, and the declaration is on a promise that the defendants would accept and pay the bills on presentation. The breach is that *they did not pay.* It is like the drawer of a bill suing the acceptor, in which case it is clear that these expenses would not be recoverable. See Byles on Bills, 9th edit., p. 402, where it is laid down that "the drawer of a bill is liable to the re-exchange, though the bill be returned through never so many hands, but *the acceptor* is not liable to the re-exchange." In support of that proposition, the learned author cities, amongst other cases, that of *Woolsey* v. *Crawford*, 2 Campb. 445, where it was sought to make the acceptor of a foreign bill answerable for all the damage suffered by the plaintiff, the payee, and indorser, from the dishonour of the bill, including 10 per cent. paid by him to the indorsee as re-exchange, and 6*l.* per cent. interest, and other charges, upon which Lord Ellenborough, C. J., said, "You may as well state that, by reason of the bill not being being paid, the plaintiff was obliged to raise money by mortgage. The acceptor's contract cannot be carried further than to pay the sum specified in the bill, and interest according to the legal rate." [MARTIN, B.—This is damage flowing directly from a breach of contract on the part of the acceptor. *R. G. Williams* (*contra*) referred to Story on Bills, par. 398, p. 489, 4th edit., and *Francis* v. *Rucker*, Ambl. Rep. 672, as authorities that the acceptor is liable to the drawer for re-exchange. KELLY, C. B.—This is not an action on a bill, but on a special contract. But whatever may be the law of America, or however great the authority of the American judge, I cannot think that the law and practice of America in such a case can be a precedent for the law as administered in England.] The contract is to accept and pay. They do accept, and the breach is for nonpayment. It is precisely as if they had been simply sued on a bill for nonpayment. In each case, the promise and the breach are identical, and there is no difference, as regards the measure of damages, between the two; and except the cases of banker and customer, which have been cited, there is no authority for saying that more damages can be recovered in the one case than in the other. The pleader here has evidently sought to avoid the difficulty, of which he was aware, by suing, not on the bill, but on the letter of credit; but it is submitted that he has not succeeded. Again, what was in the contemplation of the parties at the time when the contract was made must be looked at, according to the authority of *Hadley* v. *Baxendale*, 9 Ex. 241; 23 L. J. 171, Ex.; and it is contended that the defendants receiving only ½ per cent. could not have contemplated this responsibility. [KELLY, C.B.—They must have known that the plaintiffs, or any other merchant in Liverpool, under the circumstances, would, if they could, obtain money at 2½ per cent. to prevent the expense, inconvenience, and discredit of the bills being sent back dishonoured to Alexandria.] The damages are too remote. The principle governing such a case is laid down in Sedgwick on Damages,

ch. 8, p. 263, sect. 233, 4th edit. It is there said "In actions on promise to pay a liquidated sum, as on promissory notes or bills, the rule of damages is a fixed and arbitrary one. It is *identical with the rate of legal interest*. The actual damage may have been much greater; the non-performing of the obligation may have caused the greatest distress, nay even extreme positive loss; it may have produced actual insolvency. *These remote results the law, however, does not investigate.*"

KELLY, C. B.—There is no doubt whatever that as a general rule, in actions on bills of exchange, neither general nor special damages are recoverable by reason of the simple nonpayment of the bill. But the case now before us for our decision is not an action simply on a bill of exchange at all. It is an action on *a special contract* entered into by the defendants with the plaintiffs, that they would do certain things; and the action is against them upon their liability under that special contract. Now undoubtedly, as was observed by Mr. Quain in the course of his argument, the question involved in the case is one of very great importance, and the learned counsel on either side have failed to discover any case applicable to or bearing upon the particular point, except the two English cases of *Marzetti* v. *Williams*, in the Queen's Bench, and *Rolin* v. *Steward*, in the Common Pleas, and the American case of *Riggs* v. *Lindsey*. Now the general principle is, that the plaintiff is entitled to recover compensation for whatever damages naturally and directly flow from the breach by the defendant of the contract which has been made between them. Let us then see what the contract was in this case, and what are the damages naturally and directly resulting or flowing from the breach of it, and what also, in the language of the decision in *Hadley* v. *Baxendale* (*ubi. sup.*), "may be supposed to have been in the contemplation of the parties at the time when the contract was entered into between them, as the probable result of the breach of it." The contract here, as set out in the declaration, was this:—The plaintiffs' firm, at Alexandria, desiring to purchase and ship to England for sale cargoes of grain, it was agreed between them and the defendants that, for commission and reward to be paid to the defendants in that behalf, the defendants should accept bills drawn by the plaintiffs in Alexandria for the payment of the purchase-money of the said grain, and that the plaintiffs should, from time to time, pay over to the defendants the proceeds of the said sales, for the purpose of the same being specially appropriated by the defendants to the payment of the said bills at maturity, so that the defendants might be placed in funds by the plaintiffs whilst the bills were running, and be kept out of cash advances on account of them; that under that contract the plaintiffs' firm at Alexandria drew bills to the amount of 21,928*l.* upon the defendants, and which bills were accepted by the defendants. It is stated, too, that the plaintiffs performed their part of the contract by supplying the plaintiffs before the stipulated time with sufficient funds for the purpose of their meeting and paying the said bills. And then it is alleged, as a breach of contract on the defendants' part, that the defendants, before the said bills became due and payable, refused and declined to carry out the said agreement on their part, whereupon the plaintiffs were obliged, at great expense, to make other arrangements for meeting and paying the said bills, and incurred great expenses in protecting their credit by reason of the defendants' breach of contract. Now it seems that, upon learning that the defendants refused to meet the bills, the plaintiffs, for their credit's sake, and in order to avoid the expense and discredit which would have attached to the bills being sent back dishonoured to Alexandria, applied to, and succeeded in borrowing from, Messrs. Marriott and Co., financial agents at Liverpool, the requisite amount (21,928*l.*) wherewith to meet and take up the bills in question; and for that accommodation they had to pay Messrs. Marriott the sum of 548*l.* 11*s.* 4*d.*, being their commission at 2½ per cent. on the sum so borrowed, to enable them to take up their bills. As soon also as the plaintiffs became aware that the defendants would not take up the bills, they telegraphed to the firm at Alexandria, informing them of the state of the case, and various telegraphic messages passed to and from Liverpool and Alexandria between the plaintiffs in England, and their partners at Alexandria, relative to the proceedings necessary to be taken under the circumstances, with a view to meeting the difficulty and saving the credit of the plaintiffs' firm in the best possible and least expensive way. By the course which was adopted the money was obtained and the bills were taken up. Was this then, I will say, not so much a reasonable and prudent course of conduct on the part of the plaintiffs, but was it not such conduct as any other merchant in Liverpool would have resorted to under the circumstances? I think it was; and I think, moreover, that it was exactly the course which the defendants themselves must have expected the plaintiffs would adopt when they gave notice to the plaintiffs of their intention not to pay the bills, with the view, it must be supposed, that the latter would take means to protect themselves in the best way they could. And what do the plaintiffs thereupon? Why, not having funds of their own at their disposal at the moment applicable to the purpose, they borrowed the amount at what cannot but be said to be a very reasonable rate of commission, of Messrs. Marriott and Co., and therewith took up these bills, amounting altogether to the large sum of 21,928*l.*, and so preserved the honour and credit of their firm which had been so seriously imperilled by the defendants breach of contract with them. Surely this was a most reasonable and natural course for the plaintiffs to adopt, and one by which I think the defendants, by their notice to the plaintiffs of their inability to meet the bills when they should fall due, must be taken to have given their implied sanction. But further, if these bills had not been taken up they would have been sent back to Alexandria dishonoured. What, in addition to the slur and discredit thereby cast on the plaintiffs' mercantile reputation, would have been the expense of that step, depends of course materially upon the rate of exchange between England and Egypt at the time; but it was proved in evidence that the expense attending the returning of the bills to Alexandria would have been greater than the expense of borrowing the money in Liverpool wherewith to take them up. I think that all these damages were such as necessarily resulted and naturally flowed from the defendants' breach of contract, and the state of things occasioned thereby. In my judgment, therefore, the defendants' rule must be discharged, the ground on which I hold the plaintiffs entitled to recover being, that all this is general damage resulting from the breach of their contract by the defendants. This decision is in strict conformity with the justice of the case, which, in my opinion, no other decision would meet.

MARTIN, B.—I also am of opinion that this rule must be discharged; but I think these damages are special, and not general damages. Mr. Fletcher, in his argument, referred us to the very excellent and well-known treatise of Mr. Sedgwick, an American lawyer of great repute, upon the subject of damages, but the passage which he cited from that work has

really in fact no application to a case of the kind like the present, but rather to a case between an ordinary debtor and creditor. This is not that case at all. It arises on a contract contained in two letters. On the 8th Aug. the plaintiffs write to the defendants as follows: "With reference to our conversation in regard to a credit for our Alexandria firm, to be used for transactions in grain, we beg now to state the nature of the business. The grain to be shipped by our friends is to be sold in Liverpool or London before shipment, and the terms of sale are cash against delivery of documents within seven days after receipt. Our friends would draw on your bank at the time of shipment, and remit to you, either simultaneously or within very short time, as soon as the shipment is completed, the shipping documents. We would then collect the amount and pay it over to you; such collection to be considered *as in trust, and especially to be applied towards the payment or covering the drafts of our friends.* As the Alexandria drafts on your bank would be at three months' date, you would be covered in cash over two months before maturity. We are prepared to pay you your usual commission of ½ per cent. on such transactions." To this letter the defendants, by their manager, send the following reply to the plaintiffs on the 9th Aug.: "I beg to inform you, in reply to your note of yesterday, that your firm in Alexandria is at liberty to draw on this company to the extent of 20,000*l.*, in furtherance of grain shipments, *on the conditions stated.*" That then is the contract between the parties. In pursuance of it bills are drawn by the plaintiffs and accepted by the defendants. The Alexandria firm punctually complied with the terms of the contract on their part, and on or before the 21st Oct. had paid in to the defendants' bank a sum of over 22,000*l.*, being considerably more than enough to meet and pay the bills then coming due. The defendants, however, having that sum of money in their hands decline to, and do not, take the bills up. No doubt the bank may have meant to deal fairly and properly, as they thought, under the circumstances attending their suspension and stoppage at that moment, and to avoid any charge of undue preference, and so they kept this money to themselves for the general body of their creditors instead of applying it to discharge the plaintiff's drafts. That may be so, but it was, I must think, a very hard case upon the plaintiffs. Now there are three descriptions of damages in actions on special contract. First, there are nominal damages; a case may easily be conceived in which a judge would be well justified in telling the jury only to give nominal damages, as, for instance, in the case of a contract for sale and purchase of goods, where the purchaser fails to perform his agreement, and there is a rise in the market in the price of the particular goods. In that case the seller would not be a loser by the breach of contract, though the defendant would be liable, for his breach of contract, to nominal damages. Secondly, there are general damages, or such reasonable and moderate, but substantial, damages as are pointed out by Cresswell, J. in his judgment in the case of *Rolin* v. *Steward* (*ubi sup.*). And thirdly, there are special damages, such as naturally and reasonably flow from the breach of the defendant's contract, and of that kind, I think, are the damages in the present case. Mr. Quain said, indeed, that the damages sought to be recovered in an action for breach of contract should be such as the court and jury consider to have been in the contemplation of the parties at the time when the contract between them was entered into. Now for myself I do not believe that that is a true test, for I do not believe that the parties to a contract ever do at the time, contemplate, or turn over in their minds, all the possible contingencies that may happen at some future time; and in the present case one can hardly suppose that the failure of the bank before the maturity of these bills could have been thought to be a likely or possible event, and one can imagine the indignation of the bank at the bare suggestion. But, if it had been contemplated, the bank would probably have said, "There are plenty of financial houses in Liverpool who will in that event supply you with any amount of money on easy terms." A more reasonable and natural course of conduct than the plaintiffs pursued, and damages more naturally and proximately flowing from a given cause than do these damages from the breach of contract on the defendant's part, complained of in the present action, I cannot conceive, and I think that any judge who had directed the jury to give nominal damages only in such a case would have grossly misdirected them.

Pigott, B.—I am entirely of the same opinion, and look at the matter as my brother Martin does, as a question of special damages.

Rule discharged.

Attorneys for the plaintiffs, *Allen* and *Co.*, 20, Bedford-row, W.C., agents for *Simpson* and *North*, Liverpool.

Attorneys for the defendants, *Field, Roscoe, Field,* and *Francis*, 36, Lincoln's-inn-fields, W.C., agents for *Lowndes, Thorneley,* and *Archer*, Liverpool.

COURT OF PROBATE.

Reported by W. Leycester, Esq., Barrister-at-Law.

Wednesday, Feb. 2.

(Before Lord Penzance.)

In the goods of Harrow.

Lunatic—Administration—Penalties—Residue.

The husband of the sole next of kin of a deceased lunatic administered to the estate after her death. The estate was considerable, and the applicant being in humble circumstances was unable to find the requisite sureties. The court allowed the applicant himself to give a bond for the full amount of the usual penalties, and ordered him to find sureties in 100l.

John Jones died 23rd April 1869, a lunatic. His only next of kin was his sister, who died without having taken out letters of administration to her brother's estate, which now amounted to considerably over 4000*l.*

Bayford now applied, on behalf of the sister's husband, for a grant of administration, and also that the ordinary penalties of the administration bond should be dimished. The money standing to the account of the accountant-general the penalty would be nearly 10,000*l.* It was out of all question that the applicant, who was a ribbon weaver at Coventry, could furnish security to that amount. There were no debts, and, on the authority of *In the goods of Grant* (1 S. & T. 54), he moved that the penalty be reduced to 100*l.*

Lord Penzance.—I think the court must relieve you. But the better way will be that the party himself should give a bond in the full amount, and he can find sureties in 100*l.*

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MUMFORD AND BRETT v. SHUFFLEBOTHAM.

Testamentary suit—Jury discharged—New trial—Motion to try at assizes refused.

In a testamentary suit, touching the validity of a will, the jury was discharged without agreeing to a verdict. A rule absolute for a new trial was granted, but on motion by the plaintiff, at whose instance the first trial was had in this court, the court refused to change the venue to Stafford Assizes.

The plaintiffs propounded a will of which they were executors, and the defendant pleaded in opposition undue influence and incapacity. The case was tried in the sittings after Michaelmas Term, before the court and a special jury, and the jury was discharged without agreeing to a verdict. A rule absolute for a new trial was obtained, and

Huddlestone (Dr. *Swabey* with him), on behalf of the plaintiff (at whose instance the case had originally been fixed to be tried in this court), applied that the new trial might be heard at the next Stafford Assizes.

Stavely Hill, Q. C. (*Bayford* with him) *contra.*—As the jury were discharged, the first trial could not be said to be finished. Moreover, of the three counsel retained for the defendant, two did not belong to the Oxford Circuit.

Lord PENZANCE.—It would be much more agreeable to the court if the case could be sent down to be tried at Stafford, but the court cannot study its own inclination at the cost of injustice to either side. There is a time for everything. A system which has some merit, obtains in this court and in no other, though it is a change which has been recommended for general adoption—that the court intimates, when issues of fact are joined, how and before what tribunal they should be tried. A regular motion is made in this court for that purpose. It fell to the plaintiff's lot to make the application, and he voluntarily selected that it should be tried here in the Court of Probate. Had he desired to have had it tried at Stafford, and if he could have shown that the witnesses all reside in the neighbourhood of Stafford, he would have obtained his wish, for these are applications to which the court almost universally accedes. It would have been open to him to urge that economy would be achieved by trying on the spot, though I may observe that it is a disputed point whether that is always the result in such cases of removal; however, he did not make any such application. He asked that it should be tried here, and accordingly it was tried here, and the jury was discharged. Now he wants to retrace his steps—he wants to rescind the order made at his own desire, and to have the case tried at Stafford. If I could see my way to making the change without inflicting hardship on either side I might do it, but I am afraid it would. For it is truly said by the defendants that out of three counsel instructed by them, who have already had their briefs, and are thoroughly up in the facts, two do not go that circuit. I must therefore refuse the application.

Solicitor for the plaintiffs, *Eyre.*

Solicitor for the defendant, *Ayrton.*

NISI PRIUS.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

COURT OF QUEEN'S BENCH.

Monday, Feb. 7.

(Before BLACKBURN, J.)

WARBURTON v. THE MIDLAND RAILWAY COMPANY.

Railway—Negligence—Door unfastened.

A railway company ought to take reasonable care to see that the handles of the carriage doors are fastened, and if they neglect that they are guilty of negligence. But if a passenger lean too heavily upon a door and meet with an accident by its opening, he would be guilty of contributory negligence.

Action for negligence.

The negligence alleged was the leaving of a railway carriage door unfastened, in consequence of which the plaintiff fell out of a train and was injured.

The plaintiff in her evidence said, "I placed my right elbow on the window of the carriage, and my left hand on the door. I was seated on the edge of the seat. I looked out very earnestly at some passing object, then felt a most tremendous shock, and remember no more." She, in fact fell out of the train as it was in motion. There was conflict of testimony as to whether the door was or was not fastened.

BLACKBURN, J.—I think a railway company ought to take reasonable care to see that the handles of the carriage doors are fastened, and if they neglect that they are guilty of negligence. But I think that a passenger ought not to lean upon the door too much.—doors are not meant to be leant upon. It is for the jury to say whether the plaintiff leant too heavily upon the door; if so, she might be guilty of contributory negligence which would disentitle her to recover.

Verdict for plaintiff, 500l.

COURT OF COMMON PLEAS.

Tuesday, Feb. 8.

(Before KEATING, J.)

SCHOLES v. THE NORTH LONDON RAILWAY COMPANY.

Damage—Wrongful acts of third parties.

A railway engine fell over from the defendants' line into the garden of the plaintiff. This happened through the negligence of the company's servants. Damage was done to flowers in the garden by a crowd that assembled there. In an action against the company, brought by the occupier of the garden,

Held, that the damage done by the crowd was too remote.

Action for negligence.

An engine upon the defendants' railway ran off their line through the admitted negligence of their servants. It fell into the plaintiff's flower garden. Considerable damage was done to the flowers both by the engine and those who assisted to remove it, and also by a crowd of spectators who assembled at the scene of the accident and trampled over the garden.

The plaintiff sought to recover from the company for the whole damage done to his garden.

Cole, Q. C. and *Pinder* for plaintiff.

F. M. White for defendant.

KEATING, J.—Is there any authority to show that

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the defendants are liable for the acts of those independent trespassers?

Pinder, for the plaintiff, cited
R. v. *Moore*, 3 B. & Ad. 184

KEATING, J.—But that was a case of an indictment for a public nuisance.

Pinder.—The defendants have admitted that the engine came into the garden by their negligence, and the probable cause of that negligence would be to draw people to see it. The defendants are therefore responsible for those people as for their own servants.

KEATING, J.—What number of persons do you say they are responsible for? Would it not be making the defendants liable for the wrongful act of other persons? In the case where a servant was wrongfully discharged on account of a libel, that damage was held too remote in an action against the libeller.

Pinder intimated that he would confine his claim to the damage done by the persons employed in getting the engine away.

KEATING, J.—I think that very wise. Everything done about getting it out causing injury to the garden may be the subject of damages, but I think it would be dangerous for you to take damages for what was done by independent trespassers.

Verdict for plaintiff, 15*l.*

Attorney for the plaintiff, *J. W. Harling.*

Attorneys for the defendant. *Paine and Co.*

COURT OF EXCHEQUER.

Tuesday, Feb. 1.

(Before BRAMWELL, B.)

PLANT *v.* THE MIDLAND RAILWAY COMPANY.

Railway—Negligence—Train over-shooting platform.

The carriage of a train in which the plaintiff travelled overshot the platform of the station at which it stopped. The name of the station was called out. The train was not backed. The plaintiff descended from the carriage in a dark place, and alighting on rough ground, sprained his foot. He had not been requested to alight there. In an action against the company for negligence:

Held, that on the facts stated, the company were not liable. Harrold *v.* The Great Western Railway Company, 14 *L. T. Rep. N. S.* 440; *and* Siner and Wife *v.* The Great Western Railway Company, 20 *L. T. Rep. N. S*, 114; *L. Rep.* 4 *Ex.* 117, *followed.*

Action for negligence.

A train in which the plaintiff was a passenger arrived at Market Harborough station, and the carriage occupied by the plaintiff overshot the platform. "Market Harborough" was called out. The train was not backed. The plaintiff knew the station. He descended from the carriage in a dark place, and alighting on some rough ground, sprained his foot. He had not been requested to get out there.

This action was brought to recover compensation for the injury sustained.

At the close of the plaintiff's case,

Overend, Q. C. (with him *A. Wills*), for the defendants, submitted that there was no case to go to the jury, citing

Harrold v. *The Great Western Railway Company*, 14 L. T. Rep. N. S. 440; and
Siner and Wife v. *The Great Western Railway Company*, 20 L. T. Rep. N. S. 114; L. Rep. 4, Ex. 117.

O'Brien, Serjt. (with him *J. O. Griffits*), *contra*, cited *Foy* v. *London, Brighton, and South Coast Railway Company*, 11 L. T. Rep. N. S., 606; 18 C. B., N. S., 225. Although that case may be distinguished because there there was an ex-express request to the passengers that they should alight, yet all these cases depend on shades of difference. Here the train having shot beyond the platform, there is evidence of negligence, and its remaining there without any effort being made to back it is literally an invitation to the passengers to alight, and an announcement that the place is fit and proper for the purpose. The doctrine now certainly seems to be that a passenger must sit still until the door is opened for him; but the contract was to carry the plaintiff to Market Harborough and afford him facilities for descending. Then was he to wait and be taken on to Leicester, and be left to bring his action?

BRAMWELL, J.—I am quite prepared to act on the cases cited for the defendants. I think there is here no evidence of a cause of action. It is manifest that this plaintiff did not hurt himself by reason of the want of sufficient accommodation, but by reason of the want of ordinary caution on his own part. He said in his evidence, "I knocked at the door, and no one came; I opened it and got out. I had passed the platform—that I knew and I had passed the station wall—that I also knew." The truth is he got out without looking. He must be taught to take care of himself. Let him e nonsuited.

Nonsuit.

Attorneys for the plaintiff, *Torr, Janeway*, and *Co.*, 38, Bedford-row, Holborn.

Attorneys for the defendant, *Beale, Marigold*, and *Co.*, Birmingham.

END OF VOLUME XXI.

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